

BEFORE THE ENVIRONMENT COURT
I MUA I TE KOOTI TAIAO O AOTEAROA

Decision No: [2018] NZEnvC 186

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

SECOND DECISION OF THE COURT

Date of Decision: **28 SEP 2018**

Date of Issue: **28 SEP 2018**

The appeal is allowed in part – see para [256] ff

Costs are reserved



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Introduction

[1] On 11 August 2017, the Court issued a decision on *Housing New Zealand Corporation v Auckland Council* [2017] NZEnvC 120 (the August 2017 Decision). That involved an appeal by Housing Corporation New Zealand (HNZC or the Corporation) against a decision made by the Auckland Council (Council) when considering the recommendations of the Independent Hearing Panel (the Panel or IHP) on provisions of the Regional Policy Statement (RPS) chapter of the Auckland Unitary Plan.

[2] The parties appealed that decision, and the appeal was resolved by agreement in the course of the appellate hearing. The High Court decision of 1 March 2018¹ directed, by consent, that the matter be referred back to this Court for rehearing to the extent we consider necessary and for the issuing of a further decision, making findings on several matters and giving reasons in relation to those matters, in terms sufficiently full to enable the parties to understand the decision.

[3] In a Minute dated 19 May 2018 (2018 Minute) we made directions which provided the parties with the opportunity to make submissions on the next steps we should take. We received the following submissions:

- Housing New Zealand Corporation (Rehearing) 30 May 2018. Annexure A - Auckland Council's synopsis of submissions on *Housing New Zealand Corporation v Auckland Council* CIV-2017-404-002037 dated 7 February 2018. Annexure B – Summary table of scope of the New Objective. Annexure C – Extracts from the Transcript – Cross examination of Council witnesses regarding how the unchallenged lower order provisions would give effect to the protection of historic heritage if the new objective was introduced. Annexure D – Extract of Ms Linzey's evidence addressing how historic heritage is managed by the Unitary Plan;
- Auckland Council, dated 6 June 2018;
- M Jones and AT Arlov, dated 6 June 2018; and
- Housing New Zealand Corporation had leave to respond to any new arguments raised by the Council in its submissions and made two additional comments in correspondence dated 11 June 2018.



Housing New Zealand Corporation v Auckland Council [2018] NZHC 288.

[4] In summary, the Council submitted that the matters to be addressed, and as set out in the High Court decision, can be reordered and refocused as the following primary and secondary issues. The Council's primary issues were:

- Assessment of the Alternative Solution against the statutory framework as determined in *Man O'War Station v Auckland Council* [2014] NZRMA 335 (EC);
- The relevance of the uncontested historic evidence of Mr Matthews in assessing the appropriateness of the Alternative Solution; and
- Matters of jurisdiction, in particular:
 - whether the Court has the necessary jurisdiction to consider the Corporation's appeal;
 - whether the Alternative Solution is within the scope of the Environment Court to uphold; and
 - whether there is scope in the Corporation's appeal to delete the additional changes to the RPS.

The Council's secondary issues were:

- The assessment of the Alternative Solution against the statutory framework as discussed in *Man O'War Station Ltd v Auckland Council* [2017] NZRMA 121 (CA);
- Irrelevant considerations under the statutory test discussed by the Environment Court in *Man O'War Station Ltd v Auckland Council* [2014] NZRMA 331 listing: the certificates of compliance granted to HNZZ; the extent to which objectives should be considered when assessing a restricted discretionary activity; future possible implications of the Alternative Solution for resource consents; possible future plan changes to the Unitary Plan; the Council's process with respect to an application for resource consent for the Buchanan Street property; and the Hearing Panel Recommendations and reasons and the Council's Decision.

[5] After careful consideration of all the material before us we conclude that we have what we require to make a decision and further evidence and a viva voce rehearing is unnecessary. We now issue a second decision which addresses the issues set out by the parties in the draft consent order annexed to the High Court decision.



Scene Setting

[6] To set the scene the Alternative Solution adopted by the Council in its Decision was to add a new B5.3.1(1) Objective (new objective) and to make amendments to the implementing policies and the explanation and principal reasons for adoption as follows:

B5.1 Issues

- (1) Auckland's ...
- (2) Historic heritage ...
- (3) Areas with special character should be identified so their particular amenity values can be maintained and enhanced.

B5.3 Special character

B5.3.1 Objectives

- (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.

B5.3.2 Policies

- (1) Identify special character areas to maintain and enhance ~~the amenity values of~~ 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) ~~legacy-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.
- (3) Include an area with special character in Schedule 15 Special Character Schedule, Statements and Maps.
- (4) ~~Maintain and enhance the amenity values of~~ Manage identified special character areas 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.

B5.4 Explanation and principal reasons for adoption ...

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 and places 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 amenity values (particularly the character or appearance) and the quality of the environment (particularly of the streetscape) 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.

[7] Character Area Statements for special character areas are contained in Schedule 15: Special Character Schedule, Statements and Maps. These statements provide descriptions of the nature of the special character for each area and are an important reference in assessing any application for resource consent in that area. The maps in Schedule 15 show some of these special character areas as containing “sites with identified historic character buildings”, such as Residential: Helensville 15.1.7.1, or “sites subject to demolition, removal and relocation rules”, such as Residential: Isthmus B – Mount Eden/Epsom 15.1.7.3.1.

[8] The Council’s decision stated:

The Council has rejected the Panel’s recommendations in relation to Hearing Topic 010/029/030/079 (Special character and pre 1944), as listed below, with accompanying reasons, alternative solutions and section 32AA evaluation (where necessary):



(a) The deletion of the objective that provides for management of heritage values in the Regional Policy Statement

Reasons (i) The Special Character Areas overlay – Residential and Business 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. However the cascade down from the RPS to District Plan is not evident, with no corresponding RPS objective, resulting in a disconnect between the RPS and District Plan.

Alternative solution. See Attachment A 13.

[9] We note that the Council’s decision adopting the Alternative Solution uses the phrase “heritage values” and not “historic heritage values”, although the new objective refers to “historic heritage values” as follows:

Historic heritage values of identified special character areas are protected from inappropriate subdivision, use and development.

This is the language of section 6(f).

[10] There was no specific s 32AA evaluation provided for this decision.

