

IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY

I TE KOTI MATUA O AOTEAROA  
TĀMAKI MAKĀURAU ROHE

No. CIV-2017-404-

**UNDER THE** Resource Management Act 1991 (**RMA**) and the Local Government (Auckland Transitional Provisions) Act 2010 (**LGATPA**)

**IN THE MATTER** of an appeal from a decision of the Environment Court pursuant to section 299 of the RMA and section 156(4) of the LGATPA

**BETWEEN** **AUCKLAND COUNCIL** a unitary authority established under section 6 of the Local Government (Auckland Council) Act 2009

**Appellant**

**AND** **HOUSING NEW ZEALAND CORPORATION** a statutory corporation established under the Housing Corporation Act 1974 (as amended) and a Crown Agency under the Crown Entities Act 2004.

**Respondent**

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**NOTICE OF APPEAL**

**DATED 1 SEPTEMBER 2017**

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 **Simpson Grierson**  
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**To:** The Registrar of the High Court at Auckland

**And to:** Housing New Zealand Corporation (the respondent)

**TAKE NOTICE** that Auckland Council (**Council**) (the appellant) appeals against the decision of the Environment Court dated 10 August 2017 and issued on 11 August 2017 with reference [2017] NZEnvC 120 (**Decision**) **UPON THE GROUNDS** that the Decision is erroneous in law and upon the further grounds as set out below.

### **Errors of law**

1. The Decision allowed an appeal by Housing New Zealand Corporation (**HNZ**) against a decision made by the Council when considering the recommendations provided by the Auckland Unitary Plan Independent Hearings Panel (**IHP**) for the provisions of the Regional Policy Statement (**RPS**) chapter of the proposed Auckland Unitary Plan.
2. The IHP had recommended a single “objective” in relation to Special Character in the RPS, namely (referred to as Objective B5.3.1(2)):

The character and amenity of values of identified special character areas are maintained and enhanced.
3. In its decision, which rejected (in part) the IHP’s recommendation, the Council included the following additional objective for Special Character (referred to as Objective B5.3.1(1)):

Historic heritage values of identified special character areas are protected from inappropriate subdivision, use and development.
4. In allowing the appeal, the Environment Court deleted the additional Objective B5.3.1(1). The effect of the Decision is to reinstate the recommendations made by the IHP, with Objective B5.3.1(2) as the sole Special Character objective in the RPS.
5. In determining whether Objective B5.3.1(1) should be retained in the RPS the Court was required to consider whether the Council's decision:<sup>1</sup>
  - (a) accorded with and assisted the Council in carrying out its functions so as to meet the requirements of Part 2 of the RMA;

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<sup>1</sup> *Man O'War Station Ltd v Auckland Council* [2014] NZEnvC 167; [2014] NZRMA 335.

- (b) took account of the effects on the environment;
- (c) was consistent with, or gave effect to (as appropriate) applicable national, regional and local planning documents; and
- (d) was the most appropriate way to achieve the purpose of the RMA.

6. In particular, the Court was required to assess the Council's decision against sections 32, 59, 61 and 62 (and Part 2) of the RMA, in order to reach a view on whether the inclusion of Objective B5.3.1(1) was the most appropriate way to achieve the purpose of the RMA.
7. The Environment Court erred by failing to address, or sufficiently address, the matters in paragraphs 5 and 6 above in its Decision. Aside from summarising the parties' evidence, legal submissions and cross-examination, the Environment Court's evaluation is limited to a single paragraph (paragraph [88]) which recorded that the Environment Court had "considerable doubt as to the rationale for, and potential implications of, including the new objective", leading to the conclusion in paragraph [89] that it was not persuaded that adding the objective to the RPS was the "most appropriate" approach. The Environment Court should have, but did not, analyse Objective B5.3.1(1) in a substantive way, by reference to the legally relevant considerations set out above.
8. The Environment Court also erred in failing to determine whether deletion of Objective B5.3.1(1) would result in a gap in the RPS, or a disconnect in the cascade between the RPS and the district plan, as submitted by the Council. The Environment Court expressly made no finding on that (paragraph [90] of the Decision). However, the Environment Court was not in a position to decide that retaining Objective B5.3.1(1) was *not* the "most appropriate" approach without considering the implications of deleting it and making a comparison between the two. It failed to do that.
9. The Environment Court erred in holding that there was considerable doubt as to the rationale for the additional objective, given the clear evidence and submissions for the Council that:

- (a) There were historic heritage values within all the Special Character Areas. This evidence (by Mr Matthews on behalf of the Council) was uncontested;
- (b) Under section 6(f) of the RMA, the protection of that historic heritage from inappropriate subdivision, use and development was a matter of national importance;
- (c) Objective B5.3.1(1) gave effect to section 6(f) because it provided for the protection of historic heritage values of identified Special Character Areas from inappropriate subdivision use and development; and
- (d) If Objective B5.3.1(1) was not included, the Auckland Unitary Plan would fail to give effect to section 6(f). It would also mean there would be no appropriate and complete planning management response for the historic heritage values within the Special Character Areas.

The Environment Court did not explain in its Decision why it had doubt as to the rationale for the objective.

**10.** The Environment Court also erred in holding that there was considerable doubt as to the implications of the additional objective, and in using that alleged uncertainty as a basis for the Decision, when:

- (a) On the clear weight of the evidence, there was no such uncertainty; and
- (b) In any event, it was within the expertise and role of the Court to resolve any apparent uncertainty by determining what the implications of the objective would be and then assessing its appropriateness in light of the conclusion reached. The Court should have done that rather than simply setting out the competing submissions of the parties and then saying that there was doubt.

The Environment Court did not explain in its Decision why it had doubt as to the implications of the objective.

**11.** The Environment Court also erred in law by taking into account the following irrelevant considerations:

- (a) The Council's resource consent process relating to 17 Buchanan St, Devonport;
- (b) The certificates of compliance held by HNZ;
- (c) The assessment of restricted discretionary activities with reference to Objective B5.3.1(1);
- (d) Potential future development and resource consenting implications;
- (e) Possible implications for future district plan changes; and
- (f) The fact that (as the Environment Court held) the Council's decision report was very short and did not traverse matters in the same detail as the Environment Court had, and had not had the benefit of cross-examination.

12. The Environment Court also erred at law by failing to have any or sufficient regard to the following relevant considerations or statutory requirements:

- (a) The Council's uncontested historic heritage evidence, and that in light of this evidence that the Council's additional objective was necessary to give effect to section 6(f) of the RMA; and
- (b) The statutory provisions referred to in paragraph 6 above.

13. The Environment Court did not give reasons, or sufficient reasons, for its conclusions that including Objective B5.3.1(1) was not the most appropriate approach and that the objective should be deleted.

#### **Questions of law to be resolved**

14. Did the Environment Court apply the correct legal test when determining whether Objective B5.3.1(1) should be retained in the RPS?

15. In making the Decision was the Environment Court required to address the matters in paragraphs 5 and 6 above, and did it fail to do so?

16. Was the Environment Court required to make a substantive assessment of the implications of retaining or deleting Objective B5.3.1(1), by reference to the relevant statutory considerations, or was it sufficient to rely on alleged "considerable doubt as to the rationale for and the potential implications of the new objective"?

17. Was the deletion of Objective B5.3.1(1) from the RPS the most appropriate way to achieve the purpose of the RMA? Was it open to the Environment Court to reach the conclusion that it was, in light of the evidence which was before the Environment Court?
18. Was the Environment Court obliged to decide whether the deletion of Objective B5.3.1(1) would result in a gap in the RPS, or a disconnect in the cascade between the RPS and the district plan, as submitted by the Council, or was it sufficient to make no finding on that issue? Was the Court required to consider the implications of deleting Objective B5.3.1(1), before it could conclude (as it did) that retaining Objective B5.3.1(1) was not the most appropriate approach?
19. Was it legally open to the Environment Court to conclude that there was considerable doubt as to the rationale for Objective B5.3.1(1), given the evidence given and submissions made to it?
20. Was it legally open to the Environment Court to hold that there was considerable doubt as to the implications of Objective B5.3.1(1), in light of the evidence?
21. Could the Environment Court rely on that alleged uncertainty as a basis for the Decision, or was it obliged to resolve any apparent uncertainty by determining what the implications of Objective B5.3.1(1) would be and then assessing the appropriateness of Objective B5.3.1(1) in light of that conclusion?
22. Did the Environment Court err in law by taking into account any or all of the irrelevant considerations referred to in paragraph 11 above, or by failing to have any or sufficient regard to the relevant considerations or statutory requirements referred to in paragraph 12 above?
23. Did the Environment Court give reasons, or sufficient reasons, for its conclusion that including Objective B5.3.1(1) was not the most appropriate approach and that Objective B5.3.1(1) should be deleted?

