**BEFORE THE ENVIRONMENT COURT**
**AT AUCKLAND**

**ENV–2018 –AKL -**

**I MUA I TE KOOTI TAIAO**
**I TĀMAKI MAKAURAU ROHE**

| | |
|---|---|
| **UNDER** | the Local Government Act (Auckland Transitional Provisions) Act 2010 ("**LGATPA**") and the Resource Management Act 1991("**RMA**") |
| **IN THE MATTER** | of an appeal under section 156(1) of LGATPA |
| **BETWEEN** | **BROOKBY QUARRIES LIMITED** |
| | **Appellant** |
| **AND** | **AUCKLAND COUNCIL** |
| | **Respondent** |

# NOTICE OF APPEAL

**26 JULY 2018**


Russell McVeagh

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**To:** The Registrar
Environment Court
Auckland

**BROOKBY QUARRIES LIMITED** ("**Brookby**") appeals against part of the decision of the Auckland Council ("**Council**") in respect of the Proposed Auckland Unitary Plan ("**Unitary Plan**").

**Introduction**

1. The Independent Hearings Panel ("**IHP**") issued a recommendation, which was accepted by Council, that deleted the Significant Ecological Areas ("**SEA**") overlay from several Special Purpose zones in the Auckland Unitary Plan, including from the Special Purpose Quarry zone ("**Recommendation**"). Relevant to this appeal, the Recommendation deleted the SEA overlay from the Brookby Quarry at Kimptons Road ("**Brookby Quarry**").

2. The High Court issued its judgment on that appeal on 18 May 2018[1] and a second supplementary judgment on that appeal on 8 June 2018[2] (together, "**High Court Judgment**").

3. The High Court Judgment:

   (a) agreed that the IHP / Council erred in deleting the SEA overlay in certain areas in reliance on "other planning imperatives", relying on the *Man O' War* decision (at [31]);

   (b) cautioned that, where the object of the provisions is to provide a planning outcome, having regard to the full context including the need to achieve the sustainable management purpose of the Act, then the *Man O' War* dicta relied upon by Royal Forest and Bird Protection Society of New Zealand ("**Forest and Bird**") may have limited, if any, application (at [32]);

   (c) agreed that there was jurisdiction in any subsequent appeal for an appellant to seek an amended activity status (ie less onerous than restricted discretionary) (at [36]);

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1 *Royal Forest & Bird Protection Society of New Zealand Inc v Auckland Council* [2018] NZHC 1069.

2 *Royal Forest & Bird Protection Society of New Zealand Inc v Auckland Council* [2018] NZHC 1344.

(d) confirmed that the Environment Court "need not be troubled with issues of jurisdiction", but rather that it "must assess whether the Council approved version of the SEA policy matrix, including restricted discretionary activity status, should apply to quarry lands" (at [37]).

4. In respect of Brookby Quarry, the High Court Judgment:

(a) reinstated the SEA overlay over approximately 55 ha of Brookby Quarry;

(b) reinstated a rule requiring a restricted discretionary resource consent to be obtained for the removal of vegetation classified as an SEA within the Special Purpose Quarry zone; and

(c) through (a) and (b) above, and the applicable objective and policy framework, effectively defined an "alternative solution" for the purposes of s 156(1)(b) of the LGATPA (together, "**Alternative Solution**").

5. A right of appeal to the Environment Court is now available under section 156(1)(b) of the LGATPA:

(a) Brookby sought the removal of the SEA overlay from the Special Purpose Quarry zone in its submission, and therefore the activity status of removal of vegetation identified as SEA (together with any applicable objective and policy framework if such removal is not classified as a permitted activity) is within the scope of Brookby's submission;

(b) the Council (by virtue of the High Court Judgment) is deemed to have rejected the Recommendation, and instead imposed the Alternative Solution (ie provisions that comprised a rule requiring restricted discretionary activity consent for the removal of vegetation identified as SEA, together with an associated objective and policy framework).

**Grounds for Appeal**

6. Brookby's grounds for appeal are that the Alternative Solution:

(a) will not promote the sustainable management of Auckland's aggregate resources, will not achieve the purpose of the

RMA, and is contrary to Part 2 and other provisions of the RMA;

(b) will not meet the reasonably foreseeable needs of future generations;

(c) does not manage the use of Auckland's aggregate resources in a way that enables the community to provide for their social and economic well-being;

(d) does not represent an efficient use and development of natural and physical resources (including, in particular Auckland's aggregate resources);

(e) does not appropriately avoid, remedy or mitigate the adverse effects on the environment; and

(f) does not represent the most appropriate way to achieve the purpose of the RMA and / or the objectives of the Unitary Plan in terms of section 32 of the RMA.

7. Without limiting the generality of the above, the specific grounds of appeal are set out below:

(a) Brookby's submission sought the removal of the SEA overlay from the Special Purpose Quarry zone, primarily because an SEA Overlay is inimical to the classification of the land for a Special Purpose Quarry zone and the subsequent use of that land for mineral extraction activities;

(b) the Special Purpose Quarry zone over the Brookby Quarry includes just over 30 ha of land in Stage 3 of the quarry's 100-year development plan, for which resource consents have yet to be sought. This Stage 3 area could contain as much as 111 million tonnes of aggregate, however the Stage 3 land is entirely covered by the SEA overlay;

(c) while not operating to prohibit the clearance of vegetation within Stage 3, the combination of objectives and policies relating to SEAs operate to form a formidable consenting barrier to the grant of any resource consent. This could significantly discourage any applications for consent and could effectively sterilise an aggregate resource that has been recognized as not only regionally, but also nationally

significant.[3] At best, the existence of the SEA Overlay would mean that any consenting process for the expansion into Stage 3 would be significantly more expensive;

(d) while the High Court Judgment agreed that the identification of SEA should be undertaken independently from the planning consequences of that identification, the planning framework may legitimately provide a more permissive regime for the clearance of vegetation in certain zones to enable certain activities. In other words, the existence of any such SEA overlay does not and cannot operate as a form of veto over any development of the underlying land;

(e) the High Court Judgment effectively endorsed a bespoke arrangement for removal of SEA within the Special Purpose Quarry zone, and Brookby says that the primary purpose of the zone should – subject to the provisions proposed - prevail over the values recognised by the SEA overlay;

(f) it is appropriate to have a more permissive approach to the removal of SEA where they are located within a Special Purpose Quarry zone, including through having appropriate recognition of the importance of regionally significant quarries and mineral extraction activities; and

(g) having regard to the suite of matters that must be assessed when considering the appropriate planning framework that should apply to the removal of vegetation classified as SEA within a Special Purpose Quarry zone, the relief sought is the most appropriate method of giving effect to the objectives of the Unitary Plan.

**Relief sought**

8. Brookby respectfully requests:

(a) that the Unitary Plan be amended such that:

(i) the objectives and policies in Chapter D9 appropriately recognise regionally significant quarries and mineral extraction activities;

(ii) it is clear that the matter of discretion in E15.8.1(3) applies to vegetation removal within an SEA in a

[3] *Brookby Quarries Ltd v Auckland Council* [2012] NZEnvC 168, at [54].

Quarry zone, and make any necessary consequential amendments arising from other aspects of this appeal, so as to avoid any potential uncertainty in assessing future applications for resource consent;

(iii) the assessment criteria in E15.8.2(3) appropriately identifies the extent of the mitigation that would be required for vegetation alteration or removal of an SEA within a Quarry zone;

(iv) the assessment criterion in E15.8.2(3)(a) is limited to consideration of whether the proposed measures will minimise or mitigate significant adverse effects on the values for which the SEA was scheduled in the Unitary Plan in accordance with Schedule 3; and

(b) such consequential or related relief as may be necessary to give effect to its concerns; and

(c) costs of and incidental to the appeal.

**Service**

9. An electronic copy of this notice is being served today by email on the Auckland Council at unitaryplan@aucklandcouncil.govt.nz. Waivers and directions have been made by the Environment Court in relation to the usual requirements of the RMA as to service of this notice on other persons.

**Attachments**

10. Copies of the following documents are attached to this notice:

(a) Attachment A - The relevant parts of Brookby's original submission.

(b) Attachment B - The relevant parts of the Recommendation.

(c) Attachment C - The relevant parts of the Council decision.

(d) Attachment D – The High Court Judgment.

**BROOKBY QUARRIES LTD** by its counsel Russell Bartlett QC:

**Signature**: R Bartlett QC
**Date**: 26 July 2018

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**TO:** The Registrar, Environment Court

**AND TO:** Auckland Council

**Advice to recipients of copy of notice of appeal**

*How to become a party to proceedings*

1. If you wish to be a party to the appeal, as per the requirements in Environment Court decision [2016] NZEnvC 153, within 15 working days after the period for lodging a notice of appeal ends you must:

   (a) lodge a notice of your wish to be a party to the proceedings (in form33) with the Environment Court by emailing unitaryplan.ecappeals@justice.govt.nz;

   (b) serve copies of your notice on the Auckland Council on unitaryplan@aucklandcouncil.govt.nz; and

   (c) serve copies of your notice on the appellant electronically.

2. Service on other parties is complete upon the Court uploading a copy of the notice onto the Environment Court's website.

3. You may apply to the Environment Court under section 281 of the Resource Management Act 1991 for a waiver of the above timing requirements (see form 38).

4. Your right to be a party to the proceedings in the Court may be limited by the trade competition provisions in section 274(1) and Part 11A of the Resource Management Act 1991.

*Advice*

5. If you have any questions about this notice, contact the Environment Court in Auckland

**ATTACHMENT A – RELEVANT PARTS OF BROOKBY'S ORIGINAL SUBMISSION**

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|---|---|---|
| Indicative Streams | An indicative stream running generally west-east which was in-filled a number of years ago remains on the planning maps and needs to be removed where it no longer exists. This stream was a tributary of the Papakura Stream. | **Remove the length of indicative watercourse within the site which no longer exists.** |
| Significant Ecological Areas | BQL does not support the inclusion of Significant Ecological Area overlays within a Quarry zone as this overlay is contradictory in purpose to the Quarry zone.<br><br>Quarry Zones have been identified over sites with significant mineral resources. At Brookby, the use of this resource will continue to involve the removal of vegetation and earthworks. This is unavoidable. The imposition of a Significant Ecological Area overlay which controls the removal of vegetation is contrary to this, introduces the need to balance the use of mineral resources within a defined quarry zone with the retention of ecological values and imposes additional regulatory controls which may impact on the effective and efficient supply of the mineral resource to the Auckland community. In addition, it is considered that the introduction of an SEA over an existing Quarry site and proposed extension area is contrary to proposed RPS Policy 6.2.3a.<br><br>Furthermore, in the case of the SEA which covers the land proposed to be zoned Quarry, Auckland Council has been unable to provide the background assessment used to define this area as an SEA.<br><br>SEA's have been imposed over extensive areas of Auckland in the PAUP. Although many land uses can be avoided or adapted in such areas to avoid or minimise the impact on the SEA, the same does not apply to mineral extraction. The Quarry Zone is very limited in extent in the PAUP and directly reflects where existing Quarries operate (and future extension areas). Quarries have to operate where the mineral resource can be efficiently extracted and mineral extraction in these limited areas should not be compromised by other overlays, particularly when the values these overlays are protecting are provided for extensively elsewhere and are not of national (or even regional) significance within the Quarry zone area.<br><br>Brookby therefore seeks the removal of the SEA overlay within the area proposed to be zoned Quarry. | **Remove the SEA Overlay on land to be zoned Quarry.** |
| Natural Stream Management Area | For the same reasons as given for the Significant Ecological Area overlay, it is considered that the Natural Stream Management Area overlay should not be used on areas proposed to be zoned Quarry. | **Remove the Natural Stream Management Area Overlay on land to be zoned Quarry.** |
| **Part 4 Definitions** | | |
| Mineral Extraction | | |
| Mineral Extraction | BQL supports the definition of mineral extraction, except for the inclusion of the term "accessory uses" (final bullet point). Elsewhere in the PAUP the term "accessory activities" is used and this term is also | **Modify definition:**<br><br>**Mineral extraction activities** |

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**ATTACHMENT B – RELEVANT PARTS OF RECOMMENDATION**

AUCKLAND UNITARY PLAN
INDEPENDENT HEARINGS PANEL

*Te Paepae Kaiwawao Motuhake o te Mahere Kotahitanga o Tāmaki Makaurau*

# Report to Auckland Council
# Hearing topic 023

# Significant ecological areas and vegetation management

# July 2016

# Report to Auckland Council - Hearing topic 023 Significant ecological areas and vegetation management

## Contents

# 1. Hearing topic overview

## 1.1. Topic description

Topic 023 – Significant ecological areas and vegetation management addresses the coastal plan, regional plan and district plan provisions of the proposed Auckland Unitary Plan relating to:

| Topic | Proposed Auckland Unitary Plan reference | Independent hearings Panel reference |
|---|---|---|
| Topic 023 – Significant ecological areas and vegetation management | Chapter B - regional policy statement - 4, Protecting our historic heritage, special character and natural heritage - Te tiaki taonga tuku iho.<br><br>Chapter C - Auckland Wide Objectives and Policies - Section 5, Natural Resources.<br><br>Chapter H - Auckland Wide Rules - Section 4, Natural Resources.<br><br>Appendix 5.1 Schedule of Significant Ecological Areas – land<br><br>Appendix 6.1 Schedule of Significant Ecological Areas – Marine<br><br>Appendix 6.5 Significant Ecological Areas – marine where mangroves are a minor component or absent<br><br>Planning maps | D9 Significant Ecological Areas Overlay.<br><br>E15 Vegetation management and biodiversity.<br><br>Schedule 3 Significant Ecological Areas – Terrestrial Schedule<br><br>Schedule 4 Significant Ecological Areas – marine Schedule<br><br>Schedule 5 Significant Ecological Areas – Marine where mangroves are a minor component or absent<br><br>Planning maps on the GIS viewer) |

Under the Local Government (Auckland Transitional Provisions) Act 2010, section 144 (8) (c) requires the Panel to set out:

> the reasons for accepting or rejecting submissions and, for this purpose, may address the submissions by grouping them according to—
>
> (i) the provisions of the proposed plan to which they relate; or

(ii) the matters to which they relate.