[11] HNZC’s notice of appeal seeks that the Council’s decision be disallowed in relation to the introduction of Objective B5.3.1(1),² but it did not pursue an alternative new objective referred to in its Notice of Appeal at the hearing.³ The appeal did not specifically seek the relief of disallowing the amendments to the issue, the B5.3.2 Policies and the description and explanation made in the Council’s decision. The appeal only sought “such other orders, relief or other consequential amendments as are considered appropriate or necessary by the Court to address the concerns set out in the appeal”.

Terminology

[12] Setting out some terminology and definitions is a useful first step given much of the case revolves around the use of language in the Unitary Plan.

[13] We looked at the Concise Oxford English Dictionary 11th edition definitions of the following words:

² See para [6].

³ The notice of appeal stated: That a new objective be included at RPS level to set the direction for the management of special character areas in the DP as follows: B5.3.1. Objectives (1) Identify, maintain and enhance the amenity values of special character areas.



Heritage n. valued things such as historic buildings that have been passed down from previous generations. [as modifier] of special value and worthy of preservation.

Historic adj famous or important in history, or potentially so. *archaic* of the past.

USAGE

Historic and historical are used in slightly different ways. Historic means 'famous or important in history' (*a historic occasion*), whereas 'historical' chiefly means 'concerning history' (*historical evidence*).

Historical adj. of or concerning history. belonging to or set in the past. (of the study of a subject) based on an analysis of its development over a period.

- DERIVATIVES **historically** adv.

USAGE

On the use of *an historical event* or *a historical event*, see **usage** at AN.

Legacy

n. (pl. **legacies**) 2. something handed down by a predecessor.

adj. *Computing* denoting hardware or software that has been superseded but is difficult to replace because of its wide use.

While the Unitary Plan uses the above words, it does not contain a definition of them.

[14] There are also relevant RMA definitions which are:

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

historic heritage—

(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



environment includes—

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

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

[15] The above defined RMA terms are used in Part 2 and we repeat the provisions of that Part of the Act relevant to the case:

Section 6 Matters of national importance:

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance: ...

(f) the protection of historic heritage from inappropriate subdivision, use, and development:

Section 7 Other matters:

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to — ...

(c) the maintenance and enhancement of amenity values: ...

(f) maintenance and enhancement of the quality of the environment:

[16] We note that recent legislation, the Heritage New Zealand Pouhere Taonga Act 2014, has as its purpose (see s 3) - “to promote the identification, protection, preservation, and conservation of the historical and cultural heritage of New Zealand”.

Jurisdictional Issues

[17] There were several jurisdictional issues raised by the parties at the hearing, and extensively traversed in the submissions received in response to the 2018 Minute. In addition there were extensive submissions on new jurisdictional issues, some but not all of which arose out of our August 2017 Decision and the Minute (2017 Minute) that followed it.

[18] Provisions of the Local Government (Auckland Transitional Provisions) Act 2010 (LGATPA) that assumed some prominence in the jurisdictional issues follow:



Section 148

- (1) The Auckland Council must –
- (a) decide whether to accept or reject each recommendation of the Hearings Panel; and
 - (b) for each rejected recommendation, decide an alternative solution, which –
 - (i) may or may not include elements of both the proposed plan as notified and the Hearings Panel's recommendation in respect of that part of the proposed plan; but⁴
 - (ii) must be within the scope of the submissions.

Section 156

- (1) A person who made a submission on the proposed plan may appeal to the Environment Court in respect of a provision or matter relating to the proposed plan –
- (a) that the person addressed in the submission; and
 - (b) in relation to which the Council rejected a recommendation of the Hearings Panel and decided an alternative solution, which resulted in –
 - (i) a provision being included in the proposed plan; or
 - (ii) a matter being excluded from the proposed plan. (underlining added)

[19] We deal with the jurisdiction issues under three headings (and in that order):

- Whether HNZC had the ability to appeal and the Court has the necessary jurisdiction to consider HNZC's appeal on scope under s 156(1) of the LGATPA. This appears to be a new issue not directly raised or addressed in the earlier Environment Court proceedings, with the Council providing extensive submissions on it in response to the 2018 Minute.
- Whether there was scope for the Council to make the decisions it did (and accordingly the limits of the Court's scope on appeal).
- Whether there is scope for the Court to disallow the new objective but uphold other amendments made by the Council in its Alternative Solution.

[20] To ensure we deal with all the arguments, we set out the submissions made on jurisdiction in response to the 2018 Minute in some detail.

Ability to appeal

[21] The Council submitted that HNZC has no power to appeal based on an allegation that the Council's decision was (unlawfully) out of scope and therefore the



We note that the second subparagraph is introduced by "but" for emphasis, although its logical meaning is "and".

Environment Court has no jurisdiction to determine that question. It said that when deciding on an alternative solution, the Council's decision must be within the scope of submissions. However, if the Council acts contrary to s 148(1)(b)(ii) of the LGATPA, judicial review is the appropriate remedy; not an appeal to the Environment Court.

[22] The Council's argument is:⁵

The Corporation's appeal to the Environment Court is under section 156 of the LGATPA. As the Council had rejected a Panel recommendation and decided an alternative solution, the relevant subsection is subsection (1), which provides that a prerequisite of the right of appeal "in respect of a provision or matter" is that the person addressed the provision or matter in their submission to the Panel.

When deciding an alternative solution, the Council's decision must be within the scope of submissions.⁶ However, if the Council acts contrary to section 148(1)(b)(ii), judicial review is the appropriate remedy; not an appeal to the Environment Court. The Corporation's argument that it has a right of appeal under section 156 is, in fact internally inconsistent: to be able to appeal, it must have made a submission on the matter, but if it made a submission on the matter then it must necessarily be within scope.

This is not simply a technical or procedural point. The clear policy of the LGATPA is for the Environment Court's role in the Unitary Plan process to be limited to certain de novo, merits-based appeals only. An allegation that the Council has exceeded its powers under section 148, on the other hand, is a purely legal question of vires for which judicial review is the appropriate remedy.

For these reasons, the Corporation has no power to appeal based on an allegation that the Council's decision was (unlawfully) out of scope. Accordingly, the Environment (sic) has no jurisdiction to determine that question.

However, and without resiling from this submission that there is no ability for HNZC to appeal, the Council considers that its Alternative Solution is within scope and therefore, this point may become moot.