#### **Grounds of appeal**

24. The Decision was made on the basis of the errors of law described in paragraphs 1 to 13 above. These errors were material to the Decision

and the Environment Court's conclusion that Objective B5.3.1(1) should be deleted from the RPS. The appeal should be allowed on the grounds that it was made on a wrong legal basis.

- 25.** The essence of the appeal is that in making the Decision, the Environment Court failed to squarely address the key issue of whether Objective B5.3.1(1) was the most appropriate way to achieve the purpose of the RMA, in light of the uncontested evidence that historic heritage was clearly evident (and had been identified) within Special Character Areas.
- 25.1** As such these historic heritage features had to be recognised in the RPS objectives, as a matter of national importance under section 6(f) of the RMA. The effect of the Environment Court decision is to remove that recognition; the remaining RPS objective (relating only to amenity values) does not reflect the values in the Special Character Areas that are derived from historic heritage.
- 26.** The result is that there is insufficient protection of historic heritage within identified Special Character Areas, in those cases where historic heritage may not warrant scheduling, but is still worthy of protection and management.
- 27.** The Environment Court sets out the evidence and submissions of the parties in some detail, but beyond that the Decision provides no analysis or reasoning in relation to the rationale and implications of Objective B5.3.1(1), nor does it provide any proper explanation of the basis for its conclusion. The Environment Court does not apply the statutory test (as established through case law) or refer to, or apply, relevant statutory provisions, as identified above. The Environment Court does not explain why deleting the additional objective is more appropriate than retaining it.
- 28.** The reasoning provided by the Environment Court, such as it is, is either insufficient for allowing the appeal and/or is contrary to the weight of evidence (in particular the uncontested historic heritage evidence of Mr Matthews). The Environment Court came to a conclusion which it could not reasonably have come to.

## Relief sought

29. The appellant seeks the following relief:
- (a) That the Decision is reversed;
  - (b) Such further or other relief as may be appropriate; and
  - (c) Costs of and incidental to this appeal, including disbursements.

## Attachment

30. Attached to this notice of appeal is a copy of the Decision (marked "A").

This notice is filed in reliance on sections 299 and 300 of the Resource Management Act 1991, section 156(4) of the Local Government (Auckland Transitional Provisions) Act 2010 and Part 20 of the High Court Rules.

DATED at Auckland this *1st* day of September 2017



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W S Loutit  
Solicitor for the appellant

This document is filed by WILLIAM STUART LOUTIT solicitor for the appellant of the firm Simpson Grierson.

The address for service of the appellant is at the offices of Simpson Grierson, Level 27, 88 Shortland Street, Auckland.

Documents for service on the appellant may be left at that address for service or may be:

- (a) posted to the solicitor at Private Bag 92518, Auckland; or
- (b) left for the solicitor at a document exchange for direction to DX CX10092; or
- (c) transmitted to the solicitor by facsimile to +64-9-307 0331; or
- (d) sent by email to [bill.loutit@simpsongrierson.com](mailto:bill.loutit@simpsongrierson.com).



**BEFORE THE ENVIRONMENT COURT**

**Decision No: [2017] NZEnvC 120**

**IN THE MATTER** of an appeal under the Resource Management Act 1991 and the Local Government (Auckland Transitional Provisions) Act 2010

**BETWEEN** HOUSING NEW ZEALAND CORPORATION  
(ENV-2016-AKL-0000238)  
Appellant

**AND** AUCKLAND COUNCIL  
Respondent

Court: Environment Judge C J Thompson  
Environment Commissioner K A Edmonds  
Deputy Environment Commissioner R M Bartlett

Hearing: at Auckland 27 and 28 June 2017. Site visits 29 June 2017

Counsel and parties:  
D A Allan, C E Kirman and A K Devine for Housing New Zealand Corporation  
J A Burns for A T Arlov and M J Jones – s274 parties  
W S Loutit and R J O’Conner for the Auckland Council

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**DECISION OF THE COURT**

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Decision issued: 11 August 2017

The appeal is allowed – see para [95]

Costs are reserved



### *Introduction*

[1] This appeal by Housing Corporation New Zealand (the Corporation) is against a decision made by the Auckland Council when considering the recommendations of the Independent Hearing Panel (the Panel) on provisions of the Regional Policy Statement (RPS) chapter of the Auckland Unitary Plan. This was part of the process created in the Local Government (Auckland Transitional Provisions) Act 2010 (LGATPA) to draft and confirm the Auckland Unitary Plan – a document to contain both regional and district planning documents for the purposes of the Resource Management Act 1991. On the point at issue, the Council decided not to adopt the Panel's recommended wording, and adopted a different provision - which it had argued for in the Panel's hearings – although it was different from what was in the notified version of the Proposed Plan (PAUP). The provision in contention includes reference to *historic heritage values* and to *protection*.

### *The parties' general positions*

[2] The Corporation seeks that the Panel's version be reinstated, arguing that the Council was in error in declining to adopt the recommendation of the Panel for the terms of the RPS's Objectives for *Special Character Areas*. The Council continues to support its decision and is supported in that by the s274 parties, Ms Arlov and Mr Jones, and the Character Coalition Inc. Mr Burns appeared and made submissions for Ms Arlov and Mr Jones which, while of general relevance to the issues, had a particular focus on the area in which they live – the Balmoral Tram Suburb Special Character Area. Mr Burns advised us that Mr Enright, for Character Coalition Inc, supported the position he put forward. Mr K Vernon and Proarch Consultants Ltd (also s274 parties) advised the Court that they did not wish to participate at the hearing and would abide the decision of the Court. There was no appearance for, or communication from, the s274 party, City Life Developments Ltd.

### *The Objective at issue*

[3] The RPS Objectives relating to protecting our historic heritage, special character and natural heritage<sup>1</sup> notified as part of the PAUP (and on which submissions were made) were:

#### Historic Heritage

1. Auckland's significant historic heritage places are identified and protected.

<sup>1</sup>

The Panel reorganised the RPS and renamed the chapter of relevance to this decision as: Ngā rawa hanganga tuku iho me te āhua - Built heritage and character.



2. Significant historic heritage places are used appropriately and owners and the community are encouraged to actively protect and conserve these places.

Special character

3. Special character areas are identified in neighbourhoods and business centres in Auckland.
4. The character of identified special character areas is retained and enhanced.
5. A precautionary approach is taken to the management of areas with a concentration of pre-1944 buildings until they have been evaluated for historic heritage, or special character significance.

[4] When the issue of special character came before the Panel, the Council had altered its view and did not support the notified version. The Objective as decided upon by the Panel was:

B5.3 Special character

B5.3.1 Objectives

The character and amenity values of identified special character areas are maintained and enhanced<sup>2</sup>

[5] The Objectives decided upon by the Council, after considering the Panel's recommendations for special character, and now the subject of this appeal, is:

B5.3 Special character

- (1) Historic heritage values of identified special character areas are protected from inappropriate subdivision, use and development
- (2) The character and amenity values of identified special character areas are maintained and enhanced

So it will be seen that the difference between the Panel's version, and the [final] Council version, is that the Council has added into para (1) a direct reference to *historic heritage values* and has also incorporated the s6(f) RMA terminology of *protected from inappropriate subdivision use and development*; whereas the para (2) reference to *amenity values* being *maintained and enhanced* is taken from s7(c) RMA. The term amenity values is defined in the RMA as:

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<sup>2</sup> The Panel recommended and the Council accepted the following Objectives for historic heritage:

- (1) Significant historic heritage places are identified and protected from inappropriate subdivision, use and development.
- (2) Significant historic heritage places are used appropriately and their protection, management and conservation are encouraged, including retention, maintenance and adaptation.



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

Of note too is the deletion of the RPS Objective on a precautionary approach to the management of areas with a concentration of pre-1944 buildings until evaluated for historic heritage, or special character significance.

[6] The Panel's view on the merits of the proposed RPS provisions are summarised in the following paragraphs under the heading: 2 Unscheduled significant historic heritage of its Report on Topic 010 Historic Heritage:

In the Panel's view, the method of protecting historic heritage by scheduling those places identified as having considerable and outstanding historic heritage value is well-established. The Panel supports this approach because it provides certainty to landowners and is likely to achieve the outcomes sought by the Plan. The Panel considers that significant historic heritage places should be identified, evaluated and included in the schedule following the process set out in the regional policy statement because this promotes effective protection.