This report covers all of the submissions in the Submission Points Pathways report (SPP) for this topic. The Panel has grouped all of the submissions in terms of (c) (i) and (ii) and, while individual submissions and points may not be expressly referred to, all points have nevertheless been taken into account when making the Panel's recommendations.

## 1.2. Summary of the Panel's recommended changes to the proposed Auckland Unitary Plan

The following is a summary of the key changes, other than those already accepted by the parties at mediation, expert conferencing and direct discussion, recommended by the Panel.

i. The majority of the objectives and policies of the notified plan have been retained, but some have been re-cast due to the restructuring of the Plan. The regional policy statement is now 'standalone' and as a consequence there is no provision tagging (e.g. regional policy statement, regional plan, regional coastal plan, district plan) (as set out in the Panel's Report to Auckland Council - Overview of recommendations July 2016). Due to this a number of the objectives and policies have been recast and relocated to the Chapter D Overlays (which generally addresses section 6, 7 and 8 matters) and to the Chapter E Auckland-wide provisions. This means that the provisions addressed in this report need to be read in conjunction with the other parts of the Plan, in particular Chapter B Regional policy statement, Chapter D Overlays and Chapter E Auckland-wide.

ii. That the rules relating to vegetation management and infrastructure have been relocated to section E26 Infrastructure.

iii. That the vegetation management rules are retained as regional rules, with a number of permitted activities to address the concerns of the designating authorities and farmers. An exception to this is for land held or managed under the Conservation Act 1987, where the rules are deemed to be district plan rules.

iv. Additional provisions have been provided for development on Māori and Treaty Settlement Land.

v. A number of significant ecological areas have been spatially modified and in some cases deleted as the Panel found they did not satisfy the significant ecological area factors as set out in the recommended regional policy statement, the evidence for them was inadequate, or other planning imperatives outweighed their identification. The details of these changes are addressed in this report.

vi. Vegetation removal provisions have been retained over quarry zones, notwithstanding that the significant ecological areas have been removed from the Special Purpose - Quarry Zone.

The Panel notes that the subdivision provisions relating to significant ecological areas are addressed in the Panel's Report to Auckland Council – Hearing topic 064 - Subdivision -

General for urban subdivisions and Report to Auckland Council – Hearing topic 064 (and 056) Rural Subdivision for rural subdivisions. This includes the "cluster subdivision rule for urban areas" as set out in the Council's closing statement to this topic.

## 1.3. Overview

The Panel acknowledges the importance of protecting significant ecological areas and that this is a matter of national importance in section 6(c) of the Resource Management Act 1991 - the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna. The Plan identities (maps) significant ecological areas and provides a management regime protecting these areas by seeking to avoid the adverse effects of subdivision use and development. Other areas not identified as significant ecological areas, but having significant biodiversity and ecological values, are also important. The Plan also seeks to manage these areas, including by avoiding, remedying and mitigating adverse effects, particularly in terms of vegetation removal.

The policy direction of the notified Plan and the policies recommended by the Panel are not significantly different. As set out in the summary of the changes, probably the most significant is the plan structure and where the provisions sit within that structure. The regional policy statement is now 'standalone' and as a consequence there is no tagging of provisions (e.g. regional policy statement, regional plan, regional coastal plan, district plan). Due to this a number of the objectives and policies have been recast and relocated to the Chapter D Overlays (which generally addresses section 6, 7 and 8 matters) and to the Auckland-wide provisions. This means that the provisions addressed in this report need to be read in conjunction with the other parts of the Plan, in particular the regional policy statement, the Overlay chapter and the Auckland-wide provisions. Also the rules relating to vegetation management and infrastructure have been relocated to section E26 Infrastructure.

After significant debate in the hearing and by the Panel in deliberations, the vegetation management rules are recommended to be retained as regional rules. The reasons for this are addressed more fully later in this report. However, a range of permitted activities for vegetation removal has been included, largely agreed by the Council, to address the concerns of the designating authorities and farmers. These rules, with specified standards, will enable those parties to undertake their day-to-day activities without having to obtain resource consent. One exception to this approach is that the vegetation removal rules are district rules for land held or managed under the Conservation Act 1987. Again the reasons for this are set out below.

Changes to the notified provisions have been made to provide additional provisions for development on Māori and Treaty Settlement Land. Notwithstanding section 6(c) of the Resource Management Act 1991 (the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna), the Panel is recommending greater development opportunity, with limits, on Māori and Treaty Settlement Land where these areas may also be significant ecological areas, to better address section 6(e) - the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, wāhi tapu, and other taonga, 7(a) - kaitiakitanga, and section 8 relating to the Treaty of Waitangi.

No change has been made to the activity status for vegetation clearance to establish an accessway and building platform for a dwelling in a significant ecological area (there was a request to move from controlled to restricted discretionary activity). The Panel has taken the same approach to this activity as it has for development on Māori and Treaty Settlement Land as set out in the paragraph above.

The Panel generally accepts the Council's position that areas that satisfy the significant ecological factors (set out in the regional policy statement) should be mapped as such. However, where there are competing values, a judgment call, based on evidence, needs to be made as to what provisions better promote sustainable management of natural and physical resource as required by section 5 of the Resource Management Act 1991. Also, it follows that if an area does not satisfy the significant ecological factors, then it should not be mapped as a significant ecological area.

As addressed below a number of significant ecological areas have been spatially modified and in some cases deleted as the Panel found they did not satisfy the significant ecological area factors as set out in the recommended regional policy statement, the evidence for them was inadequate, or other planning imperatives outweighed their identification. The details of these are addressed in this report.

Significant ecological areas have been deleted from the Special Purpose - Quarry Zone areas. This is due to the economic and strategic importance of the mineral resource. These areas are identified as areas to be quarried, which means ground cover has to be removed to access the resource, giving rise to a direct conflict between the purpose of the zone as a quarry and this form of protection. Notwithstanding this, the vegetation removal provisions are retained over the Special Purpose - Quarry Zone.

## 1.4. Scope

The Panel considers that the recommendations in 1.2 above and the changes made to the provisions relating to this topic (see 1.1 above) are within scope of submissions.

For an explanation of the Panel’s approach to scope see the Panel’s Report to Auckland Council – Overview of recommendations July 2016.

## 1.5. Documents relied on

Documents relied on by the Panel in making its recommendations are listed below in section 9 Reference documents.

# 2. Changes to objectives and policies

## 2.1. Statement of issue

A number of objectives and policies need to be rewritten as a result of the changes to the structure of the Plan.

## 2.2. Panel recommendation and reasons

The reasons for the revised structure to the Plan have been set out in the Panel's Report to Auckland Council – Overview of recommendations July 2016. The reasons are also set out in the Summary and Overview sections of this report. Those reasons are not repeated here.

# 3. Vegetation management - regional vs district plan rules

## 3.1. Statement of issue

A number of submitters filed legal submissions and evidence relating to the rules for vegetation management; whether they were appropriate and, if so, should they be regional or district plan rules. J Webber and A Murray opposed the application of the Significant Ecological Area Overlay and vegetation management rules over a coastal grove of pohutukawa on their property in Marine Parade, Herne Bay but also raised wider concerns about the legal basis for the rules. In their legal submissions, Ms Webber and Mr Murray challenged the validity of the Plan's significant ecological areas and coastal vegetation management provisions on the basis that these regional rules are contrary to Parliament's intention behind amending section 76 of the Resource Management Act1991 to remove the ability to provide general tree protection rules in district plans, and that such protections do not relate to regional council functions under section 30 of the Resource Management Act 1991.

Similar concerns about the Council seeking to circumvent Parliament's intent were raised by Federated Farmers in relation to the Significant Ecological Areas Overlay. Mr Gardner for Federated Farmers did however accept that the Council had the power to regulate land use for the protection of biodiversity in rural areas through regional rules.

## 3.2. Panel recommendations and reasons

The Panel agrees with the Council's position. The Council has clear jurisdiction to create regional plan level vegetation management rules. This is set out in the Council's opening legal submissions, its closing statement, as well as the evidence in chief of Dr Andrea Julian (filed in relation to the regional policy statement Chapters B.4.3.3 (Trees and Vegetation) and B.4.3.4 (Biodiversity) for Topic 010. The retention and maintenance of trees, vegetation and significant ecological areas assists the Council in meeting regional functions described under subsections 30(1)(c), 30(1)(f), 30(1)(fa) and 30(1)(ga) of the Resource Management Act 1991.

Notwithstanding the above the Panel understands the concerns raised by a number of submitters, notably the designating authorities, farmers (mainly through Federated Farmers) and the Minister of Conservation regarding regional rules. These matters were raised at the

hearing and the Council was sympathetic to the concerns that regional rules, as opposed to district rules, would:

i. impact on the designating authorities (as pursuant to section 166 *designation* means a provision made in a district plan);

ii. land held or managed under the Conservation Act 1987 or any other Act specified in Schedule 1 of that Act (other than land held for administrative (as pursuant to section 4 (3) of the Resource Management Act) that section covers district use rules); and

iii. farming activities where existing use rights would be lost in terms of regional rules.

The Council's response, which the Panel supports and has recommended, is that a number of activities be provided for as permitted activities. This is to enable legitimate and necessary activities, within specified limits (standards), to be undertaken by designating authorities (in particular network utility operators), the Department of Conversation on behalf of the Minister and farmers who need to be able to maintain tracks and fences and ensure vegetation is clear of buildings, as they have lawfully done prior to the notification of this Plan.

The Panel notes that it attempted to redraft the provisions so that those which would apply in urban areas (urban significant ecological areas which the Panel views as forests as opposed to a collection of individual trees) would be regional rules and those in rural areas would be district land use provisions. This was an option suggested by Federated Farmers. However the distinction between urban and rural is not clear as open space zones and a number of special purpose zones are neither urban nor rural, so this became problematic and created a complicated set of provisions. The Panel's recommended approach as addressed above is, in section 32 and 32AA terms, the most appropriate and efficient.

# 4. Permitted activities

## 4.1. Statement of issue

A number of submitters requested that new permitted activities be provided for in the general vegetation rules and within the overlays, including:

i. enrichment and restoration planting;

ii. wetland management;

iii. farming operations, including the removal of shelter belts;

iv. works on Department of Conservation land (including new tracks); and

v. large-scale and commercial gardening.

## 4.2. Panel recommendations and reasons

### 4.2.1. Enrichment and restoration planting

The Panel has not listed 'enrichment planting' as a permitted activity. The Panel agrees with the Council that it is generally inappropriate within significant ecological areas as ecological restoration should focus on removing threats and constraints to natural forest regeneration and letting vegetation patterns re-establish naturally. However 'conservation planting' is a permitted activity.

### 4.2.2. Wetlands - Wildlife management

Fish and Game New Zealand (Auckland/Waikato Region) sought a permitted activity for 'vegetation removal for the purpose of managing wildlife'.

The Panel supports the Council's position that pest species removal is provided for as a permitted activity through the activity of 'pest plant removal'. Accordingly the most significant risk to the functioning of natural wetlands is already provided for and it is not necessary to provide for a new permitted activity for vegetation removal for the purpose of managing wildlife in wetlands.