[23] HNZC disagreed. It referred to s 156(1) of the LGATPA, as setting a threshold for lodging an appeal. HNZC submitted that it had made original and further

Paras 3.27 – 3.31.
Section 148(1)(b)(ii) of the LGATPA.



submissions concerning the special character area provisions (passing the threshold in (a)) and the Council rejected the Panel's recommendations regarding the special character provisions (passing the threshold in (b)). Accordingly, HNZN was entitled to lodge its appeal to the Environment Court. Further HNZN submitted that it does not accept that judicial review and an appeal to the Environment Court are mutually exclusive categories.⁷

- (a) The LGATPA provides limited rights of appeal to the Environment Court which give rise to a *de novo* hearing on the merits, both factual and legal. The Court on appeal is subject to the same jurisdictional constraints that applied to the Council (unless the Court exercises its powers under section 292 and 293 of the Resource Management Act 1991. Thus the Environment Court on appeal has no ability to grant relief that is not within scope. If the Court is to make an order changing provisions then it needs to satisfy itself that the provisions are within scope. It is for that reason that the Court requires parties seeking consent orders to confirm that the relief is within its jurisdiction.
- (b) Judicial review is a separate process, which focusses on flaws in the decision making process rather than the merits of the case. It is therefore a more limited means of challenging a decision. Under RMA, a right of judicial review can only be exercised after appeal rights have been exhausted (see section 296 of RMA). In practice, the *de novo* appeal rights under RMA render judicial review of little practical importance other than where a party that claims to be affected by a proposal challenges a decision not to notify them of an application.
- (c) The Corporation does not accept that only the High Court on judicial review can consider the vires of the Council (and Environment Court on appeal) to grant certain relief. By virtue of section 296 of RMA, that would result in submitters having to wait until an Environment Court hearing is over before asserting on judicial review to the High Court that the relief granted by the Environment Court was out of scope. Issues of scope may well be raised on judicial review but that does not preclude them being considered by the Environment Court on appeal. The Corporation submits that in this case the issue of scope is fundamental to the Environment Court's consideration of its legitimately lodged appeal. Critically, the Court needs to satisfy itself that any changes to the AUP that it proposes are within its jurisdiction to impose. That obligation applies regardless of whether (as in this case) the Council at first instance made a mistake as to jurisdiction. The fact that the Council wrongly asserted that it had scope to alter a provision does not expand the Environment Court's jurisdiction on appeal.



Submission 11 June 2018, para 8.

[24] Further, HNZN did not accept the statement by the Council that:

The Corporation's argument that it has a right of appeal under section 156 is, in fact, internally inconsistent: to be able to appeal it must have made a submission on the matter then it must necessarily be within scope.

HNZN considers this statement conflates the "provision or matter" subject to a submission in terms of s 156(1) of LGATPA with the content of the decision made (i.e. relief granted) by Council in these respects. It states:⁸

- (a) By "subject matter of the appeal", the Corporation is referring to the "provision or matter" in terms of section 156(1) addressed in the Corporation's submission, which entitles the Corporation to file an appeal on that topic. As noted above, that is the broad set of provisions regarding Special Character in this case.
- (b) It is, however, the much narrower concept of "the relief granted by Council" and which may or may not be upheld by the Court that is relevant to the enquiry as to scope.
- (c) It is almost axiomatic that the relief sought in an appellant's submission on a topic subject to appeal will not have been accepted by the decision maker as that is why the appeal has been filed. That is, of course, the circumstance which applies in this case –the Corporation submitted on the Special Character provisions but disagrees strongly with aspects of the decision made by Council on that topic.

[25] Accordingly, expressed in full, HNZN argues that the Council submissions do not make sense and are fundamentally flawed. Whether a submission has been made on a provision (hence giving rise to an appeal right) is a completely different inquiry from one relating to whether the relief granted on that provision is within scope. An appeal can legitimately be lodged on a provision where the Council went beyond scope in granting relief. HNZN says that the Council's argument results in an assertion to the effect that the Environment Court has no jurisdiction to determine whether relief before it (and that it is intending to uphold) is within its jurisdiction to grant.

[26] In summary in this case, HNZN argues that:⁹

- (a) The relief granted by the Council was contrary to that sought by the Corporation;
- (b) The relief granted by the Council was on the subject matter addressed in the Corporation's submission, but outside the scope provided by any of the submissions on the subject matter; and
- (c) Hence, the relief granted by Council is beyond the Court's jurisdiction to uphold on appeal.



Submission 11 June 2018, para 10.

Submission 11 June 2018, para 12.

[27] HNZC submitted that in this case it was unnecessary to judicially review the Council's decision regarding jurisdiction because the legislation gave HNZC a right to seek a *de novo* hearing before the Environment Court on appeal, at which time the issue could be addressed on its merits. Section 290 of the RMA provides that the Environment Court:

... has the same power, duty, and discretion in respect of a decision appealed against ... as the person against whose decision the appeal or inquiry is brought.

[28] As we have said, no party argued this point before us at the 2017 hearing. We are inclined to the view that the Council's proposition does not accord with the established principles and practice whereby the Court considers questions of scope in its consideration of RPS and district plan appeals. We proceed with consideration of the merits of the case, including considering the question of whether there is scope for any amendments to the RPS that we may consider appropriate, in the light of the substantive issues referred back to us from the High Court.

Whether there was scope for the amendments made by the Council in its Decision on the Panel's Recommendations?

[29] HNZC submitted that the amendments made by the Council in its Decision on the Panel's Recommendation are unlawful, not being within the scope of submissions as required under s 148(1)(b)(ii) of the LGATPA. The effect of s 290 of the RMA is that the Environment Court is subject to the same limits and obligations as the Council at first instance. If the Council was limited as to jurisdiction then so is the Environment Court.

[30] Further, that requirement is expressed in *Hopkins v Dunedin City Council*,¹⁰ where the Environment Court recorded that while the Court is empowered to regulate its own procedure, before a Court can hear a matter *de novo* the preliminary grounds for jurisdiction must be made out:

Reading together the provisions of section 269, 279, 290 I have concluded that the Court is empowered to regulate procedure in respect of references and that the provisions of section 290 are intended to apply to cases involving references also. Section 292 and 293 are also directly applicable to the references as well as appeals or inquiries. I have concluded that the



Hopkins v Dunedin City Council C180/2000.

Court is empowered to hear *de novo* the submission of the referrer provided the preliminary grounds for jurisdiction as required under Clause 14 of the First Schedule are made out.