For these reasons, the Panel does not support the inclusion of the plan provisions relating to unscheduled historic heritage. If the Council wishes to protect historic heritage, it should follow the identification and scheduling process provided for in the regional policy statement, using the plan change procedure.

Overall, the Panel does not support the inclusion of objectives and policies addressing 'unscheduled historic heritage' in the regional policy statement (nor does it support the many references to 'unscheduled significant historic heritage' that occur throughout the Plan, and this is addressed in more detail in the Panel's report on hearing topic 031 Historic heritage as referenced above). Accordingly, provisions relating to unidentified historic heritage places have been removed from the regional policy statement.

These are the Panel's reasons for (in this instance) rejecting the relevant (Council) submissions, on the topic. It was required to set out those reasons by s144(8)(c) of the LGATPA.

[7] The issues on appeal are given better context if the PAUP provisions about *Special Character Areas* (which are part of the District Plan) are mentioned, and we shall do so in the course of the decision.



*The statutory framework*

[8] This being an issue about a Regional Policy Statement, a significant provision to be borne in mind is contained in s59 RMA:

The purpose of a regional policy statement is to achieve the purpose of the Act by providing an overview of the resource management issues of the region and policies and methods to achieve integrated management of the natural and physical resources of the whole region.

Section 61 is also to be considered:

Matters to be considered by regional council (policy statements)

- (1) A regional council must prepare and change its regional policy statement in accordance with —
  - (a) its functions under section 30; and
  - (b) the provisions of Part 2; and
  - (c) its obligation (if any) to prepare an evaluation report in accordance with section 32; and
  - (d) its obligation to have particular regard to an evaluation report prepared in accordance with section 32; and
  - (e) any regulations.
- (2) In addition to the requirements of section 62(2), when preparing or changing a regional policy statement, the regional council shall have regard to—
  - (a) any —
    - (i) management plans and strategies prepared under other Acts; and
    - (ii) [Repealed]
    - (iii) relevant entry on the New Zealand Heritage List/Rārangi Kōrero required by the Heritage New Zealand Pouhere Taonga Act 2014; and
    - (iii) regulations relating to ensuring sustainability, or the conservation, management, or sustainability of fisheries resources (including regulations or bylaws relating to taiapure, mahinga mataitai, or other non-commercial Maori customary fishing); and
    - (iv) [Repealed]to the extent that their content has a bearing on resource management issues of the region; and
  - (b) the extent to which the regional policy statement needs to be consistent with the policy statements and plans of adjacent regional councils; and
  - (c) the extent to which the regional policy statement needs to be consistent with regulations made under the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012; and
- (2A) When a regional council is preparing or changing a regional policy statement, it must deal with the following documents, if they are lodged with the council, in the manner specified, to the extent that their content has a bearing on the resource management issues of the region:
  - (a) the council must take into account any relevant planning document recognised by an iwi authority; and



- (b) in relation to a planning document prepared by a customary marine title group under section 85 of the Marine and Coastal Area (Takutai Moana) Act 2011, the council must, in accordance with section 93 of that Act,—
  - (i) recognise and provide for the matters in that document, to the extent that they relate to the relevant customary marine title area; and
  - (ii) take into account the matters in that document, to the extent that they relate to a part of the common marine and coastal area outside the customary marine title area of the relevant group.
- (3) In preparing or changing any regional policy statement, a regional council must not have regard to trade competition or the effects of trade competition.

[9] Further, regional policy statements must contain the matters set out in s62:

Contents of regional policy statements

- (1) A regional policy statement must state—
  - (a) the significant resource management issues for the region; and
  - (b) the resource management issues of significance to iwi authorities in the region; and
  - (c) the objectives sought to be achieved by the statement; and
  - (d) the policies for those issues and objectives and an explanation of those policies; and
  - (e) the methods (excluding rules) used, or to be used, to implement the policies; and
  - (f) the principal reasons for adopting the objectives, policies, and methods of implementation set out in the statement; and
  - (g) the environmental results anticipated from implementation of those policies and methods; and
  - (h) the processes to be used to deal with issues that cross local authority boundaries, and issues between territorial authorities or between regions; and
  - (i) the local authority responsible in the whole or any part of the region for specifying the objectives, policies, and methods for the control of the use of land—
    - (i) to avoid or mitigate natural hazards or any group of hazards; and
    - (ii) to prevent or mitigate the adverse effects of the storage, use, disposal, or transportation of hazardous substances; and
    - (iii) to maintain indigenous biological diversity; and
  - (j) the procedures used to monitor the efficiency and effectiveness of the policies or methods contained in the statement; and
  - (k) any other information required for the purpose of the regional council's functions, powers, and duties under this Act.
- (2) If no responsibilities are specified in the regional policy statement for functions described in subsection (1)(i)(i) or (ii), the regional council retains primary responsibility for the function in subsection (1)(i)(i) and the territorial authorities of the region retain primary responsibility for the function in subsection (1)(i)(ii).



- (3) A regional policy statement must not be inconsistent with any water conservation order and must give effect to a national policy statement or New Zealand coastal policy statement.

[10] It will also be useful to set out s32 RMA. It provides:

32 Requirements for preparing and publishing evaluation reports

- (1) An evaluation report required under this Act must—
- (a) examine the extent to which the objectives of the proposal being evaluated are the most appropriate way to achieve the purpose of this Act; and
  - (b) examine whether the provisions in the proposal are the most appropriate way to achieve the objectives by—
    - (i) identifying other reasonably practicable options for achieving the objectives; and
    - (ii) assessing the efficiency and effectiveness of the provisions in achieving the objectives; and
    - (iii) summarising the reasons for deciding on the provisions; and
  - (c) contain a level of detail that corresponds to the scale and significance of the environmental, economic, social, and cultural effects that are anticipated from the implementation of the proposal.
- (2) An assessment under subsection (1)(b)(ii) must—
- (a) identify and assess the benefits and costs of the environmental, economic, social, and cultural effects that are anticipated from the implementation of the provisions, including the opportunities for—
    - (i) economic growth that are anticipated to be provided or reduced; and
    - (ii) employment that are anticipated to be provided or reduced; and
  - (b) if practicable, quantify the benefits and costs referred to in paragraph (a); and
  - (c) assess the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the provisions.
- (3) If the proposal (an **amending proposal**) will amend a standard, statement, regulation, plan, or change that is already proposed or that already exists (an **existing proposal**), the examination under subsection (1)(b) must relate to—
- (a) the provisions and objectives of the amending proposal; and
  - (b) the objectives of the existing proposal to the extent that those objectives—
    - (i) are relevant to the objectives of the amending proposal; and
    - (ii) would remain if the amending proposal were to take effect.
- (4) If the proposal will impose a greater prohibition or restriction on an activity to which a national environmental standard applies than the existing prohibitions or restrictions in that standard, the evaluation report must examine whether the prohibition or restriction is justified in the circumstances of each region or district in which the prohibition or restriction would have effect.
- (5) The person who must have particular regard to the evaluation report must make the report available for public inspection—
- (a) as soon as practicable after the proposal is made (in the case of a standard or regulation); or
  - (b) at the same time as the proposal is publicly notified.



(6) In this section,—

**objectives** means,—

- (a) for a proposal that contains or states objectives, those objectives:
- (b) for all other proposals, the purpose of the proposal

**proposal** means a proposed standard, statement, regulation, plan, or change for which an evaluation report must be prepared under this Act

**provisions** means,—

- (a) for a proposed plan or change, the policies, rules, or other methods that implement, or give effect to, the objectives of the proposed plan or change:
- (b) for all other proposals, the policies or provisions of the proposal that implement, or give effect to, the objectives of the proposal.

### *National Policy Statement*

[11] The National Policy Statement – Urban Development Capacity (NPS-UDC) came into effect on 1 December 2016 and has the purpose ascribed to such a Policy Statement in s45(1) RMA, ie:

...to state objectives and policies for matters of national significance that are relevant to achieving the purpose of this Act.

Mentioning that the NPS *came into effect* on 1 December 2016 may, if left unqualified, leave a false impression. Portions of it relevant to the issues in this appeal ...*must be given effect immediately*. See the *Timeframes* at p17 of the NPS.