### 4.2.3. Farming activities

Federated Farmers, Horticulture New Zealand, Potai Farms and Waytemore Forests sought additional permitted activities for vegetation alteration or removal in relation to riparian margins, coastal margins and rural areas for:

i. normal farming operations, and

ii. the management of shelter belts.

Amendments have been made to permit all forestry and farming activities that existed at the time the Plan was notified. Shelter belts are to be treated no differently to other vegetation management provisions, so to the extent that the rules address vegetation management that would apply to shelter belts, those provisions apply.

### 4.2.4. Department of Conservation land

The Minister of Conservation sought permitted activity status for vegetation removal on Department of Conservation land for activities in accordance with a conservation management strategy. The Minister's submissions and evidence were that the proposed permitted activities were not adequate to cover all the necessary activities the Department carries out.

The Council supported the position of its expert planner Ms Ford's evidence in rebuttal that the proposed rules adequately provide for the majority of the Departments' work (through the permitted activities for maintenance of existing structures, tracks and fences) and there was insufficient reason to justify a wider permitted activity for the Minister. The Panel notes its earlier comments with respect to the Minister's submission and land held or managed under the Conservation Act 1987 or any other act specified in Schedule 1 of the Conservation Act 1987.

### 4.2.5. Large-scale and commercial

Mr D Hay, expert planner, appeared for the Potts Road Trust which runs Ayrlies Garden and Wetlands. The Trust sought amendments to ensure that its operations were not affected by the imposition of a significant ecological area and proposed a range of options including removal of the significant ecological area, a new precinct with associated rules or amendments to the definitions.

As the Panel understands the rules proposed by the Council and supported by the Panel, they allow for vegetation removal and alteration for the purposes of operation, maintenance and repair of garden fences and other lawfully established activities as a permitted activity. From the evidence of Mr Hay the Panel finds that Ayrlies Garden would fall within the ordinary meaning of a garden, and as a result the Panel considers no further provisions are required to address the submitter's concern.

# 5. Development on Māori and Treaty Settlement Land

## 5.1. Statement of issue

The Independent Māori Statutory Board presented legal submissions from Mr Hovell and expert evidence from Mr Rawiri (tikanga associated with papakāinga) and Dr Mitchell (expert planner) regarding the Board's request for additional development capacity on Māori and Treaty Settlement Land. The Council did not support the Board’s request and had expressed this view, supported by expert evidence, at a number of hearings (Topics 036, 023 and 019), that it did not agree with the amendments sought by the Independent Māori Statutory Board.

## 5.2. Panel recommendation and reasons

The Panel supports the Independent Māori Statutory Board requests for the reasons set out below. The Panel notes the Council's acknowledgement that this issue involved "a difficult balance between section 6(e) and other section 6 matters about natural character, outstanding landscapes and significant indigenous biodiversity, and there is no clear answer" (paragraph 7.2 of the Council's closing statement).

It was the Council's view that amending the plan in the manner sought by the Independent Māori Statutory Board would potentially result in significant adverse effects on natural character, landscapes and biodiversity and a site-specific assessment of the activity and the values is required through a resource consent application.

The Independent Māori Statutory Board position was that significant ecological area values should not operate as an overriding priority over Mana Whenua values, and the appropriate balance was to be best achieved through a controlled activity rule for papakāinga and marae complexes on ancestral land in natural heritage overlay areas.

The Independent Māori Statutory Board also considered that the threshold proposed by the Council as a controlled activity of one marae complex and up to ten dwellings per site was inappropriate and too restrictive, and that the amount of vegetation that could be cleared was too low to give effect to the Part 2 statutory imperatives and the provisions of the regional policy statement.

It is noted that the Council proposed a controlled activity rule for significant ecological areas, but qualified this to circumstances where there was “no practicable alternative location outside of the area of protected vegetation on the site”. This, according to the Independent Māori Statutory Board, meant that the Plan retained the overriding priority for significant ecological areas as opposed to enabling the development of Māori and Treaty Settlement Land. The Independent Māori Statutory Board noted, and the Panel agrees, that the term ‘where practicable’ is uncertain and is not an appropriate mechanism for determining activity status.

The legal submissions of Mr Hovell and evidence of Mr Rawiri and Dr Mitchell set out why the additional provisions should be provided in this context and why, notwithstanding section 6(c) of the Resource Management Act 1991 (the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna), that section 6(e) (the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, wāhi tapu, and other taonga), section 7(a) kaitiakitanga, and section 8 relating to the Treaty of Waitangi, should predominate in this case. They also set out why the development thresholds were too low and needed to be increased and why the ‘where practicable’ part of the rule needed to be deleted (noting that Dr Mitchell in his redrafted provisions proposed that the ‘where practicable’ clause become an assessment criterion).

The Panel accepts the position of the Independent Māori Statutory Board; that the provisions they proposed would give effect to sections 6(e), 7(a) and 8 of the Resource Management Act 1991 and to the regional policy statement. The Council was concerned about the potential for significant adverse effects on natural character, landscapes and biodiversity. The Panel accepts there may be a greater risk of adverse effects due to a policy and rule direction enabling use and development of Māori and Treaty Settlement Land, however this needs to be balanced with the provisions of sections 6, 7 and 8 as set out above. In this respect the Panel is mindful of Mr Rawiri's evidence where he states that:

> It is also important to note that Mana Whenua themselves have important tikanga as kaitiaki. Whakapapa expresses the connection of Mana Whenua to the natural world through whakapapa to the atua and the primal parents of Ranginui and Papatuanuku. Mana Whenua are therefore connected to the whenua and native bush for example through Tanemahuta. Through this whakapapa and respect for the mana of the atua, Mana Whenua have inherent duties to maintain the mauri of the natural environment, and Mana Whenua do not undertake activity lightly and do not undertake unnecessary activity that will destroy the mauri of the natural environment. (Paragraph 12, evidence in chief.)

Moreover as a percentage of land held, Māori Land is significantly over-represented in terms of land covered by a significant ecological area than non-Māori land. This places a much greater regulatory burden on Māori Land, and makes it more difficult to give effect to the Part 2 matters addressed above.

Finally, while additional development provisions are provided, a consent is still required and this will trigger a site assessment and the development of an assessment of environmental effects. The Council, as the consent authority, is able to assess any proposal and impose conditions where control has been retained and includes, amongst other things:

i. the location of the activities;

ii. the area of vegetation to be cleared;

iii. the ability to locate activities outside of significant ecological areas but on the site;

iv. measures to remedy or mitigate adverse effects of vegetation clearance and associated earthworks.

# 6. Controlled activity status for accessway and building platform clearance

## 6.1. Statement of issue

Ngati Whatua Orakei Whai Maia Limited opposed the controlled activity status for altering or removing up to 300m$^2$ of vegetation within a significant ecological area for a building platform and accessway when there is no practicable alternative. This was set out in the legal submissions and evidence in chief of Mr Roberts, expert planner.

## 6.2. Panel recommendation and reasons

Ngati Whatua Orakei Whai Maia Limited considered that the scope of the controlled activity did not allow the Council to impose conditions which would alter any proposed building to avoid adverse effects on significant ecological areas. Ngati Whatua Orakei Whai Maia Limited sought discretionary activity status for this activity. Moreover the legal submissions (paragraph 16) expressed concerns that it would not be possible for the Council to impose conditions that would reduce the size of the area to be cleared or relocate the building platform to a different location as this would essentially mean declining consent for the activity.

The Panel acknowledges that pursuant to sections 87A(2) and 104A of the Resource Management Act 1991, controlled activities cannot be declined and the conditions can only be imposed on matters over which control is reserved. However the Panel does not agree with the submitter's legal submissions that it would not be possible to impose appropriate conditions which could reduce the size of the area to be cleared or relocate the building platform to a location different to that applied for. The reasons for this are those set out in the Council's closing statement paragraphs 7.15-7.19.

The Panel does however find that it is not appropriate for the rule itself to state "Vegetation alteration or removal within a SEA for a building platform and accessway for one dwelling per site where there is no practicable alternative location outside the area of protected vegetation on the site" (emphasis added) as proposed by the Council. The reasons for this are those set out in section 5 above.

To provide certainty to those who have a significant ecological area over their land and who wish to build a dwelling, the Panel recommends the retention of the controlled activity status (as it has for additional provision for development on Māori and Treaty Settlement Land in section 4 above). The matters over which control has been retained include:

i. the location of the building platform and accessway;

ii. the area of vegetation to be removed; and

iii. measures to remedy or mitigate adverse effects of vegetation clearance and associated earthworks.

The assessment criteria include:

i. whether there are practicable alternative locations for the development on the site outside of the vegetated area or significant ecological area; and

ii. whether vegetation clearance can be carried out in a way that removes lower quality vegetation such that the removal of the high quality vegetation is avoided.

# 7. Mapping of significant ecological areas

## 7.1. Statement of issue

A number of submitters requested additions, modifications or deletions to the notified mapped significant ecological areas.

## 7.2. Panel recommendation and reasons

The Panel generally accepts the Council's position that areas that meet the significant ecological factors (set out in the regional policy statement) should be mapped as such. However, where there are competing values, a judgment call, based on evidence, needs to be made as to which provisions better promote sustainable management of natural and physical resources as required by section 5 of the Resource Management Act 1991. Also, it follows that if an area does not meet the significant ecological area factors, then it should not be mapped as a significant ecological area.

The Panel acknowledges that this was one of the key issues that emerged throughout the hearing, i.e. should a significant ecological area be applied to land where that might create a tension between competing planning considerations (e.g. the development of Māori Land addressed above) and/or frustrate the achievement of other objectives within the Plan (e.g. the Special Purpose - Quarry Zone), notwithstanding that one or more of the significant ecological area factors for identification were present.

A number of submitters argued that the significant ecological area should either be removed of modified, or that the greater range of activities be enabled or provided for. These submitters included: Brookby Quarry (quarry use); Manukau District Health Board (healthcare facilities); Regional Facilities Auckland (zoo); the Turners (farming); and Melanesia Mission Trust Board, John Compton, Chitty Family Trust, Ms C Caughey, Nuttal Family Trust, Brian and Patricia Beecroft, R and J Duthie and COD Crown Projects Limited (all in relation to housing).

These submitters contended that the significant ecological areas should be removed from their respective properties or modified due a range of reasons including:

i. the significant ecological area was inconsistent or in conflict with the zoning of the site and other components of the Plan;

ii. that conflict should be resolved now through the removal of the significant ecological area and not left to a resource consent application for the site;

iii. the costs of imposing the significant ecological area (in consenting costs and loss of development potential) for individual landowners are greater than the benefits and have not been taken into account;

iv. the combination of the costs of resource consents and the policy framework for significant ecological areas will reduce development options for the land;

v. other alternatives had not been adequately considered, including protecting the ecological values through other methods in the Plan, such as the riparian vegetation rural vegetation or subdivision rules; and

vi. the potential restrictions imposed by the significant ecological area would frustrate the achievement of other parts of the Plan.

The Panel recommends addition, modification or deletion of a number of significant ecological areas relative to the mapped areas as notified. The results of these recommendations are set out in the overlay maps. The Panel used the following approach to arrive at its recommendations.

Where there was evidence that the identification of the significant ecological area would frustrate the purpose of the zone or location, and that purpose has economic or strategic importance to the region and could not readily be achieved in another way or area, the Panel recommends removal of the identification of the significant ecological area. Examples include their removal from all Special Purpose – Quarry Zones and from the Middlemore Hospital site.

Where the Panel found the evidence in support of the significant ecological area to be inadequate relative to the significant ecological area factors, the Panel recommends modification or deletion. This situation often occurred where the Council evidence was not supported by a site visit (e.g. relied on photographic or mapping evidence) and the land owner provided evidence that either contradicted or called into question the Council evidence. In a limited number of cases the Panel was provided competing evidence from experts that had all visited the site and in these circumstances the Panel formed a judgement on that evidence. The overall timing and volume of the hearings process precluded the Panel undertaking site visits.

The Panel has made specific comments on some of the significant ecological areas, set out below. These are particularly where there was contested expert evidence and spatial change (removal of or the reduction in size a significant ecological area or an addition) has been made.

### 7.2.1. Portland Road – Remuera

Ms Davis, expert ecologist for the Portland Road Ecological Valley Group provided evidence in support of retaining this significant ecological area. She stated at paragraph 9 of here evidence in chief

> My conclusion is that the site listed in Schedule 5.4 of the PAUP as SEA_T_6065 fully meets the criteria for Threat status and rarity, and substantially meets the criteria for

> Representativeness and in part meets the criteria for Stepping stones, migration pathways and buffers. Given that for a site to qualify as a SEA it only needs to meet one of the criteria then I recommend that Portland Bush remain on Schedule 5.4 of the PAUP as a Significant Ecological Area.