[31] HNZN submitted that, in this case, the preliminary grounds for jurisdiction in terms of appeals from the Council to the Environment Court were twofold:¹¹

- (a) The jurisdictional grounds governing the Council's decision set out in section 148 of the LGATPA - This element imposes constraints on the Council's ability to issue decisions, effectively defining the envelope of relief available to it. In terms of this appeal, the key requirement is that any alternative solution "*must be within the scope of the submissions*".
- (b) The jurisdictional grounds for lodging an appeal against the Council's decision set out in section 156 of the LGATPA – This element sets limits on the circumstances in which an appeal can be lodged and the extent of relief that can be sought. The key constraint in this case is that "*the right of appeal is limited to the effect of the differences between the alternative solution and the recommendation*". That defines the available envelope of relief.

[32] HNZN concluded that the relief that the Environment Court can impose is thus governed by both the scope of submissions and the limits on lodging an appeal, and the extent of relief that can be sought. The Environment Court's ability to hold a *de novo* hearing and, critically, the relief it grants, is therefore constrained. There is, in that context, an ability for a party to challenge a decision of the Environment Court on the grounds that it goes beyond the envelope of relief that was available to it under the submissions lodged on the Unitary Plan and the appeal before it.

[33] At the hearing the Council submitted that it had relied on several submissions to provide scope for its alternative solution and reiterated and expanded on this in its response to the 2018 Minute. The Council referred to Ms Rowe's evidence as demonstrating that the breadth of submissions received in relation to the RPS provisions that related to special character ranged from general support for the provisions of the notified version of the Unitary Plan, to submissions that sought the deletion of the objectives and policies. In addition, given the combined nature of the Unitary Plan, the Council pointed out that various submitters sought changes to both lower and higher order provisions relating to historic heritage and special character.

[34] In particular, the Council relied on submissions by Devonport Heritage Inc. and the Civic Trust, which sought better recognition of the historic heritage values present



[3.7].

in special character areas, and proposed amendments to Chapter B4.2 (as it was called then) of the proposed Unitary Plan (as notified) to achieve this.

Devonport Heritage Inc's submission relevantly sought:¹²

- (a) an amendment to the title of Chapter B4.2 to Special Heritage Character Areas;
- (b) consequential amendments to the introduction of Chapter B4.2 to incorporate reference to the heritage character of special character areas and their historic importance.

[35] Various individual submitters also sought the relief sought by Devonport Heritage Inc, including that:

- (a) The title to B4.2 "Special Character Area" be amended to read "Special Character Heritage Area" or "Special Heritage Character Area";
- (b) The introduction of additional wording to underpin the "heritage" character and "historic" importance of the area.

[36] The Civic Trust's submission sought amendments to the introduction and Policy 2 of Chapter B4.2 of the notified proposed Unitary Plan to acknowledge that a further attribute that contributes to special character is a collection of different but compatible styles reflecting an area's historical evolution over time.

[37] In its submission, Remuera Heritage Inc¹³ sought that B1.3 (RPS Issues) be amended to acknowledge the relationship between the concepts of "historic" and "character", specifically noting that character derived from heritage (that which is inherited from the past) may also be considered as "amenity values". Remuera Heritage Inc. also sought that Chapter B4.2 be amended to redefine Special Character with a more appropriate descriptor, and that "historic" was a better alternative to describe the attributes of the special character areas "inherited over time."

¹² Devonport Heritage Inc. (3263-2 and 3263-3). See Common Bundle, tab 4, page 126 and tab 15, page 250. The submissions by William W Rayner (6174-6) (Common Bundle, tab 10, page 195 and tab 17, page 265), Roger Brittenden (5246-3) (Common Bundle, tab 11, page 211, and tab 16, page 254), Margot McRae (3514-4) (Common Bundle tab 12, page 214 and tab 15, page 252), Robin Hay and Terrie Gray (2733-3) (Common Bundle, tab 13, page 218 and tab 15, page 249) and Robyn Langwell (6979-4) (Common Bundle, tab 14, page 220 and tab 17, page 280) also sought the relief sought by Devonport Heritage Inc. See also Gary Russell (2422-85) (Common Bundle, tab 5, page 155, and tab 15, page 244).
Remuera Heritage Inc. (Submission 5347-4).



[38] Heritage New Zealand Pouhere Taonga requested that the list of attributes that make up a special character area in the introduction to the RPS be amended to include the presence of a distinct mix of styles that reflect the evolution of an area.

[39] In summary, the relevant submissions relied on by the Council sought:

- (a) that "special" be replaced by words such as "historic" or "heritage" in the context of a character overlay;
- (b) changes to the RPS.

[40] The HNZC case was that there was no jurisdiction for the Council to make the changes that it did to the Panel's recommendation and HNZC's appeal should be allowed. HNZC submitted that none of the submissions sought the relief in the Council's Decision and that the Summary of Submissions produced by the Council would not have alerted a reader in any way to the potential for the changes that the Council now seeks.

[41] HNZC worked through submissions raised by the Council and the summary of submissions prepared by the Council (in detail) to support its argument that there was no scope. HNZC submitted that none of the submissions sought the relief in the Council's Decision. It also took exception to the Council's summary of submissions categorising the HNZC submission as: "Clarify the rationale for the inclusion of special character as significant heritage be clarified". It said its submission is clearly seeking that a s 32 cost benefit analysis be undertaken on the special character area provisions.¹⁴

[42] The Council did not accept HNZC's submission that because there was no explicit reference to s 6(f) of the Act in the submissions, no one would know that there was an intention to introduce historic heritage matters. The Council's view was that the new objective does not refer to s 6(f) and although Objective B5.3.1(1) uses the words "historic heritage" this is consistent with submissions and the need for the RPS to better reflect or refer to the "heritage" or "historic" values within the special character area.



¹⁴ Housing New Zealand Corporation Submission No. 839-33. That submission point sought: In addition to the 'text' amendments below, Housing New Zealand seeks the following process be undertaken: Reporting from the Council on the rationale (section 32) for inclusion of 'special character' as significant heritage.

[43] The Council also did not accept HNZC's argument that many of the submissions are geographically confined to particular areas, for example Devonport, and that such specificity cannot, "when read as a whole", provide scope for the Alternative Solution. The Council considered that this view is incorrect, given the relief sought by the submitters predominantly relates to the title and introductory section of the proposed RPS Chapter. It said that if submitters intended for specific changes to apply to a confined geographical location, it is unlikely that they would have sought changes to the RPS Chapter, as those changes would impact on the application of the RPS to the wider region. Specific changes relating to Devonport, for example, are more appropriately situated in the lower order provisions. In any event, if the submitter had intended for these changes to apply to a specific geographic location, those same changes would have been open to the Council to consider on a region-wide basis.