[12] While the Corporation initially raised it as a document that might assume some importance in our decision-making, it was not a focus of the hearing. Indeed the planners recorded in the joint witness statement that it would only be relevant to a future plan change stage. In any case, we do not find that it informs our decision-making on the approach to the regional policy statement provision in front of us.

### *Hierarchy of planning documents*

[13] The hierarchy of planning documents is summarised in para [14] of the Supreme Court's judgment in *EDS v New Zealand King Salmon Company* [2014] 1 NZLR 593 (SC): (*King Salmon*)

Second, the scheme moves from the general to the specific. Part 2 sets out and amplifies the core principle, sustainable management of natural and physical resources, as we will later explain. Next, national policy statements and New Zealand coastal policy statements set out objectives, and identify policies to achieve those objectives, from a national perspective. Against the background of those documents, regional policy statements identify objectives, policies and (perhaps) methods in relation to particular regions. "Rules" are, by definition, found in regional and district plans (which must also identify objectives and policies and may identify methods). The effect is that as one goes down the hierarchy of documents, greater specificity is provided both as to substantive content and to locality – the general is made





increasingly specific. The planning documents also move from the general to the specific in the sense that, viewed overall, they begin with objectives, then move to policies, then to methods and “rules”.

[14] A consequence of that hierarchy is that it is generally not helpful, in settling the wording of a regional policy statement, to be guided by the possible wording of a district plan provision. The district plan provisions should be developed to give effect to/comply with the higher documents, such as a regional policy statement – not the other way around.

*The issue of scope*

[15] At the Panel hearing, the Council argued that its revised version of the RPS Objective (ie that which it later adopted and which is the subject of the appeal) was, although not included in the notified version of the PAUP on which public submissions had been invited, within the *scope* of decisions the Panel could lawfully make. In line with that stance, when working through the Panel’s recommendations, it still considered that the revised version it adopted, differing from the Panel’s recommendation, was within *scope*.

[16] In the course of its submissions on appeal, the Corporation strongly disputed that position, arguing that the Panel was correct in its view that the amended position the Council sought was not within scope. It follows of course that the Corporation’s argument was that the Council’s own decision to adopt the amended position was flawed because the problem about scope had not gone away in the meantime.

[17] It is not necessary to determine whether the scope of the change made by Auckland Council was outside the scope of any original submission on the PAUP because we have concluded that the appeal seeking the deletion of Objective 5.3.1 of the RPS as included by the Council in its decision should be upheld on its merits in any event.<sup>3</sup>

<sup>3</sup>

*Turners & Growers Horticulture Ltd v Far North District Council* [2017] NZHC 764 at [30]:  
I reject Northland Waste’s contention that the Environment Court erred in law by failing to address whether the scope of the relief sought by Turners & Growers on appeal, in the notice of appeal or in its evidence and submissions, was outside the scope of its original submission on Plan Change 15. The Environment Court did not have to determine this because it concluded that the appeal should be dismissed on its merits in any event.



*What is really the issue?*

[18] Mr Loutit, in his opening submissions for the Council, commented that the evidence for the two principal parties (ie the Corporation and the Council) ... *passed as ships in the night*. With a deferential nod to Henry Wadsworth Longfellow, we think the idiom is quite apt. They really were largely talking about different issues. We shall do our best to address them separately, and to demonstrate why we have reached the conclusion already noted.

#### *Decision-making Framework*

[19] Mr Loutit submitted that the objective needs to be assessed against the framework set out in the *Man O'War decision*<sup>4</sup>, that is, whether it:

- (a) accords with and assists the Council in carrying out its functions so as to meet the requirements of Part 2 of the Act;
- (b) takes account of the effects on the environment;
- (c) is consistent with, or gives effect to (as appropriate) applicable national, regional and local planning documents; and
- (d) is the most appropriate way to achieve the purpose of the Act.

[20] Further, he submitted that case law is clear that when looking at an objective in an RPS, the district plan provisions are irrelevant, citing the *Man O'War* High Court<sup>5</sup> and Court of Appeal<sup>6</sup> decisions to that effect and submitting that although they were about the extent of Outstanding Natural Landscapes, the principle is the same.

[21] The Council's position was that the planning document hierarchy, with the RPS sitting at the top, means that the Corporation's case, with its considerable reliance on the lower order provisions in the district plan as not providing a platform for the new objective, was the "tail wagging the dog" and that approach did not align with the established case law position that the focus should be "up" not "down". Mr Burns agreed with that stance.

[22] Both parties reminded us many times that the lower order provisions are settled, with the Council largely accepting the lower order provisions which meant there were no appeal rights to the Environment Court. We recognise that the



<sup>4</sup> *Man O'War Station Ltd v Auckland Council* [2014] NZEnvC 167, [2014] NZRMA 335.

<sup>5</sup> *Man O'War Station Ltd v Auckland Council* [2015] NZHC 767, (2015) 18 ELRNZ 591, [2015] NZRMA 329 .

<sup>6</sup> *Man O'War Station Ltd v Auckland Council* [2017] NZCA 24, [2017] NZRMA 121.

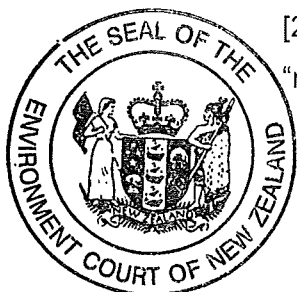
legislation deliberately put in place a regime with limited appeal rights and tight timeframes, but there were no submissions to the effect that makes any difference to the legal position.

[23] The Court often has to deal with this conundrum. We note that the Council itself relied on the lower level provisions, including the basis of the identification and mapping of the special character areas in the district plan, in support of the Council's decision to add the new objective. Mr Loutit sought to distinguish the Council's approach, using the argument that the reference to the lower order provisions, and their history and development, was for "context".

[24] The Council's case was that adding the s6(f) objective to the special character area provisions is the most appropriate way to achieve the purpose of the Act, and is the optimum planning solution to managing the historic heritage and amenity values within the special character areas. Further, the Council submitted that it addresses Part 2 as a whole, managing both historic values and amenity values under sections 6(f) and 7(c) of the Act and assists the Council to carry out its functions in that regard. In addition, the argument was that otherwise the (collective) historic heritage values that are not covered by the historic heritage overlay, with its scheduling approach for significant historic heritage places and areas, would effectively *slip through the cracks* and there would be greater (presumably adverse) effects on the environment. The Council submitted that special character areas involve a collection of buildings which represent historic heritage but which individually do not warrant scheduling as significant historic heritage places or areas. Both Mr Loutit and Mr Burns pointed to the lower order provisions and their genesis as being designed to protect historic heritage but through managing it – maintaining and enhancing it.

[25] The Corporation's case was that the addition of the objective fundamentally changed the provisions of the RPS and had implications for resource consenting, the district plan provisions and future plan changes. It considered this change to have the potential to impact on the provision of social housing and affordable housing on the land holdings affected by the special character areas (and possible future such areas).

[26] The Corporation questioned the lawfulness of what it described as "reclassifying" through the Council decision, areas identified as special character



areas under s7(c) as historic heritage areas to be protected under s6(f) in light of recent Supreme Court and Court of Appeal decisions<sup>7</sup> regarding the operation of s6. The Corporation submitted that, read together, these cases provide that the lawful approach for providing for s6 matters within planning documents is to, first, identify those attributes, in this case historic heritage, and to then determine the appropriate policy framework for protecting the identified attribute. The Corporation's view was that the Council had tried to begin with the identified and mapped special character areas as recommended by the Panel by reference to section 7(c). It has then attributed collective historic heritage qualities and values to these under s6(f), relying on the evidence of Mr Antony Matthews where he listed qualities and values within the special character areas. These, in his view, meant that the areas also exhibit collective historic heritage in terms of s6(f)<sup>8</sup>. The Council did not accept that was the approach it had adopted, or that the consequences of adding the new objective to the RPS would be as predicted by the Corporation, as we will further explore.

#### *Scheduled and unscheduled historic heritage terminology*

[27] There was considerable focus on the historic heritage in special character areas as "unscheduled" and not "scheduled" as it would be under the significant historic heritage overlay of scheduled places and areas provisions in the district plan. That was not an altogether helpful distinction, given that there are properties in the special character areas subject to demolition, removal and relocation within a site rules<sup>9</sup> and (and related policies), albeit through a *restricted discretionary* rather than a *discretionary* activity status - as for the significant historic heritage places and areas. The planning witnesses had agreed that the RPS objective in B5.3, including the new objective B5.3.1(1), should not be given consideration when assessing *restricted discretionary* activities, unlike the potential scope for specific consideration of the relevance of the RPS objectives for a *discretionary* activity. We are not sure we agree with that. Rather, we agree with Mr Burns' submission (at para 22) that, in the assessment of *restricted discretionary* activities, a consent authority should have regard to objectives and policies insofar as they relate to, and inform, matters of discretion.