The Panel agrees, but accepted the evidence of Ms C Caughey that her property should have the significant ecological area overlay removed. The Council has already agreed to this change and the removal of the significant ecological area overlay from her property, and the Panel agrees.

### 7.2.2. Norcross Reserve Area

The Panel heard considerable expert evidence from planners and ecologists on the ecological values of this area. Northcross Reserve and its environs is land formerly owned by the Ministry of Education. In this area there are some indigenous broadleaved trees and shrubs with interspersed podocarps and also a low-fertility ridgeline with a mix of gumland scrub species and weeds common in this type of habitat. It is notes that this area was not identified as a significant ecological area in the notified Plan.

The Environmental Defence Society Incorporated and Royal Forest and Bird Protection Society of New Zealand sought that the entire area be a significant ecological area (Areas A, B and C set out in Dr Goldwater's (expert ecologist) evidence. The reasons for this were set out in his evidence. Dr Goldwater stated in his evidence in rebuttal

> The five sites are listed below together with the criteria they meet for the SEA overlay: a. Northcross Reserve and environs: meets criterion Stepping stones, migration pathways and buffers (4c).

COD Crown Projects Limited presented expert planning evidence (Mr Mattison) and ecological evidence (Dr Flynn) setting out why only part of this area should be retained as a significant ecological area. COD Crown Projects Limited had recently purchased some the land from the Ministry of Education for a housing development (area B on the Goldwater map).

Dr Flynn states at 1.4 and 1.5 of her evidence that:

> In my assessment, the vegetation within the subject site as a whole is an example of a "novel/ hybrid ecosystem" as described in Singers et al (2015), as the canopy and emergent tiers are dominated by exotic vegetation pine and wattle), while the subcanopy largely comprises native broadleaved shrubs and treeferns. These factors suggest that the land owned by COD Crown Projects Limited ("CCPL") has characteristics which trigger the exclusion criteria used by Auckland Council's ecologists (see page 2 of the ecological assessment undertaken by Jane Andrews in relation to submission 1219-1 in 023 Hrg – Auckland Council – Joint Ecology - Appendix 1.1 – Rebuttal).
>
> I do not consider that the subject site meets any of the PAUP SEA criteria.

The Council took the position that it did not support the significant ecological area overlay over private land where the land owner was not in agreement.

The Panel agreed with the evidence of COD Crown Projects Limited and has not included its land in the significant ecological area overlay. The Panel also agrees with Dr Goldwater and the Council evidence that area A in Dr Goldwater's map does meet the significant ecological area factors, and accordingly this area has included in the Significant Ecological Areas Overlay.

### 7.2.3. Kohimarama and Significant Ecological Area 6180

There was a considerable number of 'competing' submissions in relation to this significant ecological area overlay. Some submitters sought the removal of the significant ecological area overlay while others sought its retention and some its expansion.

The Melanesian Mission Trust Board (expert evidence from Ms Covington – planning and Dr Flynn – ecological) sought the removal of many of the sites within the significant ecological area overlay. Legal submissions from Ms Goodyear sought the removal of the overlay from 310A Kohimarama Road (for P and C Ellis and J Radley).

The Frances Battersby Family Trust (legal submissions from Ms Chappell and Ms Battersby) sought an expansion of the significant ecological area overlay over 69 Allum Street. The Kohimarama Forest Preservation Group opposed the submissions of The Melanesian Mission Trust Board. The Kohimarama Forest Preservation Group presented expert evidence from Mr Brown – planning and Dr Goldwater – ecologist.

The Panel understood the importance of this area to those who submitted in support of the significant ecological area. However, in terms of the significance factors the Panel was persuaded by the expert evidence of Dr Flynn. In her conclusion to her evidence in chief at 4.1 and 4.2 she stated:

> Vegetation within the SEA in the gully between Kohimaramara Road, Allum Road and Pamela Place is dominated by exotic species, most of which are regarded as invasive weed species. Notwithstanding that the site has some features of ecological value, I do not consider that SEA criteria can be applied in a "categorical" way, without using one's judgement as to the long-term viability of the ecological feature in question, and its relative importance in achieving the protection and maintenance of biodiversity in the local and regional context. I also do not support simply retaining sites of marginal value as SEAs on a precautionary basis, using the rationale that "more is better". In my opinion, given its condition and context, the vegetation and habitat within the subject site does not meet the threshold of ecological significance envisaged by PAUP SEA criteria.
>
> Furthermore, I do not consider it appropriate or practicable to retain sites as SEAs where invasive weed species comprise the dominant component of the vegetation, as PAUP provisions intended to protect SEAs would provide little or no protection to identified ecological values.

The Panel has recommended reducing the size of the significant ecological area. This is shown on the overlay in the planning maps on the GIS viewer.

### 7.2.4. 21 Ayr Street Parnell

Mr Compton requested the removal of the significant ecological area (SEA_T_6063) from the entire property at 21 Ayr St, Parnell. Expert planning evidence was presented by Mr

Lovett. The primary reason for seeking the deletion was on the basis that the site does not meet the relevant factors and was not likely to have any threatened species (ornate skink) present.

The primary evidence of the Council was that the site meets the relevant factors due to the likely presence of ornate skinks. The Council's expert ecologist, Dr Ussher, in his evidence in rebuttal, focused on the likely presence of native lizards with a conservation classification of 'threatened' or 'at risk' in the significant ecological area at 21 Ayr Street, Parnell. He acknowledged that he had not sighted an ornate skink on the submitter's property (cross examination from Mr Bartlett, legal counsel for Mr Compton).

The Council's opening legal submissions (at section 9.4) stated:

> The Council's primary argument is that the site meets the relevant criteria and so should be mapped in order to reflect the important biodiversity values present on the site. In relation to the alternative proposed by Mr Lovett, the Council agrees that the translocation of skinks can be an appropriate response to a development proposal that affects the habitat of skinks. However, the primary response should be the retention of the habitat.

Having had regard to the evidence, the likelihood or not of ornate skinks being in this area, and that if they were they could be relocated, the Panel has recommended the removal of the significant ecological area over this property.

#### 7.2.5. Waikumete Cemetery

Auckland Botanical Society, Richard Reid and Associates Limited and Richard H Gallen sought that the Plan continue to recognise and protect the significant ecological area of contiguous native gum land vegetation within Waikumete Cemetery as was shown in the Auckland Council District Plan – Operative Waitākere Section (Natural Areas).

The notified Plan mapped a smaller area of the Waikumete Cemetery as a significant ecological area (reduced by approximately 50 per cent from that shown in the operative district plan.

The Council's opening legal submissions (paragraph 8.7) set out the Council's position in relation to Waikumete Cemetery. It stated:

> a number of submitters seek the extension of the SEA to cover a greater proportion of the site. The Council Parks Department in its capacity as landowner of the site does not agree to the addition and notes that the current extent of the SEA is consistent with the recently approved Reserve Management Plan for the Cemetery, Reserves Act Classification and Resource Management Act Designation of the site, for cemetery purposes.

The Council did not present any evidence in relation to Waikumete Cemetery and its status as a significant ecological area.

The submitters presented expert evidence in chief from Dr Bellingham (ecologist and planner), and Mr Cameron (botanist). Mr Reid, and architect, also presented evidence in chief. A summary of their collective evidence considered that the native gum land vegetation was unique, nationally rare and critically threatened. They set out that the Council had

assessed Waikumete Cemetery as meeting three factors for significant ecological area status: representativeness; threat status and rarity; and diversity. Notwithstanding this the significant ecological area overlay in the notified Plan reduced the area by approximately 50 per cent.

The Panel's view was that the area sought by the submitters to have a significant ecological area overlay met the relevant factors. According to the Council, its position was that an area meeting the factors should be mapped as a significant ecological area. The Panel has recommended that the significant ecological area be mapped as requested by the submitters.

In relation to requests to expand or add identified significant ecological areas the Panel issued guidance in Procedural Minute 6 (5 August 2014, see paragraphs 12 to 16) that indicated the Panel did not expect its processes would be able to do justice to situations where the landowner(s) were not in support of such requests by other parties. In response few requests for expansions or additions were sustained through the hearing process and most that were related to land in public ownership.

# 8. Consequential changes

## 8.1. Changes to other parts of the plan

There are no consequential changes to other parts of the Plan as a result of the Panel's recommendations on this topic.

## 8.2. Changes to provisions in this topic

There are no changes to provisions in this topic as a result of the Panel's recommendations on other hearing topics.

# 9. Reference documents

The documents listed below, as well as the submissions and evidence presented to the Panel on this topic, have been relied upon by the Panel in making its recommendations.

The documents can be located on the aupihp website (www.aupihp.govt.nz ) on the hearings page under the relevant hearing topic number and name.

You can use the links provided below to locate the documents, or you can go to the website and search for the document by name or date loaded.

(The date in brackets after the document link refers to the date the document was loaded onto the aupihp website. Note this may not be the same as the date of the document referred to in the report.)

## 9.1. General topic documents

Panel documents

023 - Submission Point Pathway Report - 15 May 2015 (15 May 2015)

023 - Submission Point Pathway Report - 4 August 2015 (4 August 2015)

023 - Parties and Issues Report - 2 July 2015 (2 July 2015)

023 - Mediation Joint Statement - Sessions 1,2 and 3 (15, 16 and 19 June 2015) (26 June 2015)

Procedural Minute 6 5 August 2014

Direct Discussion Outcomes

023 - Outcome of Direct Discussions - stream 1 - 28 April 2015 (6 May 2015)

023 - Outcome of Direct Discussions - stream 1 - 5 June 2015 (17 June 2015)

023 - Outcome of Direct Discussions - stream 2 - 28 April 2015 (11 May 2015)

023 - Outcome of Direct Discussions - stream 2 - 5 June 2015 (17 June 2015)

023 - Outcome of Direct Discussions - stream 3 - 5 June 2015 (17 June 2015)

Auckland Council marked up version

023 - Proposed Marked-up Version (Objectives and Policies) (10 June 2015)

023 - Proposed Marked-up Version (Provisions - SEA's and Rivers, Lakes, Streams and Wetlands) (10 June 2015)

023 - Proposed Marked-up Version (Rules - Vegetation Management) (10 June 2015)

Auckland Council closing statement

023 Hrg - Auckland Council - Closing Remarks (2 September 2015)

023 Hrg - Auckland Council - Closing Remarks - Attachment A (2 September 2015)

023 Hrg - Auckland Council - Joint Ecologists Post Closing Tracker - 12 November 2015 (13 November 2015)

023 Hrg - Auckland Council - Joint Ecologists Closing Tracker - Appendix 1 (2 September 2015)

023 Hrg - Auckland Council - Joint Ecologists Closing Remarks - Appendix (2 September 2015)

023 Hrg - Auckland Council - Post Closing Remarks - Appendix 5.1 Schedule of Significant Ecological Areas - Land (13 November 2015)

023 Hrg - Auckland Council - Post Closing Remarks - Appendix 6 Final Mark-up (13 November 2015)

023 Hrg - Auckland Council and Makgill Brothers and Haldane Trust - Memorandum - 28 July 2015 (28 July 2015)

023 Hrg - Auckland Council and Makgill Brothers and Haldane Trust - Memorandum - Attachments (28 July 2015)

023 - List of Minor Errors (23 April 2015)

023 - Memorandum of counsel for Council - 22 June 2015 (23 June 2015)

## 9.2. Specific evidence

**Auckland Botanical Society**

023 Hrg - Richard Reid and Associates Limited et al (Ewen Cameron) - Primary Evidence (22 July 2015)

**Auckland Council**

023 Hrg - Auckland Council - Legal Submissions (6 August 2015)

023 Hrg - Auckland Council (Marilyn Ford) - Planning - Vegetation Management - REBUTTAL (31 July 2015)

023 Hrg - Auckland Council (Marilyn Ford) - Planning - Vegetation Management - REBUTTAL - Attachment A (31 July 2015)

Hearing Evidence – Andrea Julian (13 November 2014)

023 Hrg - Auckland Council (Dr Graham Ussher) - Ecology - Significant Ecological Areas Terrestrial - REBUTTAL (29 July 2015)