[44] HNZC drew our attention to interim guidance released by the Panel on 15 July 2015 as follows:¹⁵

- The Panel is not convinced ... that special character ... is "historic heritage" requiring protection as a matter of national importance. If Council wishes to change the provisions from special character to historic character (i.e. a change in the policy basis from s 7(c) and (f) to s 6(f) of the RMA) then it should proceed by way of a plan change with a robust s 32 analysis of the relative benefits and costs of such a change and enabling public participation through the schedule 1 RMA process. ...
- Additional special character areas should be addressed by a future plan change.

On scope for change the Panel stated:

- The Proposed Auckland Unitary Plan as notified identified and proposed provisions for "special character areas". In B.4.2 Special Character the Introduction states "*...In special character areas the maintenance and enhancement of the amenity values and quality of the environment ...*" These are s 7 matters under the RMA.
- Throughout the hearing process, at both Regional Policy Statement (RPS) and district plan level, the Council has proposed to change "special character" to "historic character" and stated that this is based on s 6(f) – the protection of historic heritage as a matter of national importance. The Council acknowledged that this is a significant philosophical shift.



Interim Guidance Text for Topics 029 and 030 Special Character and Pre-1944 15
July 2015.

- Submitters and the Panel questioned whether there is scope in submissions to make such a change.
- The Council provided an analysis of the scope matter in its closing statement. It considers that the submissions from the Civic Trust, The Character Coalition, Remuera Heritage, Heritage New Zealand Pouhere Taonga, Devonport Heritage and Mr Gary Russell provide the necessary scope.
- For present purposes the Panel assumes that there is scope and proceeds on this basis to consider the merits of a change from “special character” to “historic character” and the implications of this.

[45] The Panel’s conclusion in its Recommendation Report on special character was in a similar vein:¹⁶

The implication of the change would be a focus on historic heritage in terms of section 6(f) Resource Management Act 1991 rather than special character as notified, which was intended to have regard to character and amenity values – a section 7 matter.

The Council’s position was supported by a number of submitters including: Devonport Heritage (3263-3), Remuera Heritage Incorporated (5347-12), Heritage New Zealand Pouhere Taonga (Heritage New Zealand) (371-25) and Civic Trust (6444-27 and 28). In general terms these submitters sought the term ‘special character’ be replaced with ‘historic character’. While the Panel acknowledges the relief sought by and the evidence presented by these submitters, it is not clear from reading those submissions that the magnitude of the shift from special to historic character as envisaged by the Council was contemplated by these submissions.

[46] Before us, HNZN submitted:¹⁷

In summary, ... there is not a single submission that as a whole “fairly and reasonably” raises relief (either expressly or by reasonable implication) suggesting that the whole of the Special Character Areas overlay should be recast from a section 7 matter to a section 6(f) matter. Nor can it be said that the relief sought in these submissions even remotely could lead to a reasonable person foreseeing that such fundamental amendment to the overlay was being proposed.

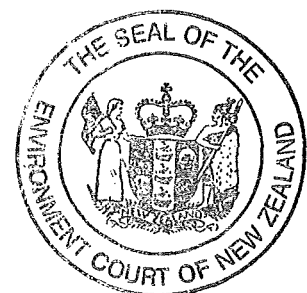
[47] In closing at the hearing the Council submitted that the approach to jurisdiction taken by HNZN was very legalistic and is not what is intended, or supported, in case

¹⁶

Special Character Report at 2.2. CB: Tab 33 at 891.

¹⁷

[2.59].



law. It submitted that we should remember that the Council had the difficult task of converting the relief sought in thousands of submissions, often prepared by lay submitters without professional help, into a coherent and cohesive Unitary Plan. Further, the Council submitted:

As Whata J stated in *Albany North*, the Auckland Unitary Plan planning process is far removed "... from the relatively discrete variations or plan changes under examination in *Clearwater*, *Option 5* and *Motor Machinists*.¹⁸ In addition, natural justice considerations have been adequately met by the Council through this process "... without unduly fettering the attainment of the Act's purpose by literally limiting the relief to that sought in submissions – an approach to planning processes long rejected by the Courts.

In one way or another, the submissions seek that "special" be replaced by words such as "historic" or "heritage" in the context of a character overlay. Also, the submissions clearly articulate and deal with changes to the RPS. In essence, cutting through the HNZC's voluminous submission on this point, the HNZC case (based on a myopic forensic analysis) is that because there is no explicit reference to section 6(f) in the submissions, no one would know that there was an intention to introduce historic heritage matters. The additional objective does not itself refer to section 6(f), which is consistent with submissions. It too uses the words "historic heritage" which is consistent with submissions. ...

Submissions from lay people do not need to refer to s 6(f). It is obvious that submissions are driving at s 6(f).

... when read as a whole, and not considered individually nor legalistically, the Council's approach was a reasonably foreseen logical consequence that the new RPS objective could come from the submissions.

[48] In summary, the Council's extensive response to the 2018 Minute made the following submissions, some of which repeated its submissions at the hearing:

- Case law clearly articulates what is considered to be sufficiently within the scope of submissions in this context. In particular, it is necessary to consider scope in a way which reflects the realities of submissions. Holding that relief in any given submission can only be accepted or rejected is inconsistent with this approach.
- Matters regarding jurisdiction and scope of submissions also need to be considered in the context of, and streamlined nature of, the Unitary Plan. The complexity of the Unitary Plan is far removed from the relatively



Albany North Landowners & Ors v Auckland Council [2017] NZHC 138 at [129].

discrete variations or plan changes under examination in *Clearwater, Option 5* and *Motor Machinists*.¹⁹

- Submissions were on the whole plan consisting of the RPS as well as regional and district plans across a broad spectrum of issues and the Council had a Herculean task in summarising the submissions in a very confined timeframe. Bearing these matters in mind, as well as the issue that many submissions were not prepared by professionals, it was reasonably foreseen that the change to include the Council's Objective and the other amendments to the RPS on the basis proposed by the Council in its Alternative Solution, could be made.
- The Courts have routinely rejected a planning approach that seeks to literally limit the relief to that sought in submissions and which may hinder the attainment of the Act's purpose. As Whata J stated in *Albany North*:²⁰

Councils customarily face multiple submissions, often conflicting, often prepared by persons without professional help. We agree with the Tribunal that Councils need scope to deal with the realities of the situation. To take a legalistic view that a Council can only accept or reject the relief sought in any given submission is unreal. As was the case here, many submissions traversed a wide variety of topics; many of these topics were addressed at the hearing and all fell for consideration by the Council in its decision.
- In light of this case law, the relevant Unitary Plan submissions on which the Council relies to provide scope for its Alternative Solution should not be too literally interpreted. In the Council's submission, the Alternative Solution must be a reasonably foreseen logical consequence of a submission.