<sup>7</sup> *Environmental Defence Society v New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593, [2014] NZRMA 195; *Man O'War Station v Auckland Council* [2017] NZCA 24, [2017] NZRMA 121.

<sup>8</sup> EIC para 6.2.

<sup>9</sup> Table D18.4.1 Activity table – Special Character Areas Overlay – Residential (A3).



*RPS: The Issues*

[28] The RPS has the following statement of issues preceding B5.2 Historic heritage and B5.3 Special character, each with their own objectives and policies. The separate subsections assume their own importance in this case.

B5.1. Issues

- (1) Auckland's distinctive historic heritage is integral to the region's identity and important for economic, social, and cultural well-being.
- (2) Historic heritage needs active stewardship to protect it from inappropriate subdivision, use and development.
- (3) Areas with special character should be identified so their particular values can be maintained and enhanced.

[29] "Historic heritage" is not defined in the PAUP but is defined in the RMA as:

- (a) means those natural and physical resources that contribute to an understanding and appreciation of New Zealand's history and cultures, deriving from any of the following qualities:
  - (i) archaeological:
  - (ii) architectural:
  - (iii) cultural:
  - (iv) historic:
  - (v) scientific:
  - (vi) technological; and
- (b) includes-
  - (i) historic sites, structures, places, and areas; and
  - (ii) archaeological sites; and
  - (iii) sites of significance to Māori, including wāhi tapu; and
  - (iv) surroundings associated with the natural and physical resources.

*A gap, or retrofitting?*

[30] The Council's case revolved around an alleged gap in the RPS without an objective mirroring s6(f) for historic heritage in special character areas. The Council submitted in opening that the objective is necessary to respond to historic heritage within identified special character areas, which may not warrant scheduling under the historic heritage provisions but may still be worthy of management.

[31] Ms Deborah Rowe, the planner called by the Council, gave evidence that in terms of the purpose of the Act, RPS Objective B5.3.1(1) is:

...the most appropriate way to ensure the sustainable management of Special Character Areas. Objective B5.3.1(1) clearly acknowledges that there are historic heritage values in Special Character Areas. The related district plan provisions that manage the use and development (including demolition) of land and buildings in the



Special Character Areas seek to retain physical attributes that define, contribute to, or support the special character of these areas; and to maintain and enhance the identified special character values of these areas.

This is because the character and amenity of identified Special Character Areas derives directly from, and is intrinsically linked to, the historic values of these areas. The identified special character results from the historic patterns of subdivision and historic urban development patterns, a predominance of buildings from a particular era, historic architectural styles, use of traditional materials and building techniques as well as the relationship of built form with streetscapes and landscape and the presence of mature vegetation.

...the character and amenity of these areas does not exist without the historic heritage values embodied in the areas' physical fabric.

...on the basis of the clear uncontested evidence of Mr Matthews ... the above characteristics are present in the Special Character Areas and are historic heritage

[32] The Corporation considered the new objective to be “retrofitting” and to fundamentally change, or at least have the potential to fundamentally change, the policy framework for the identification and management of special character areas. The Corporation suggested the new objective, using the s6 terminology and language to apply to the special character areas, lifted up and inherently changed what that section of the plan was about. It had gone from being about amenity to a focus on historic heritage. “Historical” was different, it said, from “historic heritage” and “historical factors” are different from “historic values”.

[33] The Corporation’s argument was that even if there is a gap in the RPS (which it does not accept) in terms of s6(f), it is not appropriate to deal with it by the special character area provisions. Additionally, it submitted that the approach and language conflates and confuses s6(f) and s7(c) matters, and the weight that should be given them in plan making (and resource consenting).

[34] Further, the Corporation submitted that the new objective would have (undesirable) implications for the consenting regime. The new objective could also be a *Trojan Horse* for future lower order plan changes, extending the spatial area and nature of special character areas and perhaps even going further.



*The policy and rule framework for significant historic heritage places and areas*

[35] The Corporation's position was that there is an objective in the RPS historic heritage provisions<sup>10</sup> informed by a related issue, with the lower order provisions containing policies and factors (and criteria) informing identification and methods for protecting significant heritage places and areas<sup>11</sup>. This involved the scheduling of significant historic places and areas. Ms Amelia Linzey, the planner called for the Corporation, gave evidence to that effect and considered that this was the method which should be used to protect historic heritage from inappropriate subdivision, use and development in terms of s6(f).

[36] The Council's counter view was that the historic heritage RPS and lower order provisions only deal with "significant" historic heritage and not all historic heritage which was a s6(f) matter given that, unlike other s6 matters, there is no qualifier adjective like "significant" (in s6(c) and "outstanding" (in s6(b)).

[37] The Council submitted that the special character areas illustrate collective historic heritage values and are areas where heritage scheduling as a Category A, A\* or B place (or presumably area) is not warranted. Further, the evaluative criteria identifying special character areas are different to the historic heritage places and areas, and are set out in RPS Policy B5.3.2.(2)(a) and (b) relating to the presence of physical and visual qualities and historical factors. There are rules for demolition, removal or relocation for specific named special character areas<sup>12</sup>, or for all other sites identified as subject to demolition, removal or relocation rules as shown in the maps in the Special Character Areas Overlay Statements<sup>13</sup>. (An example of the

<sup>10</sup> B5.2.1(1) Significant historic heritage places are identified and protected from inappropriate subdivision, use and development.

<sup>11</sup> The policy and other provisions that follow appear to use the terminology of "historic heritage places" to also include "historic heritage areas", although the provisions could be clearer.

<sup>12</sup> Activity Table D18.4.1, Activity A3 specifies the following is a restricted discretionary activity: Total demolition or substantial demolition (exceeding 30 per cent or more, by area, of wall elevations and roof areas) of a building, or the removal of a building (excluding accessory buildings), or the relocation of a building within the site on:

(a) all sites in all the following Special Character Areas Overlay - Residential:

(i) Special Character Area Overlay – Residential : Isthmus A;

(ii) Special Character Areas Overlay – Residential : Pukehana Avenue;

(iii) Special Character Area Overlay – General : Hill Park (those sites with a residential zone); and

(iv) Special Character Area Overlay – General : Puhoi (those sites with a residential zone); and

(b) all other sites identified as subject to demolition, removal or relocation rules as shown in the maps in the Special Character Areas Overlay Statements.

<sup>13</sup> The sites subject to demolition, removal or relocation rules relevant Special Character Areas Overlay – Residential are:

Isthmus B – Mount Eden/Epsom, Epsom, Epsom/Greenlane, Herne Bay, Mission Bay, Mount Albert, Mount Roskill, Ōtāhuhu, Parnell, Remuera, Remuera/Meadowbank, St Heliers;

Isthmus C – Mount Eden, Mount Albert, Remuera/Epsom;

General North Shore – Birkenhead Point, Devonport and Stanley Point, Northcote Point;



latter which assumed some prominence in the hearing was the Balmoral Tram Suburb.) The rules mean that the total or substantial demolition or removal of a building or its relocation within the site is a *restricted discretionary* activity (Activity Table D18.4.1, Activity A3). In that sense, the Council submitted that the management regime is more permissive and reflects the significance (or lack of significance) of the historic heritage values present in these areas.

*The identification of the special character areas and their characteristics - mapping, policy and rule framework*

[38] The Council submitted that the special character areas were selected on the basis of their heritage values and called a heritage architect, Mr Antony Matthews, who had a long involvement with the identification of special character areas, including through the earlier (referred to as *legacy*) plans, in support of that proposition.

[39] Mr Matthews said that he had been involved in earlier work identifying special character areas and it was his understanding that was the motivation for identifying those areas. He said that all special character areas had a historic heritage basis. In his opinion the special character areas in Auckland are a combination of both factors – historic heritage values and amenity values. He said he was unaware of any special character areas involving only amenity values. In his opinion, every part of the current extent of the special character areas includes historic heritage and there is always evidence of historic development in those areas, whether it is the particular houses, or the pattern of subdivision and development. He acknowledged that the scale varies from area to area, with some historic character areas covering a number of streets and others encompassing whole subdivisions.