**COD Crown Projects Limited**

023 Hrg - COD Crown Projects Limited (Sarah Flynn) - Ecology (4 August 2015)

023 Hrg - COD Crown Projects Limited (Sarah Flynn) - Ecology - Appendix 1 (4 August 2015)

023 Hrg - COD Crown Projects Limited (Sarah Flynn) - Ecology - Appendix 2 (4 August 2015)

023 Hrg - COD Crown Projects Limited (Nick Mattison) - Planning (4 August 2015)

023 Hrg - COD Crown Projects Limited (Nick Mattison) - Planning - Appendices (4 August 2015)

**Federated Farmers**

023 Hrg - Federated Farmers (Richard Gardner) - Opening Representations (10 August 2015)

**Fish and Games New Zealand**

023 Hrg - Fish and Game New Zealand (Auckland and Waikato Region) - Evidence - LATE (9 August 2015)

**Frances Battersby Family Trust**

023 Hrg - Frances Battersby Family Trust - Legal Submissions (10 August 2015)

**Horticulture New Zealand: Pukekohe Vegetable Growers Association**

023 Hrg - Horticulture New Zealand (Vance Hodgson) - Planning (16 July 2015)

**Independent Maori Statutory Board**

023 Hrg - Independent Maori Statutory Board - Lega Submissions (6 August 2015)

023 Hrg - Independent Maori Statutory Board (Hau Rawiri) - Statement of Evidence (16 July 2015)

023 Hrg - Independent Maori Statutory Board (Philip Mitchell) - Statement of Evidence (16 July 2015)

**John Compton**

023 Hrg - John Compton (John Lovett) - Planning (16 July 2015)

**Julie Webber and Andrew Murray**

023 Hrg - Julie Webber and Andrew Murray - Legal Submissions (6 August 2015)

**Melanesian Mission Trust Board**

023 Hrg - Melanesian Mission Trust Board (Clare Covington) - Planning (16 July 2015)

023 Hrg - Melanesian Mission Trust Board (Sarah Flynn) - Ecology (16 July 2015)

**Minister of Conservation**

023 Hrg - Minister of Conservation (Christopher Staite) - Planning (16 July 2015)

**Ngāti Whātua Ōrākei Whai Maia**

023 Hrg - Ngati Whatua Orakei Whai Maia Limited (Nicholas Roberts) - Planning (16 July 2015)

023 Hrg - Ngati Whatua Orakei Whai Maia Limited - Legal Submissions (7 August 2015)

**Peter D Ellis, Cherryl D Ellis and John K Radley**

023 Hrg - Peter D Ellis, Cherryl D Ellis and John K Radley - Legal Submissions (10 August 2015)

**Potai Farms Limited**

023 Hrg - Potai Farms Limited - Primary Evidence (15 July 2015)

**Potts Road Trust and Clifton Holdings Trust and The Ayrlies Gardens and Wetlands Charitable Trust**

023 Hrg - Potts Road Trust and Clifton Holdings Trust and The Ayrlies Gardens and Wetlands Charitable Trust (David Hay) - Planning (14 July 2015)

**Portland Ecological Valley Group**

023 Hrg - Portland Ecological Valley Group (Alison Davis) - Ecology (15 July 2015)

**Richard Reid and Associates Limited**

023 Hrg - Richard Reid and Associates Limited (Richard Reid) - Primary Evidence (16 July 2015)

023 Hrg - Richard Reid and Associates Limited et al (Dr Mark Bellingham) - Primary Evidence - Waikumete Cemetery (22 July 2015)

**Royal Forest and Bird Protections Society of New Zealand Inc**

023 Hrg - EDS and Royal Forest and Bird Protection Society (Nick Goldwater) - Ecology (15 July 2015)

023 Hrg - EDS and Royal Forest and Bird Protection Society (Nick Goldwater) - Ecology - Site Specific Matters (21 July 2015)

023 Hrg - EDS and Royal Forest and Bird Protection Society (Nick Goldwater) - Ecology - Site Specific Matters - Supplementary Evidence (6 August 2015)

**The Kohimarama Forest Preservation Group**

023 Hrg - The Kohimarama Forest Preservation Group (Nick Goldwater) - Ecology (15 July 2015)

**Waytemore Forests Limited, Waytemore Farms Limited, Adfordston Farms Limited and Kauri Hiwi Limited**

023 Hrg - Waytemore Forests Limited, Waytemore Farms Limited, Adfordston Farms Limited and Kauri Hiwi Limited (Mark Tollemache) - Planning (16 July 2015)

**ATTACHMENT C – RELEVANT PARTS OF COUNCIL DECISION**

| | |
|---|---|
| requirements are included for new buildings within the same area (of any size). This is inconsistent with the Policy (9) which refers to both new buildings and substantive alterations to existing buildings. | |
| (ii) The application of the rule to only additions and alterations to existing buildings and not new buildings will pose problems for implementing the policy and rule framework. No explanation of this is given in the Panel's report. Given the issues that the rule in its current form will cause when applied to development within this area, an amendment is proposed to ensure it applies consistently | |
| **Alternative solution** | See Attachment A |

**20. Council decisions relating to Panel report entitled "Report to Auckland Council Hearing Topic 023 (Significant ecological areas and vegetation management), July 2016"**

**Panel recommendations accepted:**

*20.1* The Council has accepted all the recommendations of the Panel contained in the Panel report for Hearing Topic 023 (Significant ecological areas), as they relate to the content of the PAUP, and also the associated recommendations as they appear in the plan and the maps.

**Panel recommendations rejected: none.**

**21. Council decisions relating to Panel report entitled "Report to Auckland Council Hearing Topic 024 (Genetically Modified organisms), July 2016"**

**Panel recommendations accepted:**

*21.1* The Council has accepted all the recommendations of the Panel contained in the Panel report for Hearing Topic 024 (Genetically modified organisms), as they relate to the content of the PAUP, and also the associated recommendations as they appear in the plan and the maps.

**Panel recommendations rejected: none.**

**ATTACHMENT D – HIGH COURT JUDGMENT**

**IN THE HIGH COURT OF NEW ZEALAND**
**AUCKLAND REGISTRY**

**I TE KŌTI MATUA O AOTEAROA**
**TĀMAKI MAKAURAU ROHE**

**CIV-2016-404-2343**
**[2018] NZHC 1069**

| | |
|---|---|
| BETWEEN | ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED<br>Appellant |
| AND | AUCKLAND COUNCIL<br>Respondent |

Continued next page

Hearing: On the papers

Counsel:
S Gepp and P Anderson for Appellant
J Caldwell and M Gribben for Respondent
C Kirman and A Devine for Housing NZ Corporation Inc
R Gardner for Federated Farmers of New Zealand Inc
D Minhinnick and L J Eaton for Stevenson Group Ltd
B Matheson for Fulton Hogan Ltd, Brookby Quarries Ltd and Winstone Aggregates Ltd
C Sheard for New Zealand Transport Agency
T Howell for Te Arai Group
J Gardner-Hopkins and L Hinchey for Transport NZ Ltd
R Enright and M Wright for Environmental Defence Society Inc
M Williams for Man O'War Farm Ltd

Judgment: 18 May 2018

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**JUDGMENT OF WHATA J**

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*This judgment was delivered by me on 18 May 2018 at 4.00 pm, pursuant to Rule 11.5 of the High Court Rules.*

*Registrar/Deputy Registrar*

*Date:* .....

HOUSING NEW ZEALAND CORPORATION INC
FEDERATED FARMERS OF NEW ZEALAND INC
STEVENSON GROUP LIMITED
FULTON HOGAN LIMITED
BROOKBY QUARRIES LIMITED
NEW ZEALAND TRANSPORT AGENCY
WINSTONE AGGREGATES LIMITED
TE ARAI GROUP
TRANSPOWER NEW ZEALAND LIMITED
ENVIRONMENTAL DEFENCE SOCIETY INC
MANO'WAR FARM LIMITED
COUNTIES MANUKAU DISTRICT HEALTH BOARD
Section 301 Parties

## Introduction

[1] This judgment considers the final aspect of Royal Forest and Bird Protection Society of New Zealand Inc's ("Royal Forest and Bird") appeal against various decisions of the Auckland Council on the Proposed Auckland Unitary Plan ("PAUP"). The parties[1] interested in this final aspect filed a joint memorandum recording settlement on 21 December 2017 and seek consent orders which will resolve the appeal.[2]

[2] The frame for the resolution of appeals by consent was set out in *Ancona Properties Ltd*,[3] which I adopt. As with all Unitary Plan appeals which have been resolved by way of consent orders, I am guided in my assessment by the fact the parties concerned have reached an agreed position.

## Background

[3] Helpfully, in the joint memorandum the parties have agreed on the key facts and issues. The background that follows reflects those agreed matters.

[4] Royal Forest and Bird is an incorporated society which seeks to preserve and protect indigenous flora and fauna, and the natural features of this country's landscape. To that end, it made a number of submissions on various aspects of the PAUP.

[5] The PAUP contained various areas subject to a Significant Ecological Area ("SEA") overlay. The SEA overlay applied to those areas that the Council considered met the criteria for significance, as set out in the PAUP. A different planning framework, and activity status for vegetation alteration, applied to areas not covered

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1 The parties being Royal Forest and Bird (the appellant), Auckland Council (the respondent), and the following interested parties: Housing New Zealand Corporation, Federated Farmers of New Zealand Inc, Stevenson Group Ltd, Fulton Hogan Ltd, Brookby Quarries Ltd, New Zealand Transport Agency, Winstone Aggregates (a division of Fletcher Concrete and Infrastructure Ltd), Te Arai Group, Transpower New Zealand Ltd, Environmental Defence Society Inc, Man O'War Farm Ltd, and Counties Manukau District Health Board.

2 The other aspects of Royal Forest and Bird's appeal were resolved in *Royal Forest and Bird Protection Society of New Zealand Inc v Auckland Council* [2017] NZHC 980 [Third Error Decision], and *Royal Forest and Bird Protection Society of New Zealand Inc v Auckland Council* [2017] NZHC 1606 [Second Error Decision].

3 *Ancona Properties Ltd v Auckland Council* [2017] NZHC 594.

by the overlay. A number of zones fell within the ambit of the SEA overlay, including a number of Special Purpose Zones such as the Quarry Zone.

[6] The application of the SEA overlay to various areas of land was challenged throughout the submission and hearing process, as was expert Council evidence from ecologists. In some cases, the Council's ecologists agreed with submitters that some or all of an area did not meet the SEA criteria and should be amended or removed. After hearing these submissions, the Auckland Unitary Plan Independent Hearings Panel ("Panel") released its recommendations on 22 July 2016.

[7] The alleged error of law underpinning the present settlement relates to a recommendation by the Panel to delete previously identified SEAs where it considered that "other planning imperatives" having economic or strategic importance to the region outweighed the identification of SEAs. The Panel stated:[4]

> The Panel generally accepts the Council's position that areas that satisfy the significant ecological factors (set out in the regional policy statement) should be mapped as such. However, where there are competing values, a judgment call, based on evidence, needs to be made as to what provisions better promote sustainable management of natural and physical resource as required by section 5 of the Resource Management Act 1991.
>
> ...
>
> Significant ecological areas have been deleted from the Special Purpose – Quarry Zone areas. This is due to the economic and strategic importance of the mineral resource. These areas are identified as areas to be quarried, which means ground cover has to be removed to access the resource, giving rise to a direct conflict between the purpose of the zone as a quarry and this form of protection. ...

[8] It went on:[5]

> Where there was evidence that the identification of the significant ecological area would frustrate the purpose of the zone or location, and that purpose has economic or strategic importance to the region and could not readily be achieved in any other way or area, the Panel recommends removal of the identification of the significant ecological area. Examples include their removal from all Special Purpose – Quarry Zones ...

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4 Auckland Unitary Plan Independent Hearings Panel *Report to Auckland Council Hearing topic 023 Significant ecological areas and vegetation management* (22 July 2016) at 6.

5 At 14.

[9] This recommendation, to remove these SEAs, meant the Panel did not make a recommendation on any amendment to the boundaries of SEAs that had been agreed between the Council's ecologists and various submitters.

[10] The Council adopted the relevant Panel recommendation in its decisions version of the Auckland Unitary Plan.

*Bespoke approach to SEAs identified in Quarry Zone sites*

[11] In respect of SEAs within the Quarry Zone:

(a) Vegetation removal within an SEA on a Quarry Zone had been classified in the PAUP as a restricted discretionary activity, which had been supported by some of the Quarry Operators[6] in their primary submissions.

(b) Brookby Quarries Ltd, however, sought in its submission that the SEA overlay be deleted from all Quarry Zones, with the effect that although a resource consent would still be required for general vegetation removal, there would be no need for specific consideration of the SEA matters and values.

(c) The PAUP also included specific matters of restricted discretion and specific assessment criteria for the activity of vegetation alteration or removal in SEAs in the Quarry Zone.