[49] Further, the Council submitted that:

- Jurisdiction comes down to "...a question of degree and, perhaps, even of impression."²¹ Furthermore, any issues as to the appropriateness (or otherwise) of changes to planning provisions and the scope of those changes are able to be addressed both in evidence at the hearing and in any decision by the Court.
- There is scope in the submissions in support of the Council's decision to reject the Panel's recommendation in part, and propose its Alternative



Albany North Landowners & Ors v Auckland Council [2017] NZHC 138 at [129].
Albany North Landowners & Ors v Auckland Council [2017] NZHC 138 at [107].
Power v Whakatane District Council & Ors, HC Tauranga, CIV-2008-470-456 at [43].

Solution. The Environment Court can properly consider and address any issues that may be raised through the submissions in terms of the evidence before the Court, and through the hearing process itself, further to the approach taken by the Court in *Motiti Rohe Moana Trust*.²²

- The prospect of amending the special character objectives and policies to incorporate references to the historic heritage values of the Special Character Areas was thoroughly aired through the proposed Auckland Unitary Plan Topic 010 hearing process. The amendments did not come about by way of a side-wind and there is no basis to say that persons directly affected by the amendments have been denied an effective response.
- The submissions relied on by the Council put the Alternative Solution squarely "on the table" and the thorough ventilation of matters during the hearing process mitigates the prospect of substantive unfairness insofar as it appears both sides of the argument were considered. In addition, the appeal rights to the Environment Court further to s 156 of the LGATPA (and exercised by HNZC) ensure any possible issues of natural justice are remedied. There can be no allegation of unfairness or procedural impropriety.

[50] In its response submission to the 2018 Minute HNZC submitted that it is not necessary to determine whether the scope of the change made by the Council was outside the scope of any original submission on the Unitary Plan, because the Corporation's appeal should be upheld on its merits.

Whether there is scope for the Court to disallow the new objective but uphold other amendments made by the Council in its Alternative Solution?

[51] HNZC's notice of appeal sought the deletion of the Council's new objective and the reinstatement of the Panel's sole objective. It also sought: "Such other orders, relief or other consequential amendments as considered appropriate or necessary by the Court ...".

[52] HNZC submitted that if the Court disallows the new objective, there is no scope for the other amendments. Its position was that the appeal against the Council's decision, and therefore the relief in its appeal, includes the deletion of the Council's



Motiti Rohe Moana Trust v Bay of Plenty Regional Council [2016] NZEnvC 190, (2016) 19 ELRNZ 595, [2017] NZRMA 87.

objective and other amendments to the RPS. The other amendments were consequential to the new objective and not stand-alone “additional amendments” as the Council now refers to the other amendments. That is reflected in there being only one decision by the Council in relation to the rejection of the Panel’s recommendation on the special character provisions. If the amendments were stand-alone then the Council should have dealt with them by way of a separate decision.

[53] The Council did not agree. The Council’s response was that its decision on the other amendments was not linked to, or reliant on, the new objective. It said that the other amendments were “additional amendments” and stand-alone and could remain as part of the RPS, despite any deletion of the new objective. The Council said that nowhere in the Council’s Decision Report were the other amendments referred to as “consequential amendments”. The Council submitted that the RMA requires specificity in an appeal and HNZC had not provided that. If it wished to pursue a challenge to the additional amendments, it should have specified the “precise details” of relief sought so that the Court and the respondent Council and any interested parties know what matters are at stake in the appeal. While the appeal referred to consequential amendments that was only with reference to what the Court might find necessary and not the Council’s additional amendments.

Dealing with the jurisdictional issue on scope

[54] The HNZC case makes much of the question as to whether all or any of the Alternative Solution implemented by the Council is within the scope of the Environment Court to uphold and, if so, the basis for that scope. In our August 2017 Decision we did not deal with the jurisdictional issue. Instead we cited *Turners & Growers Horticulture Ltd v Far North District Council*²³ to the effect that there is no requirement to decide a jurisdictional issue if the appeal is declined on its merits.

[55] Our decision is still not to uphold the new objective and we therefore do not need to decide whether that objective is within scope. We now consider the issue of whether the Court has jurisdiction to uphold any or all of the remaining provisions of the Alternative Solution decided by the Council and if so, the basis for that scope. That also raises the question of how far we may be able to go in amendments not just to the Alternative Solution but also to related provisions as consequential amendments. We are also mindful that s 293 of the RMA may be available to us.



Turners & Growers Horticulture Ltd v Far North District Council [2017] NZHC 764 at [30].

[56] Firstly, we consider whether the amendments to the issue, implementing policy for special character areas, and indeed the explanation in the Alternative Solution was within the scope of submissions.

[57] The Civic Trust submission sought that wherever “special character” appears the words should be changed to “historic character”. Reasons given for the Trust’s position are that there is inconsistency with use of this terminology throughout the plan and the word the word “special” is nebulous. Also that “special character” is not as specific as “historic character” e.g. it could apply to landscapes, not the built environment. The Civic Trust also sought to add into the list of attributes and reflect within Policy B5.3.2(2) the words: “A collection of different but compatible styles reflecting the area’s historical evolution over time”.

[58] The submission from Devonport Heritage sought amendments to Part 1, Chapter B, 4.2 Special Character Areas which, while it refers to Devonport, seeks broader changes to the provisions for special character areas. These include a new title “Special Heritage Character Areas”; a change to the introduction to read: “Special heritage character areas have collective and cohesive and historic importance, relevance and interest to a locality or region.” Another amendment was to add “predominance or groups of pre-1940 buildings of a particular era or style”. The Council’s summary of submissions reflected these points, and referred readers back to the submission for specific amendments to the Introduction [page 17/31 of the submission].

[59] We find that these submissions, without going into the detail of other and related submissions, and the Council’s summary of them, meet the test of “reasonably seen logical consequences”. We consider it too narrow an interpretation of the Council’s decision to conclude that a rejection of the new objective (as not being within scope) would disqualify us from making any amendments to the other provisions which the Council either amended, or retained in the light of its decision, in Issue B5.1, Policy B5.3.2 and the explanation and principal reasons. We also find that our decision not to allow the new objective reveals that there are inconsistencies in the Unitary Plan that require further consideration and amendment.