[40] The Corporation's case opposing this was that the lower order special character areas and their identification was done on the basis of s7(c), and not to protect historic heritage in the sense of s6(f). In support of that argument, it directed us to what it described as a *predecessor* Environment Court decision on Plan Change 163 to the legacy Auckland City District Plan: Isthmus section.<sup>14</sup>

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Other: Balmoral Tram Suburb, King's Road and Princes Avenue, Station Road Papatoetoe, Early Road Links, Foch Avenue and Haig Avenue, Helensville.  
*New Zealand Heavy Haulage Association Inc v Auckland Council* [2013] NZEnvC 240.





[41] The Corporation did not challenge the proposition that there is potential for unscheduled historic heritage within the Special Character Areas, and throughout many suburbs in the region. Its position was that the Council should follow the process set out in the Unitary Plan and schedule the significant places or areas, once the necessary factual assessment is undertaken through the method specifically provided, to confirm where, and to what extent, significant historic heritage places or areas are present.

[42] The Corporation did not call a heritage architect to give evidence. Ms Linzey and Ms Cherie Lane said they did not have sufficient information on which to reach a conclusion as to whether all special character areas contain historic heritage values within the definition of “historic heritage” in the RMA. Ms Linzey questioned the evidence of Mr Matthews on the historic heritage basis of some of the *legacy* provisions, suggesting that the focus was on other aspects of character. She said that it was not her understanding (and her reading of some of the legacy provisions of predecessor plans which is what she said informed her understanding as a planning witness) that all of the special character areas carried through into the PAUP were based on historic heritage values. However, she did concede that she did not have a full understanding of the background to the earlier (or legacy) plan development.

*The RPS policy on identification of special character areas and their characteristics*

[43] Mr Matthews gave evidence that the special character areas were identified because of historic heritage values, and these are clearly articulated in the character statements, both general and for specific character areas, in the PAUP. He said that these were translated from, in a number of cases, either historic character studies or historic heritage studies, and not because of amenity issues which include historic heritage, or as a subset of amenity.

[44] We note here that the Council made some additional amendments to the Panel’s version of the RPS policies (and lower order provisions). Of particular note is the amending of identification policy B.5.3.2(2) to replace the word “legacy” with “historical” at the start of (b), and qualifying “building types or styles” with the word “historical” in (a), so that it now reads:

B5.3.2 Policies



- (1) Identify special character areas to maintain and enhance places that reflect patterns of settlement, development, building style and/or streetscape quality over time.
- (2) Identify and evaluate special character areas considering the following factors:
  - (a) physical and visual qualities: groups of buildings, or the area, collectively reflect important or representative aspects of architecture or design (historical building types or styles), and/or landscape or streetscape and urban patterns, or are distinctive for their aesthetic quality; and
  - (b) historical: the area collectively reflects an important aspect, or is representative, of a significant period and pattern of community development within the region or locality.

These changes were not subject to appeal, or at least the Corporation did not argue that they came within the ambit of consequential amendments.

[45] The Corporation suggested to Mr Matthews that moving from historic values to historic heritage (which was s6 terminology) - lifting it up to a s6(f) concern and applying the new objective to refer to those values - inherently changed what that section of the plan was about. It suggested that the issue had gone from amenity to a focus on historic heritage, in the sense that "historical" was different from "historic heritage" and "historical factors" are different from "historic values".

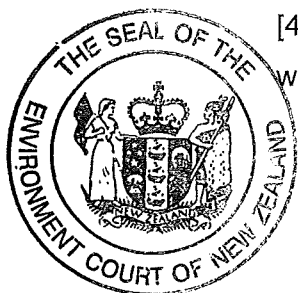
[46] Mr Matthews did not accept that, and thought both factors contributed to historic heritage values. He also considered "factors" was a wider word than "values" and is used interchangeably with values in Policy 2. Many times, in giving evidence, he emphasised that it is the "collective values" that are important, as he said is recognised in both limbs of B5.3.2 Policy (2).

[47] B5.3.2 Policy (3) is:

Include an area with special character in Schedule 15 Special Character Schedule, Statements and Maps.

We were told that the Panel largely included the special character areas identified in the notified PAUP. Mr Matthews accepted that there may be areas outside special character areas that may have exhibited those values.

[48] There was questioning of Mr Matthews and Ms Lisa Mein, the urban design witness for the Council, on the potential for there to be special character areas –



residential without historic heritage values. When questioned on the implications of the age of buildings, Mr Matthews said that generally buildings of more recent times have fewer historic heritage values associated with them. While clearly buildings from the 1910's, 1920's and 1930's may have historic heritage values, mid-century modern buildings from 1950's and 1960's have been assessed to have heritage values.

[49] In terms of Hill Park in Manurewa, a special character area brought into the Unitary Plan by the Hearings Panel in response to requests from residents, Mr Matthews said he had not undertaken an assessment of its historic heritage values. However, he said that the character statement talks about Hill Park being a mid-century suburban residential development with houses from the period so there is a likelihood there are historic heritage values there.

[50] The Corporation asked Mr Matthews why it would not be sufficient simply to add to the explanation that historic heritage values underlie the identification of the character areas and they make a significant contribution to the values of such areas. The current explanation and principal reasons for adoption (as amended by the Council in its decision) reads:

Special character areas include older established areas and places which may be whole settlements or parts of suburbs or a particular rural, institutional, maritime, commercial or industrial area. They are areas of special architectural or other built character value, exemplifying a collective and cohesive importance, relevance and interest to a locality or to the region. The identified character<sup>15</sup> of these special character areas should be maintained and enhanced by controls on demolition, design and appearance of new buildings and additions and alterations to existing buildings. It will also be important that the authorities responsible for the operation and maintenance of streets have proper regard for the appearance and quality of streets in special character areas, including in particular the presence of trees and other vegetation.

There are two key components in managing special character areas:

- identification and evaluation of areas with special character values and the **protection** of the overall special character of an area from significant change by demolition, modification of existing building or development of new buildings which would be inappropriate in the context of the area; and
- supporting appropriate ongoing use and adaptive re-use to enable effective functioning and vitality of the areas.

Character area statements for special character areas are contained in Schedule 15 Special Character Schedule, Statements and Maps. These statements provide descriptions of the



<sup>15</sup>

The Panel's recommendation for the beginning of this sentence read: The amenity values (particularly the character or appearance) and the quality of the environment (particularly of the streetscape)

nature of the special character for each area and are an important reference in assessing any application for resource consent in that area.

[51] Mr Matthews conceded that he was not a planner, so we do not traverse his evidence on why the new objective was justified. However, we do consider the points he made regarding the management of historic heritage in the special character area (some of which were reiterated by the urban design and planning witnesses for the Council).

[52] Both Ms Mein, and Ms Rowe, the planning witness for the Council, relied on the evidence of Mr Matthews as to the basis for the identification of the special character areas.

*Management of historic heritage in special character areas*

[53] As referred to earlier, the Council submitted in opening that the objective is necessary to respond to historic heritage within identified special character areas, which may not warrant scheduling but which is still worthy of management.

[54] RPS B5.3.2 Policy (4) is:

Manage identified special character areas<sup>16</sup> by all of the following:

- (a) requiring new buildings and additions and modifications to existing buildings to maintain and enhance the special character of the area;
- (b) restricting the demolition of buildings and destruction of features that define, add to or support the special character of the area;
- (c) maintaining and enhancing the relationship between the built form, streetscape, vegetation, landscape and open space that define, add to or support the character of the area; and
- (d) avoiding, remedying or mitigating the cumulative effect of the loss or degradation of identified special character values.

[55] Mr Matthews considered that the intent of the policy is to manage change within the special character areas which have historic heritage values, and these are methods by which this can be done. He said that para (a) contributes to the protection of historic heritage, as controlling additions and modifications is a method by which values can be maintained - either for an individual building or for collective values over a wide area. He thought (b) was the policy framework, or hook, for specific sites identified as needing a consent to demolish. For protection in the rest



<sup>16</sup> The Panel had recommended "Maintain and enhance the amenity values of" and the Council replaced these words with "Manage".

of special character areas (without demolition control), he considered that (c) and (d) help maintain elements identified in those character areas, such as those related to built form, streetscape, setbacks and lot sizes that would help the protection of the collective historic heritage of those areas. He recognised that the provisions are more permissive in terms of what can be done with individual places within the special character area, but considered that the approach would enable identified historic heritage values over a wide area to be retained.