(d) The Regional Policy Statement (RPS) component of the PAUP contained policies (within the section on Minerals) requiring that new mineral extraction activities were undertaken outside SEAs and other areas of natural resources, except where no practicable alternative to locating within the SEA existed, in which case the policies provided for consideration of the scale of effects on SEAs and the extent to which

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6 For ease, Fulton Hogan Ltd, Winstone Aggregates, Brookby Quarries Ltd, and Stevenson Group Ltd are collectively referred to as Quarry Operators.

adverse effects could be mitigated or offset (Associated Quarry Natural Resources Policies).

(e) The Associated Quarry Natural Resources Policies were supported by the Council and the Quarry Operators (with some minor amendments). No new SEA-related regional or district plan objectives or policies were included within the Quarry Zone part of the PAUP, or proposed by any of the Quarry Operators during the hearing process.

(f) The proposed RPS also contained a section on Biodiversity, which included specific objectives and policies for protection of SEAs. There were also specific regional and district plan objectives and policies for protection of SEAs.

(g) The Council's "closing version" of the SEA provisions proposed to amend the specific assessment criteria for the activity of vegetation alteration or removal in SEAs in the Quarry Zone, by specifying that none of the general objectives and policies would apply to the assessment of any such (restricted discretionary) application. In contrast, Royal Forest and Bird in its "closing version" sought to specify that consideration of the biodiversity objectives and policies would be required as part of the assessment of all restricted discretionary activities.

(h) Winstone Aggregates (in respect of the Hunua Quarry) and Stevenson Group Ltd (in respect of the Drury Quarry) had reached agreement with the Council that the vegetation on small portions of the Quarry Zone did not meet the criteria for SEA and that these areas of the SEA overlay should be removed ("agreed SEA removal").[7]

(i) Fulton Hogan Ltd (in respect of the Clevedon Quarry) requested a portion of the SEA be removed on the basis that its expert evidence concluded it did not meet the PAUP's criteria for a SEA. This

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7 The areas of the agreed SEA removal are shown in Appendices C and D.

amendment was not agreed by the relevant Council ecologist and so was unresolved ("unresolved SEA status").

[12] As noted, the Panel recommended the removal of the SEA overlay from, among other zones, the Quarry Zone. As a result, the Panel:

(a) recommended relocating the Associated Quarry Natural Resources Policies from the RPS to the Auckland-wide rules Chapter E38 Mineral Extraction from land;[8]

(b) recommended deleting the Quarry Zone-specific matters of restricted discretion and assessment criteria;

(c) did not need to make, and did not make, any recommendations on the agreed SEA removal as it applied to the Drury and Hunua quarries; and

(d) did not need to make, and did not make, any recommendation on the unresolved SEA status as that applied to portions of the Clevedon Quarry.

[13] The Panel's report did not specifically address the above matters, but its "recommendations version" of the Unitary Plan included amendments to that effect. However, the Panel did state in its report, subsequent to recommending deletion of the relevant SEAs, that "vegetation removal provisions have been retained over quarry zones, notwithstanding that the significant ecological areas have been removed from the Special Purpose – Quarry Zone".[9] The effect of this was under the Panel's recommendations, and the Auckland Unitary Plan Operative in part, any vegetation alteration or clearance within the Quarry Zone over small-scale permitted thresholds is a restricted discretionary activity.[10] That recommendation and subsequent decision to accept it has not been challenged.

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8 This recommended relocation and the final form of these policies was on the basis that the SEA overlay no longer applied over the Quarry Zone, and accordingly all references to SEAs within these policies had been deleted.

9 Auckland Unitary Plan Independent Hearings Panel, above n 4, at 4.

10 Pursuant to E15.4.1 Activity table, r (A10).

**The original grounds of appeal**

[14] In its appeal, Royal Forest and Bird alleges:

(a) if an area of indigenous vegetation or habitat of indigenous fauna meets the factors for a SEA, then it should be identified as such;

(b) it was unlawful for the Panel to spatially modify or delete certain areas of the SEA overlay on the basis that some other planning imperatives outweighed their identification;

(c) in accepting the Panel's recommendation in this regard, the Council erred because it:

(i) applied the wrong legal test in recognising and providing for such areas under s 6(c) of the Resource Management Act 1991 (RMA);

(ii) took into account an irrelevant consideration, namely, the other planning imperatives; and

(iii) failed to implement the RPS provisions of the Unitary Plan.

**What the parties have agreed on**

*The agreed error*

[15] The parties' positions have coalesced around sub-para (b). As I will set out below, all the parties to the appeal, except Federated Farmers (which has agreed to withdraw from the appeal if the draft consent order is granted), agree that the modification or deletion of the SEAs for "other planning imperatives" constituted an error of law. Specifically, they agree that if an area of indigenous vegetation or habitat of indigenous fauna meets the objective criteria for SEA, then it should be identified as such in the district or regional plan, irrespective of any planning outcomes that might follow.

[16] Royal Forest and Bird says the deletion of the SEA overlay for "planning imperatives" was an error of law because existing jurisprudence on s 6(c) of the RMA confirms that whether a site is "significant" is an ecological assessment which should not be conflated with consideration of management or planning imperatives. Alongside a series of decisions in the Environment Court,[11] Royal Forest and Bird cites the Court of Appeal's decision relating to s 6(b) in *Man O'War Station Ltd v Auckland Council*,[12] applied by Wylie J in relation to s 6(c) in *Royal Forest & Bird Protection Society of New Zealand Inc v Auckland Council*.[13] I will refer to this decision as RF&B No.2 for ease of reference.

[17] In *Man O'War Station Ltd* the Court of Appeal emphasised the classification of an area as having particular values meeting s 6 should be made on an "essentially factual assessment based upon the inherent quality of the landscape itself", independent of consideration of the consequences of being classified as such.[14] Wylie J, in considering the second error of law in Royal Forest and Bird's appeal, found:[15]

> [18] A related provision — s 6(b), dealing with the protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development — was considered by the Court of Appeal in *Man O'War Station Ltd v Auckland Council*. One of the questions posed for the Court's consideration was whether or not the identification of an outstanding natural landscape for the purposes of s 6(b) should be informed by, or dependent upon, the protection afforded to the landscape under the Act, and/or the relevant planning instrument. The Court held that the issue of whether land has attributes sufficient to make it an outstanding landscape within the ambit of s 6(b) requires an essentially factual assessment based upon the inherent quality of the landscape itself.
>
> [19] The structure of s 6(b) and (c) is the same. I agree with the Society and the Council that the same principle must apply to the identification of an area as a significant ecological area qualifying for protection under s 6(c). The exclusion indicators, dealing as they do with modified areas, have the potential to cut across s 6(c) and the findings made by the Court of Appeal in *Man*

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11 *Royal Forest & Bird Protection Society of New Zealand Inc v Central Otago District Council* EnvC Auckland A128/2004, 23 September 2004, EnvC Auckland A154/2004; *Royal Forest & Bird Protection Society of New Zealand Inc v New Plymouth District Council* [2015] NZEnvC 219, (2015) 19 ELRNZ 122; *Friends of Shearer Swamp Inc v West Coast Regional Council* [2010] NZEnvC 345, upheld on appeal in *West Coast Regional Council v Friends of Shearer Swamp Inc* [2012] NZRMA 45 (HC).

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

13 Second Error Decision, above n 2.

14 *Man O'War Station Ltd v Auckland Council*, above n 12, at [61]-[62].

15 Second Error Decision, above n 2 (footnotes omitted).

*O'War Station*. An area may still qualify for protection under s 6(c) notwithstanding modification.

[18] Royal Forest and Bird argues that, in the present context, the decision to remove the SEA overlay because of "other planning imperatives" diverged from the correct approach to SEA identification and that this Court should order the reinstatement of the deleted and modified SEAs.

[19] The Council accepts this error for the reasons provided above and agrees resolution requires reinstatement of removed or amended SEAs. The Quarry Operators also accept deletion of the SEA overlay was an error of law. For completeness, the Council and Quarry Operators agree with one another that it has not been alleged there was an error of law in providing a tailored approach to the resource management issue of mineral extraction within SEAs, which was different to the issue of how other activities in an SEA are managed. As for the other parties:

(a) the Environmental Defence Society supports Royal Forest and Bird's position;

(b) the Counties Manukau District Health Board, Transpower New Zealand Ltd and Housing New Zealand Corporation accept there was an error of law;

(c) Te Arai Group specifically agree with the assessment undertaken that the amendments to SEA 5548a were made for ecological reasons and not as a result of other planning imperatives;[16]

(d) Man O'War Farm Ltd will withdraw its interest in the appeal, if it has not done so already; and

(e) Federated Farmers of New Zealand Inc does not wish to express a view on whether there is an error of law, but has agreed to withdraw from the appeal if the draft consent order is granted.

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16 As shown in Appendix B, this is not subject to the present appeal.

*Areas affected by the agreed error*

[20] The parties have also reached an agreed position on reasons for deletion or modification of SEAs. Having investigated the Panel's recommendations in some depth, the parties have agreed some SEAs were modified or deleted for reasons that did not relate to "other planning imperatives". Those areas are not intended to be subject to Royal Forest and Bird's appeal, and the parties have agreed further changes to those SEAs are not necessary.

[21] Appendix A to this decision sets out:

(a) The SEAs that the parties have agreed were modified or deleted because of "other planning imperatives" and are subject to the appeal.

(b) The SEAs that were modified or deleted because of "other planning imperatives" but which the parties agree should be reduced in size because a portion of the SEA does not have ecological value sufficient to support SEA status. This includes the agreed SEA removal in Appendices C and D. These are marked in Appendix A with an asterisk.

[22] Appendix B then sets out a table of areas the parties agree were modified or deleted for reasons other than "other planning imperatives" and which are not subject to the appeal.

**Unresolved matters: consequential amendments**

[23] The parties have, however, been unable to reach consensus on what consequential amendments should follow the reinstatement of the SEA overlay, especially in relation to the management of activities within a SEA and a Quarry Zone.

[24] The Quarry Operators contend consequential amendments on the following matters need to be considered:

(a) the activity status for vegetation removal within an SEA in zones from which the SEA overlay had been removed (which they submit should be restricted discretionary or controlled);

(b) what other consequential changes flow from a change in the activity status for vegetation removal within a SEA in the Quarry Zone; and

(c) what decision should be made in respect of those submitters who sought the removal of the SEA overlay over part of their site, but whose relief was effectively superseded by the Panel's recommendation to remove the SEA on a much broad basis (i.e. how the agreed SEA removal and unresolved SEA status should be resolved).

[25] Royal Forest and Bird accepts the "default" discretionary activity status for SEA vegetation alteration or removal should not apply to vegetation alteration or removal within SEAs in the Quarry Zone, as the notified status was restricted discretionary, and no party sought a more restrictive status. It would support an order amending the activity status to restricted discretionary. It also accepts consequential recommendations relating to (a) deletion of the SEA/Quarry Zone-specific assessment criteria and (b) the agreed SEA removal and unresolved SEA removal may be necessary.

[26] But it does not accept that such reconsideration extends to the activity status for vegetation alteration or removal within SEAs in the Quarry Zone, because no party challenged the Panel's recommendation that the vegetation removal provisions for non-SEAs should continue to apply to the Quarry Zone, such that removal or alteration is a restricted discretionary activity. In its view, there is no scope for the Quarry Operators to seek controlled activity status as part of consideration of this issue.

[27] As for the other parties, the Counties Manukau District Health Board wishes to be involved in the consideration of any consequential amendments to the Unitary Plan that might be required in relation to its site and removal of vegetation within the Special Purpose: Healthcare Zone.

**The proposed solution**

[28] The parties submit that, if the appeal is allowed, the Court is required to make orders amending the provisions of the Plan. For that purpose, the parties propose:[17]

(a) The SEA overlay be reinstated, except where shown in Appendices A and B, and those parts of Hunua and Drury quarries shown in Appendices D and E.

(b) The activity status for removal of vegetation within the Quarry Zone will be restricted discretionary and in other zones will be discretionary (reflecting the notified version of the Unitary Plan).

(c) The applicable assessment criteria for vegetation alternation or removal within a SEA in a Quarry Zone are to be the same as the notified version of the PAUP.

[29] It is further submitted that s 156(2), limits the matters on appeal before the Environment Court to:

(a) what form the matters to which discretion is reserved (and associated assessment criteria) should take; and

(b) whether the portion of vegetation classified as SEA should be removed from the Clevedon quarry (i.e. the unresolved SEA status question).

[30] Given, however, the position of the Quarry parties, the appeal to the Environment Court will also require determination of:

(a) whether there is jurisdiction to consider the appropriate activity status for the removal of vegetation within a SEA in the Quarry Zones;[18] and

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17 The proposed changes are set out in Appendices E and F.