[60] Where there are explanations in a planning document they should accurately reflect the policy framework. We find that the Panel’s explanation and particularly its



use of the word “protection” did not do that. While the Council’s decision did not refer to the use of the word “protection”, there would have been no need for it to do so given its inclusion of an objective repeating s 6(f). We therefore consider it a consequential amendment to our decision to delete the new objective which uses the word “protection”. Similarly, we conclude that the Court has jurisdiction to amend and include amendments to the explanation of the special character area provisions in the RPS to more accurately reflect the actual objective and policy provisions.

[61] We therefore conclude we have jurisdiction to consider HNZC’s appeal under s 156(1) of the LGATPA at least insofar as amendments to the issue and the implementing policy for special character areas and the explanation in the RPS are concerned. There was no suggestion from any of the parties that the appeal extended to or justified amending the lower order provisions.

[62] Accordingly, for reasons we go on to give in our evaluation of the Issue B5.1, Policy B5.3.2 and explanation, we conclude that there is a need for amendments which result in a consistency of use of language and concepts (and a better or clearer relationship between the provisions) to better ensure the achievement of the single objective. We find that we have the jurisdiction to make these amendments.

The Merits Issues

Parties’ submissions

[63] The Council’s case is that there is clear evidence and submissions that:²⁴

- [a] There are historic heritage values within all the special character areas.
- [b] Under s 6(f) of the Act, the protection of that historic heritage from inappropriate subdivision, use and development is a matter of national importance;
- [c] The Objective gives effect to s 6(f) because it provides for the protection of historic heritage values of identified special character areas from inappropriate subdivision, use and development.
- [d] If the Objective is not included, the Unitary Plan would fail to give effect to s 6(f).
- [e] A failure to include the Objective would mean that there would be no appropriate and complete planning management response for the historic heritage values within the special character areas.



In particular, the Council's position is that we should reconsider the historic heritage evidence of Mr Matthews.

[64] HNZN's case was that special character areas were identified for character and amenity values (which it variously referred to as s 7, s 7(c) (amenity values) and s 7(f) (quality of the environment)), and not historic heritage values in terms of section 6(f). That makes "maintenance and enhancement" the appropriate threshold or standard to use for the objective and policy framework for special character areas. However, HNZN and its witnesses accepted that there is historic heritage in some special character areas which is not scheduled (unscheduled) under the historic heritage overlay provisions and which may contribute to the character and amenity of the special character areas. HNZN considered that the Unitary Plan provisions for historic heritage, which involve scheduling of significant historic heritage and then its protection under the s 6(f) threshold of "protection", in the historic heritage overlay is the appropriate method to use.

[65] The Council and the s 274 parties submitted that the only witness with expertise in the assessment of historic heritage who gave evidence to the Court was Mr Matthews. His evidence was that there were historic heritage values in most of the areas identified in the Unitary Plan as special character areas and that this was the reason for their inclusion in the Unitary Plan. HNZN had a different take on this, contending that historic heritage values were not the reason why areas were identified as special character areas in the Plan. HNZN considered that the reason was character and "amenity values" - s 7 and not s 6(f) matters. Accordingly, the most appropriate objective is the single objective recommended by the Panel with its approach of "maintenance and enhancement" of character and amenity values in line with s 7(c) and 7(f) matters. In its submissions and its planning evidence HNZN placed reliance on the existence in the Plan of another method of protecting historic heritage - by scheduling historic heritage sites and places in its historic heritage overlay. Its proposition was that this is the method in the plan for protecting historic heritage. HNZN's case was largely based on planning evidence from Ms Linzey.

[66] The Council, and in response to the 2018 Minute the s 274 parties, submitted that historic heritage in the special character areas requires protection under s 6(f) and it is imperative to protect historic heritage from inappropriate subdivision, use and development. The new objective which the Council seeks to include in the Plan assists in carrying out that function. As the Council recognises, s 6(f) does not differentiate



between "significant" and other historic heritage, unlike in some other s 6 matters of national importance. Further, the s 274 parties submitted that if there is no historic heritage in some special character areas, then the objective will simply not apply to them. That would not negate, or detract, from the requirement to have such a provision to afford protection to historic heritage in those special character areas where it does exist (which is almost all of them).

[67] The s 274 parties submitted that it is also irrelevant whether or not the existence of historic heritage values was the reason why the Council, or the Panel, identified areas as special character areas. What is relevant is that they contain historic heritage, which has not been scheduled in the historic heritage overlay as historic heritage places, and that historic heritage is to be protected as a matter of national importance. Without the new objective, the Plan will not contain any provision for the protection of that historic heritage from inappropriate subdivision use and development.

[68] Further, the s 274 parties submitted that it is no answer to suggest, as HNZC does, that instead of including this objective, the Council should follow the process set out in the Unitary Plan and schedule those sites or areas. There is nothing in s 6 or elsewhere in the Act, or in the Unitary Plan itself, which says that the only method for protecting historic heritage is by scheduling places or areas as historic heritage or by including them in an historic places overlay. Section 6 of the Act does not confine the imperative to protect historic heritage values to those areas or places that a Council has identified and included in a schedule of historic heritage in its plan. Section 6 does not say that "the protection of historic heritage which has been identified and included in a schedule in a plan" is a matter of national importance. It simply says that the protection of historic heritage is a matter of national importance.

[69] The s 274 parties submitted that the issue before the Court is not what provisions might be, or ought to be, included in the plan in the future to protect historic heritage values in special character areas, or what places or areas should be scheduled in the historic heritage overlay. The issue is what provision should be made in the Unitary Plan now to protect historic heritage. The objective proposed by Council assists in providing that protection. Without it, the heritage values in special character areas will have no protection at all in the plan as it is at present, and whether and when they will in the future is no more than a matter of speculation.



[70] The s 274 parties submitted that the rationale for the new objective, as summarised in their submission made at the hearing, was and remains, as follows:

- (a) There is historic heritage within almost all the special character areas.
- (b) Under s 6(f) of the Act, the protection of that historic heritage from inappropriate subdivision, use and development is a matter of national importance.
- (c) The inclusion in the Unitary Plan of an objective providing for the historic heritage values of identified special character areas to be protected from inappropriate subdivision use and development gives effect to that imperative.
- (d) Conversely, in the absence of that objective, the plan would fail to give effect to that requirement.