[56] The Corporation raised a concern about the rationale for the specific demolition controls for identified properties in certain (not all) special character areas, and what a landowner would understand from that, as well as the implications of it for resource consenting. Mr Burns produced a Heritage Assessment Balmoral Tram Suburb Special Character Area, prepared by Auckland Council Heritage Unit in August 2013, that showed character-defining, character-supporting properties and non-contributing properties and places. While that public document may provide some understanding of the basis of the demolition controls for specific properties in at least the Balmoral Tram Suburb Special Character Area, it is not included in the PAUP.<sup>17</sup>

*Protection v maintenance and enhancement*

[57] The Council's position was that the special character areas, with the objective of "maintenance and enhancement" was the form of management the Council had determined to be appropriate for historic heritage in the special character areas.

[58] The Corporation suggested that the new objective elevated the approach to historic heritage in the special character areas from the s7(c) "maintain and enhance". Ms Rowe did not accept that. She referred to an elevated level of care, but not absolute protection, given it is protecting from what is inappropriate in terms of the significance of those values and that involves "maintain and enhance".

[59] Ms Rowe noted the contrast with the direction in the significant historic heritage place and area scheduling and the "avoidance" policies under the heading of protection of scheduled significant historic heritage places (B5.2.2



<sup>17</sup>

Special Character Areas Overlay – Business Special Character Schedule, Statements and Maps have sites with character defining and character supporting buildings on maps and in the descriptive material e.g. Grey Lynn 15.1.6.6, Kingsland 15.1.6.8, Helensville Central 15.1.6.7.

Policies (6)-(7)). She was also of the opinion that “maintain” in the special character area objective (B5.3.1(2)) and policies is a strong word.

[60] The Corporation proposed that another option would be for the Council to develop a new objective covering all historic heritage elements, and a set of implementing policies to fill the gap (if there is one) with another overlay to make it clearer to landowners whether the requirement is to “protect” or to “maintain and enhance” historic heritage values. Ms Rowe could not see the point of that.

[61] Ms Rowe did not consider it a major policy shift to add the RPS objective, given the evidence of Mr Matthews that there are historic heritage values evident in the special character areas and that they informed the spatial extent of the areas and the provisions. Ms Rowe also gave evidence that the Panel had generally adopted the Council’s recommended refinement to the spatial extent of the overlay, largely driven by the Council’s position through the process that the key values being managed had both historic heritage and amenity values.

[62] When questioned, Ms Linzey accepted that there was the potential for some overlap between *maintenance and enhancement* and *protection*. However, she did not accept that the historic heritage places and areas, and special character areas and related lower order provisions, were directed at the same outcomes. She said:

...there can be maintenance elements in historic heritage and there can be protection in trying to maintain and enhance, so I do think there’s a potential for overlap. In my mind, the distinction really in the management and protection of historic heritage is about conserving and protecting that historic essence, whereas maintaining and enhancing is anticipating and in some cases encouraging change to see things change over time and in the future, so that to my mind is the fundamental difference between the different outcomes that you are seeking between the special character overlay and the historic heritage ones.

[63] As noted, in her view historic heritage should be protected through scheduling, using the existing tools in the district plan.

*The potential future development and resource consenting implications*

[64] Mr Burns submitted that only the Corporation is present opposing the addition of the objective, but that it affects the many individual private landowners in special character areas.



[65] Mr Brendon Liggett, Development Planning Manager of the Corporation, gave evidence in that capacity. He set out the role of the Corporation in social housing and affordable housing provision, and the pressures the Corporation is facing in providing for both, not just in numbers but also in the configuration of its housing stock. The Corporation has 44% of its houses in the Auckland region, owning or managing approximately 27,900 homes which is approximately 5.8% of the region's total housing stock.

[66] The Corporation had a concern that the addition of the objective would make it more uncertain and difficult to obtain consent for activities requiring consent in the special character areas.

[67] In the joint witness statement of 12 May 2017 Ms Linzey and Ms Rowe agreed that the RPS objectives in B5.3 (including the Council's inserted objective B5.3.1(1)) should not be given consideration when assessing a restricted discretionary activity application, but there is scope to consider the relevance of the RPS objectives in determining a discretionary activity application. When questioned, neither Ms Mein nor Ms Rowe considered the addition of the objective would change the way the district plan controls, at least for *restricted discretionary* activities, would be applied. Mr Matthews did not believe it would be harder to get consent because he said the special character area statements clearly articulate why those areas were identified and mapped originally.

[68] The Corporation called Ms Cherie Lane, who gave evidence as a planning consultant on recent resource consent applications for works within the North Shore Special Character Areas overlay. She considered there had been a noticeable change in direction and a shift in the assessment of *restricted discretionary* applications with criteria and "tests" interpreted to include "historic heritage" with the individual buildings being assessed in detail using a "conservation architecture" approach, with reference to the specific new RPS "protection" objective. She considered this to place emphasis on protection and restoration of individual buildings in a similar manner to what would be expected for scheduled buildings, rather than for the consideration of the proposal within its streetscape and collective historical context.



[69] She provided an example by way of a Council assessment in memorandum format (which was subsequently pointed out by Mr Loutit as being a draft) of one such application – relating to 17 Buchanan Street Devonport. She said this had resulted in requirements by the Council’s heritage team for “restorative changes” to be undertaken to the house, such as specific windows to replicate what may have originally been in place, and the construction of a replica (false stack) chimney which would not be in the same position or functional.

[70] Mr Loutit was anxious to update the record on 17 Buchanan Street with Ms Lane, producing a Council built heritage specialist memo which, unlike the Council’s earlier draft assessment, makes no reference to the new objective or reference to a “conservation architecture” approach. That memo refers to and applies the relevant PAUP district plan objectives and policies for a special character areas overlay (D18.3(1) and (2), Objective D18.2), the special character area statement and assessment criteria for demolition and additions/alterations in a special character areas. Mr Loutit also made it clear that the consent has been granted. Ms Lane’s opinion was that unless it is scheduled it is not historic heritage and she did not see any need to assess or process resource consent applications to protect historic heritage within Devonport or any other special character area.

[71] Mr Burns cross-examined Mr Liggett from the Corporation on the potential implications, given most of its property within the special character areas is in the single house zone with the lower intensity outcome available to it, compared with other zones that exist in the city. Mr Liggett accepted that the single house zone provides limitations, but if there is a large enough site there are a number of development pathways in the single house zone creating additional dwellings using the density provisions. There is also potential for the conversion of existing dwellings into two, and for minor household units, which he believed would either be a *permitted* activity or require a low level consent. In addition, there is an integrated residential development pathway (with activity status of *discretionary* as amended by the Council from the Panel’s *restricted* activity status.)

[72] Mr Liggett also did not accept the proposition by Mr Burns that the Corporation had far more and better opportunities to redevelop its sites outside special character areas for increased intensification and development. He mentioned the locational characteristics of land in special character areas and the services the land provides or has access to, with high amenity and high access to





public transport, commercial services and health care and ideally suited for increased supply of social housing. The Corporation also had a concern that there was a real possibility Council would add special character areas to the district plan and these could further limit the opportunities for development of Corporation land.

[73] Finally Mr Burns and Mr Loutit questioned Mr Liggett on the implications of the Corporation's certificate of compliance applications for the demolition of dwellings on 7,000 properties across the region (where under the previous planning regime demolition of buildings on these properties was a *permitted* activity before the PAUP was notified), and which are *on hold*. For clarity Mr Allan, counsel for the Corporation, stated the position to be:

COC date is the date on which you lodge it as opposed to the date on which it is granted, hence these went in before the provisions came in, that is the date that triggers the COC status, but the Council didn't want to process them all at once and the parties have talked about that. So the date they are issued is the date the 5 year period will start.

[74] We were told that when the Corporation wishes these certificate of compliance applications to be processed, it advises the Council. This affords more time for the Corporation to programme and undertake demolition, given the date of the certificate of compliance (which is deemed to be a resource consent with a 5 year lapse period under s139) is on its issue rather than the application. Mr Liggett could say confidently that the Corporation had applied for certificates of compliance for two thirds of the Corporation's 379 dwellings in the special character area.

[75] To date, Mr Liggett said, the Corporation has elected to have processed 80 or thereabouts of the applications for certificates of compliance in the region. Mr Liggett considered there were practical implications of having those certificates of compliance in relation to how or whether the Corporation would exercise them. He said that it would be difficult for the Corporation to demolish 7,000 houses in five years to preserve access to the land in these and potential future locations of special character areas, with a risk to the Corporation and the region as to where the 7,000 current tenants could be placed in a five year period.