18 As stated above, the Quarry Operators consider the question of activity status is within scope, and that the activity status for vegetation removal could validly be either controlled or restricted discretionary. Royal Forest and Bird considers the activity status is not within scope, because no party has challenged the Panel's recommendation that the vegetation removal provisions for areas

(b) whether there is jurisdiction to amend the Associated Quarry Natural Resources Policies;[19] and

(c) any alternative solution in relation to the activity status and controls related to vegetation within the Special Purpose: Healthcare Zone.[20]

**Assessment**

[31] The central issue on appeal is whether the Panel was correct in law to delete the SEA overlay as it related to certain areas because of other "planning imperatives". The parties (except Federated Farmers) agree that the panel so erred, relying on the dicta in *Man O'War Station Ltd* and Wylie J's decision in *RF&B No.2.* I agree that on the specific facts of this case, the dicta in both those cases applies and the Panel erred by incorporating the rule making assessment into the SEA identification process.

[32] However, as foreshadowed to the parties in a draft version of this assessment section, I want to be clear about the effect of this judgment. I invited submissions on this issue. There is a broad (though not unqualified) consensus about the following. Whether and to what extent the principles stated in *Man O'War Station Ltd* and applied in *RF&B No.2* apply in any given case will depend on the object of the provisions under scrutiny. If, as here, the clear object is to identify SEA areas that qualify for protection under s 6(c), then the assessment is a factual one as stated in *Man O'War Station Ltd* and other planning imperatives have no direct role to play. However, if the object of the provisions is to provide a planning outcome considering the full context, including other planning imperatives that achieve the sustainable management purpose of the Act, then the dicta may have limited, if any, application.

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that are not SEA should continue to apply to the quarry zone, so that vegetation alteration or removal is and only can be a restricted discretionary activity.

19 See [10](d) above, and E28.3 in the Auckland Unitary Plan Operative in part. The Quarry Operators consider it likely that any party to the Environment Court appeal would seek cross-reference in the criteria for removal of vegetation within an SEA to associated policies. While the Panel recommended a form of wording for the Associated Quarries Natural Resources Policies, that was on the basis the SEA overlay did not apply. It is unclear what form those policies might have taken, had the Panel at first instance recommended that the SEA overlay apply. The Quarry Operators consider there is a need to re-examine those policies as a direct consequential change of this appeal. Royal Forest and Bird disagrees.

20 The Counties Manukau District Health Board has indicated it may wish to apply any alternative solution. Royal Forest and Bird does not agree that there is scope to reconsider these activity statuses and controls.

[33] Royal Forest and Bird however submitted that further guidance from the Court as to the dividing line would likely assist the parties involved in planning to understand how identification decisions are properly made. While a laudable goal, that would in fact do what I specifically wish to avoid. I agree with the general thrust of the other parties that in an area as complex, intuitive and evaluative as environmental law, some care must be taken before laying down a fixed binary approach to resource management.[21] In this regard, the following reminder from the Court of Appeal, has some currency:[22]

> As Professor A L Goodhart explained in his description of ratio decidendi, the principle of a case is found by taking account of (a) the facts treated by the Judge as material and (b) the Judge's decision as based on them.

[34] In the present case, the scheme of the notified and final decisions version of the PAUP as it relates to significant ecological areas, clearly envisages the identification of the location and spacial extent of those areas by way of factual assessment against specified criteria, leaving for separate consideration the management of those areas in accordance with relevant objectives and policies of the PAUP. The reasoning therefore in *Man O'War Station Ltd*, while not binding, is sufficiently apposite to provide principled guidance in this case.

[35] Turning to the issues of jurisdiction or scope in relation to quarry lands, ordinarily it would be a matter for this Court to determine whether relief was within scope. The facts here are, however, complicated by the Panel's decision to remove the SEAs from quarry lands and with it the planning and policy matrix that applies to SEAs, which included restricted discretionary activity status benched marked against that policy matrix. The relief then sought seeks to reinstate the SEAs, the associated policy matrix and thereby restricted discretionary status.

[36] Problematically, this leaves the affected quarries in a worse position than that envisaged by the Panel, which may have, had it adopted the correct approach, sought to identify given areas as SEAs but modify the activity status of the activities in the

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21 I wish to acknowledge the careful submissions made by Royal Forest and Bird on this issue and what I say here should not be taken as a criticism of the position advocated by them.

22 *Fang v Ministry of Business, Innovation and Employment* [2017] NZCA 190, [2017] 3 NZLR 316 at [33].

applicable areas considering other planning imperatives. It seems to me therefore, that fairness dictates there should be an opportunity afforded to affected persons to seek modification of the activity status even though the SEA designation applies to the relevant area. Given that at least one submitter sought the removal altogether of SEAs from quarry lands, I am satisfied there is scope to resolve the substantive issue.

[37] On that basis, the Environment Court need not be troubled with issues of jurisdiction. Rather, it must assess whether the Council approved version of the SEA policy matrix, including restricted activity status, should apply to quarry lands.

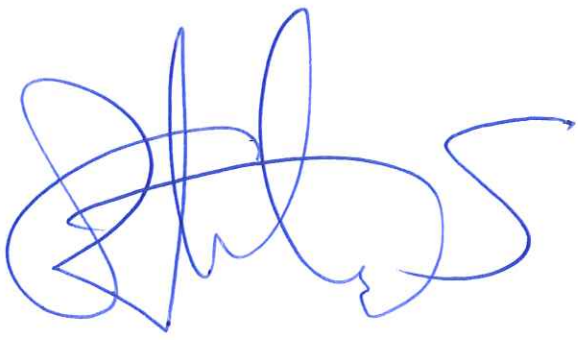
[38] Save in this respect, I endorse the approach proposed by the parties. A similar form of relief was granted in *University of Auckland v Auckland Council*.[23]

**Final orders**

[39] The Panel erred by deleting the SEA overlay (including from all Quarry Zones) on the basis of other planning imperatives. Accordingly, there shall be a consent order in the terms specified in Appendix F.

**Costs**

[40] There are no issues as to costs.



23 *University of Auckland v Auckland Council* [2017] NZHC 1150.

## Appendix A

Sites subject to appeal

| SEA Schedule No. | Submission point | Indicative address | Inferred reason for change | Appeal seeks reinstatement of layer? | |
|---|---|---|---|---|---|
| SEA_T_1177 | | Stevensons Quarry, Drury | Planning imperative | Yes * | |
| SEA_T_1186 | 5996-1 | 29 Umbria Lane Manukau Central | Planning imperative | Yes * | |
| SEA_T_2626 | | Wainui Resource, Quarry | Planning imperative | Yes * | |
| SEA_T_2626a | | Wainui Resource, Quarry | Planning imperative | Yes * | |
| SEA_T_4345 | Sub: 2560-5 | Middlemore Hospital | Planning imperative | Yes | |
| SEA_T_4386 | 2206-10 | 105 Logan Road Pukekohe | Ecological evidence presented, but may be planning imperative | Yes * | |
| SEA_T_4558 | | Whitford Quarry | Planning imperative | Yes | |
| SEA_T_5274 | | Brookby Quarry | Planning imperative | Yes | |
| SEA_T_5323 | | Stevensons Quarry (Drury), Winstone Aggregates Quarry (Coalmine Road) | Planning imperative | Yes * | |
| SEA_T_5346 | | Stevensons Quarry, Drury | Planning imperative | Yes * | |
| SEA_T_5349 | 3682-224 | Stevensons Quarry, Drury | Planning imperative | Yes * | |
| SEA_T_5539 | 6784-37 | Te Henga Quarry | Planning imperative | Yes | |
| SEA_T_5539 | 3734-1 | 1384 Huia Road | Planning imperative | Yes | |
| SEA_T_5547 | 5869-3 | 600 Island Road Mangere Bridge | Planning imperative | Yes * | |
| SEA_T_5588 | | McNicol Quarry | Planning imperative | Yes | |
| SEA_T_612 | | Harbour Ridge Road, Puhunui. [Quarry Zone] | Planning imperative | Yes | |
| SEA_T_6245 | 5473-14 | Auckland zoo | Planning imperative | Yes * | |
| SEA_T_6436 | | Wharehine Quarry | Planning imperative | Yes | |
| SEA_T_6454 | | Wainui Resource, Quarry | Planning imperative | Yes | |
| SEA_T_6464 | | Omaha Valley Rd. [Quarry Zone] | Planning imperative | Yes * | |
| SEA_T_7032 | | Winstone Aggregates Quarry (Coalmine Road) | Planning imperative | Yes | |
| SEA_T_8343 | 4761-3 | 269 Rosedale Road Albany | Planning imperative | Yes | |
| SEA_T_8443 | | Harbour Ridge Road, Puhunui. [Quarry Zone] | Planning imperative | Yes * | |

## Appendix B

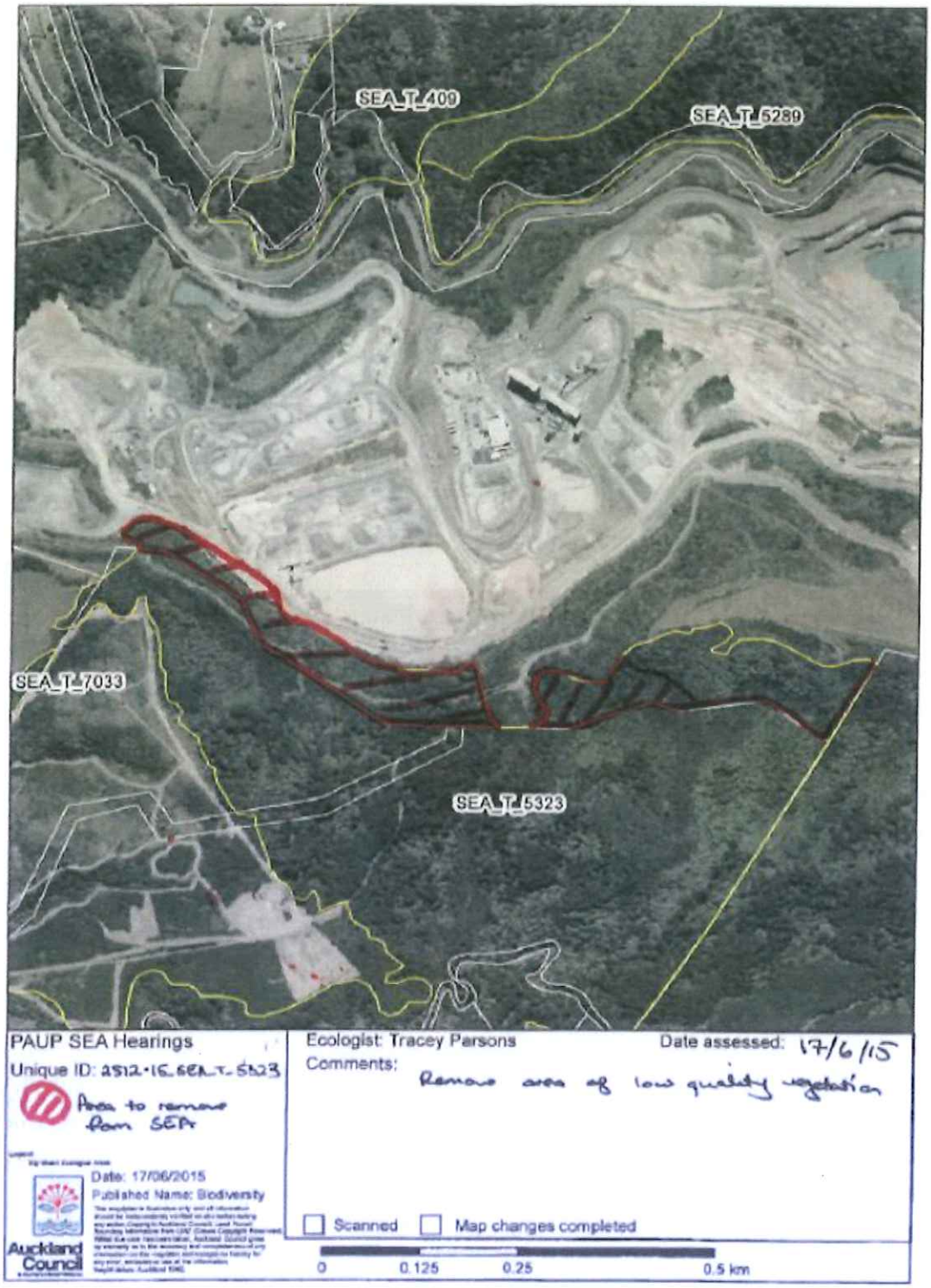
Analysis of reasons for removal of SEA overlay from sites listed in Appendix 1 of Appellant's Notice of Appeal