*Future possible implications*

[76] The Corporation also had a concern about possible future district plan changes founded on the objective, potentially adding an unknown, and possibly



large, number of special character areas. Ms Rowe, Mr Matthews, Ms Mein, Ms Linzey and Ms Lane agreed that the level of management in the special character areas is not intending to seek the same outcomes as those sought for scheduled historic heritage places or historic heritage areas. However, there was a difference on whether the new objective will necessitate a future plan change to amend the lower order provisions to give effect to it. The Council witnesses considered a future plan change is not necessary because the activities that are managed by the provisions and the outcomes sought are commensurate with the level of the significance of the historic heritage values present in the special character areas. Ms Linzey did not agree stating that such a future plan change is “probably necessary” because the lower order provisions do not achieve a protection focused outcome.

[77] The Council emphasised the opportunities for the Corporation to be consulted on, and involved in, the Schedule 1 process for such additions. The Corporation raised the spectre of the new objective effectively being a Trojan Horse, meaning it set up a situation where those opposing future changes to the lower level documents to give effect to it would be unlikely to succeed. Ms Rowe said that a counterargument is that the lower order provisions already give effect to the objective.

[78] The Corporation also suggested that the Council might need to re-evaluate the existing special character areas if there were any present without historic heritage values.

#### *Economic evidence*

[79] We need to mention the economic evidence given by Dr Doug Fairgray for the Council, and Philip Osborne for the Corporation, relating to costs (with no work having been done on benefits beyond what was done to inform the PAUP decision-making process). Their points of difference were recorded in an economics joint expert witness statement. The central issue, in terms of economic effect, is whether the change to the objective would ultimately produce a change in how the provisions were applied and the outcome, accepting that no additional houses are affected by the inclusion of the objective for special character areas. Both witnesses relied on their respective planning witnesses who held different opinions on whether there would be a change on how the provisions were applied and the outcome.



[80] When questioned by Mr Loutit, Mr Osborne made it clear that he was relying on the evidence of Ms Linzey and Ms Lane that the inclusion of the objective has the potential to result in material economic impacts as it creates additional restrictions on the ability of Housing NZ and the wider market to realise residential development capacity, as well provide appropriate choices. He said that had not quantified the cost that might come from that for the entire area, but looked at the extent of the potential impact on the Corporation's portfolio to give an indicative range of the potential extent and value of lost development. He considered there was a level of risk that could eventuate given an increase in the requirement to protect these existing dwellings - not necessarily because more consents will get turned down but because more consents may not be applied for. He said that the difficulty within these areas and additional regulation will mean that often development is not sought at all because there are potentially easier locations and development options. He did not take into account the Corporation's certificate of compliance applications.

#### *Evaluation*

[81] This was a difficult case, given the major contrasts in the positions and evidence before us on the inclusion in the RPS of a single objective mirroring s6(f) of the RMA to apply to special character areas (an overlay). The other provisions of the RPS and the lower order planning documents are settled.

[82] The Council's view was that the new objective was filling a gap with the lack of a cascade from the RPS to the district plan resulting in a disconnect between the two documents. The Corporation considered the new objective was retrofitting, with the potential to fundamentally change the nature of what the Panel had considered and decided in the rest of the RPS (and in the lower order provisions). It raised possible flow-on implications in the consenting process and the spectre of possible future plan changes.

[83] The Corporation considered that the RPS (and the lower order provisions) was clear that the appropriate planning tool for protecting historic heritage was the scheduling of historic heritage places and areas. That tool is only available to significant historic heritage. A corollary of the Corporation's view is that the Panel made a deliberate policy choice in terms of s6(f) to restrict objective, policy and rule treatment to significant historic heritage.

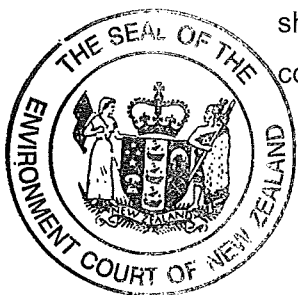


[84] The Council and Mr Burns pointed to the special character areas and the policy, rules, special character area statements and mapping, and particularly the demolition, removal and relocation rules that applied to whole special character areas, or specifically identified properties within a special character area. They contended that the RPS identification and management policies as well as the lower order provisions including the rules also had an element of the protection of historic heritage, that was not absolute protection but “maintenance and enhancement”.

[85] The Corporation was also of the view that the Panel had deliberately chosen to go down the s7(c) route with its “maintenance and enhancement of amenity” in developing identification policy and the selection of the special character (overlay) areas. The Council did not consider it as black and white as that. The selection of the overlay areas and the general and specific statements of special character indicate that they are “microcosms of time”. We only had evidence from Mr Matthews, a heritage architect called by the Council, on their historical nature and character and contributing collective values that informed the selection of the special character areas and the descriptions. We note there was no argument as to what “character” as opposed to “amenity” values might imply in the RPS objective and related policy.

[86] The evidence on the consenting implications was somewhat mixed. The Council itself seemed to accept in the way it dealt with the North Shore resource consent example, that the more specific objective of “maintain and enhance” (which could be said to have an element of protection) will be the focus of resource consent consideration (accepting that there may be some argument on that, depending on the particular status of land use activities). That may not require the “conservation architecture” approach required in the significant and scheduled historic heritage places and areas. The Council’s witnesses suggested that the new objective would make no difference to the outcome of the consenting process. However, neither of the planning witnesses (Ms Linzey or Ms Rowe) were of the opinion that the new objective would need considering on a restricted discretionary activity application – an opinion Mr Burns criticised as incorrect in law.

[87] In closing, Mr Loutit submitted that the Corporation is saying that the process should start again and if this were to happen there would be a s32 analysis and the costs and benefits would be assessed. He considered that would be futile firstly



because the extent of the overlay has been through such an analysis and is now set in stone. Secondly, he said that any other changes to the overlay, like adding further areas would require a plan change process and those changes would require a s32 analysis of the costs and benefits.

[88] We conclude that the questions raised in the course of this case leave us in considerable doubt as to the rationale for, and potential implications, of including the new objective. The Council's Decision Report is very short and does not traverse these matters in the detail that we have, or with the benefit of cross-examination. It simply states that the district plan provisions and character statements recommended by the Panel identify the amenity and heritage values of the areas that are to be addressed in the district plan provisions. Then it states that the cascade down from the RPS to the district plan is not evident, with no corresponding RPS objective, resulting in a disconnect between the RPS and the district plan.

[89] In light of the above, we are not persuaded that adding the objective to the RPS is the "most appropriate" approach.

[90] If there is a gap in the RPS, or a disconnect in the cascade between the RPS and the district plan as the Council's Decision Report describes it, (and we make no finding on that), adding a provision that mirrors s6(f) may not assist in applying the lower level provisions that are there now. It is likely to result in ongoing debate and potentially litigation on individual resource consents. It will occasion uncertainty (or perhaps more uncertainty).

[91] We also note that the Corporation questioned whether the additional RPS objective could in some way be limiting on the identification of special character areas and their management, given the focus on historic heritage.

[92] As to the suggestion of other approaches, such as a better explanation, that will not resolve any debate on the content of or deficiency in the planning framework. An explanation, if needed, should reflect and not rewrite an objective or policy.

*Section 290A RMA*

[93] Under s156(4) of Local Government (Auckland Transitional Provisions) Act 2010 the Environment Court must treat an appeal under this section as if it were a



hearing under clause 15 of Schedule 1 of the RMA and, except as otherwise provided in this section, clauses 14(5) and 15 of Schedule 1 of the RMA and Parts 11 and 11A of the RMA apply to the appeal (including, to avoid doubt, ss 299 to 308).

[94] We have considered the decision of the Council on the Panel's report and recommendation and have set out our reasons for not agreeing with the addition of new Objective 5.3(1) to the RPS.

*Result*


[95] The appeal seeking the deletion of Objective 5.3.1 of the RPS as included by the Council in its decision is allowed, effectively meaning that the Panel's B5.3 Special character Objective, is reinstated as the sole Objective

*Costs*

[96] In the circumstances we do not encourage any application for costs but if there is to be an application it should be lodged and served within 15 working days of the issuing of this decision, and any response should be lodged and served within a further 10 working days.

Dated at Wellington the 10<sup>th</sup> day of August 2017

For the Court

  
C J Thompson  
Environment Judge