| SEA Schedule No. | Submission point | Indicative address | Inferred reason for change |
|---|---|---|---|
| SEA_T_2042 | 1280-1 | 14 Elder Place Massey | Ecological evidence |
| SEA_T_2043 | 1280-1 | 14 Elder Place Massey | Ecological evidence |
| SEA_T_4711 | 6096-69 | 8-12 Titirangi Road | Boundary adjustment |
| SEA_T_5492A | | Waikumete Cemetary | Ecological evidence |
| SEA_T_5492A | | Waikumete Cemetary | Ecological evidence |
| SEA_T_5492B | | Waikumete Cemetary | Ecological evidence |
| SEA_T_5492C | | Waikumete Cemetary | Ecological evidence |
| SEA_T_5492C | | Waikumete Cemetary | Ecological evidence |
| SEA_T_5539 | 4971-14 | 280 Bethells Road Bethells | Reasonable use |
| SEA_T_5539 | 3734-1 | Multiple properties on Whatipu Road, Huia (36, 44, 46,48,50,52,5476-78, ) as well as PART DP 10639, and unformed section of Whatipu Road | Ecological evidence |
| SEA_T_5539 | 4259-1 | 77 Seaview Road Piha, 12A Rayner Road Piha, 12B Rayner Road Piha, 14A Rayner Road Piha, 14B Rayner Road Piha | Ecological evidence |
| SEA_T_5539 | 4727-7 | 190 Parker Road | Ecological evidence |
| SEA_T_5539 | 1965-1 | 134 Shaw Road | Ecological evidence |
| SEA_T_5548a | 864-50 | Lot 1 DP 453130, Lot 2 DP 453130, Lot 3 DP 453130, Lot 4 DP 453130, Lot 5 DP 453130 | Ecological evidence |
| SEA_T_6063 | 8994-2 | 21 Ayr Street Parnell | Ecological evidence |
| SEA_T_6065 | | 94 Victoria Avenue | Ecological evidence |
| SEA_T_6180 | 7094-7, 869-5 | Kohimarama | Ecological evidence |
| SEA_T_6346 | 2399-1 | 165 Mahoenui Valley Road Coatesville | Ecological / reasonable use |
| SEA_T_6373a | 5294-331 | 260 Ihumatao Road Mangere, 200 Ihumatao Road Mangere | Ecological evidence |

| SEA Schedule No. | Submission point | Indicative address | Inferred reason for change |
|---|---|---|---|
| SEA_T_6393 | 906-1 | 211 Whitehills Road Wainui | Ecological evidence. |
| SEA_T_6652 | 6862-3 | 132 Upper Orewa Road Silverdale | Reasonable use/minor boundary adjustment |
| SEA_T_6652b | 5600-1 | Lot 2 DP 381692 Hillcrest Road Orewa | Reasonable use |
| SEA_T_6669 | 3639-1 | 122 Foley Quarry Road Albany Heights | Boundary adjustment |
| SEA_T_6677 | | | Boundary adjustment / Sliver |
| SEA_T_6998 | 265-2 | 1172 Whangaparaoa Road Coal Mine Bay | Ecological evidence |
| SEA_T_770 | 5510-7 | Pt Lot 1 DP 177047 Birdsall Road Whangateau | Ecological evidence |
| SEA_T_780 | 3300-1 | 6 Kyle Street Leigh | Ecological evidence. |
| SEA_T_785 | 2627-1 | 99 Upper Whangateau Road Whangateau | Ecological / Reasonable use |
| SEA_T_8049 | 1236-1 | 51 Spinella Drive Bayview | Ecological evidence |
| SEA_T_8160 | | Quarry (Puketutu Island) | Reasonable use |
| SEA_T_8162 | 1154-1 | 67 Waipa Street Birkenhead | Ecological evidence |
| SEA_T_8169 | 6151-5 | 163 Hinemoa Street Birkenhead | Ecological evidence |
| SEA_T_8295 | 3202-2 | 140 Gills Road Albany Heights | Reasonable use / Legal |
| SEA_T_8297 | 3159-33 | 29 Kewa Road Albany Heights; 40A Kewa Road Albany Heights; 42 Kewa Road Kewa Road Albany Heights | Ecological evidence |
| SEA_T_8299 | 7346-3 | 181 Gills Road Albany Heights; 185 Gills Road Albany Heights | Ecological evidence |
| SEA_T_8300 | 281-1 | 140 The Avenue Lucas Heights | Ecological evidence |
| SEA_T_973 | 7324-4 | Pt Lot 1 DP 33446 | Reasonable use / Boundary adjustment |
| SEA-M2-26a | | | Boundary adjustment / CMA edge |
| SEA_T_2295 | 827-1 | 369 Whitmore Road Takatu | Withdrawn |
| SEA_T_6622 | 1579-1 | 181 Haruru Road Tahekeroa | Withdrawn |
| SEA_T_930 | 827-1 | 369 Whitmore Road Takatu | Withdrawn |
| SEA-M2-3262DD | 827-1 | 369 Whitmore Road Takatu | Withdrawn |

## Appendix D

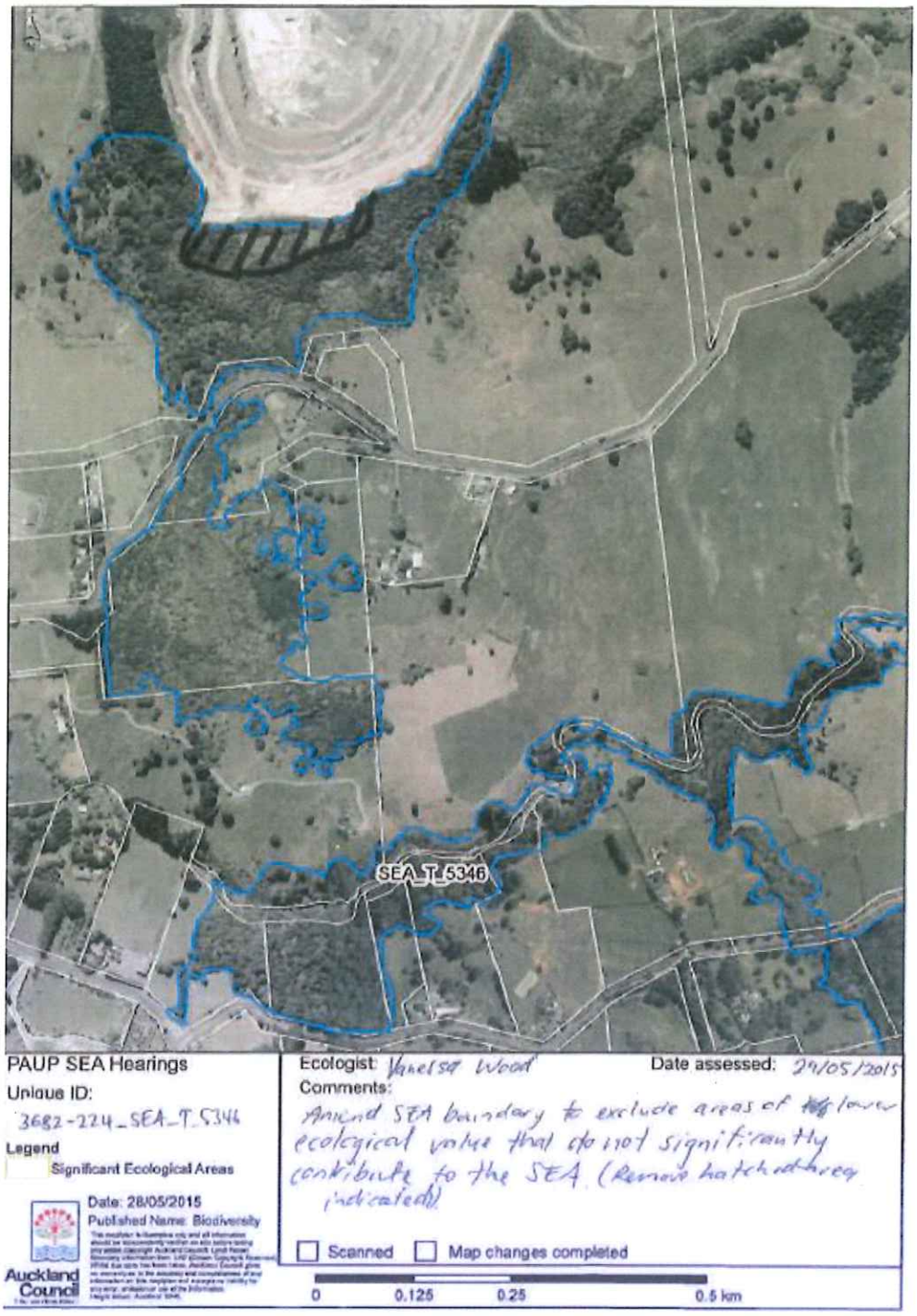
## Winstone Aggregate's Hunua Quarry




**Note**: Areas of SEA overlay to be removed shown in red hatching.

## Appendix E

## Stevenson's Drury Quarry




**Note**: Area of SEA overlay to be removed shown in black hatching.

**Appendix F**

**Draft consent order**

**IN THE HIGH COURT OF NEW ZEALAND**
**AUCKLAND REGISTRY** **CIV-2016-404-002343**

| | |
|---|---|
| **UNDER THE** | Local Government (Auckland Transitional Provisions) Act 2010 (**LGATPA**) and the Resource Management Act 1991 (**RMA**) |
| **IN THE MATTER** | of an appeal under section 158 of the LGATPA |
| **BETWEEN** | **ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED**<br>Appellant |
| **AND** | **AUCKLAND COUNCIL**<br>Respondent |
| **AND** | **HOUSING NEW ZEALAND CORPORATION**<br>**FEDERATED FARMERS OF NEW ZEALAND INCORPORATED**<br>**STEVENSON GROUP LIMITED**<br>**FULTON HOGAN LIMITED**<br>**BROOKBY QUARRIES LIMITED**<br>**NEW ZEALAND TRANSPORT AGENCY**<br>**WINSTONE AGGREGATES**<br>**TE ARAI GROUP**<br>**TRANSPOWER NEW ZEALAND LIMITED**<br>**ENVIRONMENTAL DEFENCE SOCIETY INCORPORATED**<br>**MAN O'WAR FARM LIMITED**<br>**COUNTIES MANUKAU DISTRICT HEALTH BOARD**<br>Section 301 Parties |

**BEFORE THE HIGH COURT**

**High Court Judge** .....

**IN CHAMBERS at Auckland**

## CONSENT ORDER

### Introduction

1. The Court has read and considered the appeal and the memorandum of the parties dated December 2017.

2. The Appellant is Royal Forest and Bird Protection Society of New Zealand Incorporated.

3. The Respondent is Auckland Council.

4. The following parties have joined the appeal under section 301 of the RMA:

   (a) Housing New Zealand Corporation;
   (b) Federated Farmers of New Zealand Incorporated;
   (c) Stevenson Group Limited;
   (d) Fulton Hogan Limited;
   (e) Brookby Quarries Limited;
   (f) New Zealand Transport Agency;
   (g) Winstone Aggregates;
   (h) Te Arai Group;
   (i) Transpower New Zealand Limited;
   (j) Environmental Defence Society Incorporated; and
   (k) Man O'War Farm Limited.
   (l) Counties Manukau District Health Board

5. The Court is making this order, such order being by consent, rather than representing a decision or determination on the merits. The Court understands for present purposes that:

   (a) All parties to the proceedings have executed the memorandum requesting this order; and

   (b) All parties are satisfied that all matters proposed for the Court's endorsement fall within the Court's jurisdiction, and conform to the purpose and principles of the Resource Management Act 1991, including in particular, Part 2, as well as the LGATPA.

**Order**

6. Pursuant to the power vested in it under the Local Government (Auckland Transitional Provisions) Act 2010 the Court orders, by consent, that the Auckland Unitary Plan be amended by:

   (a) Including within the AUP maps, the identification of Significant Ecological Areas on certain sites, as shown in Appendix A.

   (b) Including a new activity for *Any vegetation alteration or removal within a Quarry Zone*, within an SEA, in Chapter E15, along with matters of discretion and assessment criteria related to this new activity, as shown in Appendix B.

7. These amended provisions be treated as an "alternative solution" for the purposes of sections 148 and 156 of the LGATPA, with this order triggering a right of appeal to the Environment Court under section 156(1) limited to the matters set out in paragraphs 6(a) and (b) of this order.

8. There is no order as to costs.

**DATED** at this day of 2017

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**Justice of the High Court**