[71] Further the s 274 parties submitted that the implications of including the new objective can be summarised as follows:

- (a) Under s 104(1)(b), the objective is a matter to which Council as consent authority must have regard when considering applications for resource consents for use and development of land in special character areas.
- (b) Where an application in one of those areas will have an effect on historic heritage (for example, to demolish or alter a building or place in a special character area which has historic heritage value, or contributes to the historic heritage values of the area) the inclusion of the objective will mean that those effects will need to be considered, and where necessary avoided, remedied or mitigated so as to protect historic heritage.
- (c) Conversely, where an application in one of those areas without historic heritage values, or is to demolish or alter a building or place in a special character area which has no historic heritage value and does not contribute to the historic heritage values of the area, the inclusion of the objective will have no effect.
- (d) In the absence of the objective, in considering resource consent applications, regard will not be had to historic heritage values which exist in special character areas, and that historic heritage will not be protected from inappropriate subdivision use and development.

[72] Finally, the submission of the s 274 parties in response to the 2018 Minute is that the inclusion of the new objective proposed by the Council meant that including it in the RPS will:



- (a) Meet the requirements of Part 2, and in particular s 6(f) of the Act;
- (b) Take account of the effects on the environment, and in particular on historic heritage in special character areas;
- (c) Give effect to the national imperative in s 6(f) of the Act; and
- (d) Be the most appropriate way to achieve the purpose of the Act.

[73] The Council's decision referred to a disconnect between s 6(f) in Part 2 and the RPS, and the RPS and lower order provisions in the Unitary Plan, without the new objective. HNZN's case was that there was no disconnect, given the identification of special character areas and the description of their attributes was based on s 7 character and amenity values (which may include but need not relate to historic heritage values) and not s 6(f) historic heritage.

The heritage evidence of Mr Matthews

[74] In response to the 2018 Minute, the Council referred to the necessity for the Court to reconsider the heritage evidence of Mr Matthews because it is relevant to the central issue: - whether the Council's RPS objective is appropriate to achieve the purpose of the Act. The Council continued to assert (as it had at the hearing) that Mr Matthews' evidence was uncontested given there was no other expert evidence on historic heritage. The Council sought detailed reasoning on why (if that is our conclusion) the evidence of Mr Matthews did not justify the approach in the Alternative Solution.

[75] In the August 2017 Decision, this Court summarised Mr Matthews' evidence that:²⁵

... 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 [proposed Unitary Plan]. 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.

[76] The LGATPA directs, at s 145(2), that in preparing the regional plan, the Panel must ensure that regard has been had to the Auckland Plan, the spatial plan for Auckland prepared and adopted under s 79 Local Government (Auckland Council) Act 2009. Mr Matthews referred to the Auckland Plan as setting out the framework for managing Auckland's historic heritage as part of the overall strategic vision for

²⁵ [43].



Auckland:²⁶

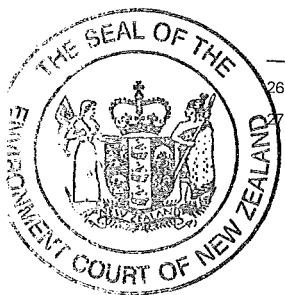
Our heritage has an important role in shaping the character of the places in which we live, work and play. Character results from a predominance of buildings of a particular era or style, a distinctive pattern of lot sizes, street and road patterns, intensity of development, the presence of mature vegetation, the relationship of built form and natural landscapes, or the use of traditional materials and design elements. Many of these attributes relate to the history of an area, and are reflected in the historic built environment. There are areas in Auckland that warrant protection because of their special character. Others may not meet our thresholds for scheduling, but remain important, valued parts of our city (see Figure 4.2 and Chapter 10: Urban Auckland). We will therefore conserve the historic character of our suburbs, town centres and settlements to ensure their appearance, quality, identity and heritage values are retained and revealed.

[77] Figure 4.2 from the Auckland Plan: *General Process for Managing Heritage Places to Conserve Their Values* - has a hierarchy in terms of recognised historic heritage values and level of regulatory control (recognising possible measures include legal instruments and unitary plan approaches), starting with World Heritage Sites and moving down through Scheduled Historic Heritage Places (Category A and B), Historic Heritage Conservation Areas, Historic Character Areas to General Character Areas.

[78] That is the context in which the Unitary Plan (which is to have regard to the Auckland Plan) was prepared.

[79] Mr Matthews gave evidence on what he referred to as a values-centred approach to the management of historic heritage as best practice. He said that this approach has broadened and provides greater depth of understanding of what is considered historic heritage and worthy of management and protection.²⁷ In the view of Mr Matthews, while the Unitary Plan identifies both individual historic heritage places and historic heritage areas, special character areas also possess historic heritage values and are within the definition of “historic heritage” under the RMA. Mr Matthews was of the opinion that although the Unitary Plan makes a distinction between the management approach to scheduled historic heritage and special character areas, the methods to assess and measure the associated qualities and values and levels of significance, and the corresponding planning response to protect

²⁶ Chapter 4.
Evidence-in-chief [5.3]-[5.6].



and manage those values, are similarly founded on a values-based planning approach.

[80] Mr Matthews considered that historic heritage places and historic heritage areas in the Unitary Plan deal with individual places or areas where it can be shown that a greater range of heritage values or specific heritage values of greater significance are evident and therefore require a greater degree of management. In his view, within special character areas, collective historic heritage values are evident, rather than a range of historic heritage values associated with a particular or individual place or area that may warrant scheduling. He said that the degree of management of these special character areas reflects the significance of the values or qualities contained within these areas.

[81] Mr Matthews said:

[5.14] Special Character Areas are those that exhibit the characteristics of a particular era of human settlement and development, contributing to an understanding and appreciation of its history and culture. In my opinion, Special Character Areas demonstrate a measure of coherence based on a range of historic and physical qualities or values and contribute to an understanding of Auckland's historic development. The values evident in these character areas demonstrate they are of cultural significance and form part of our historic heritage.

[5.15] The special character of Auckland's residential and business Special Character Areas results from a combination of elements including the urban structure, buildings and their relationship to one another, the street and open spaces. A collective coherence is often evident based on a mix in the age and styles of buildings in a particular area.²⁸

[82] The Council pointed to Mr Matthews' expert view that:

[6.11] The large collections of historic timber houses in Auckland's Special Character Areas are in my view of national significance; although similar types of houses are found in other New Zealand towns and cities, the dramatic growth in Auckland's population in the late 19th and early 20th centuries has resulted in the largest numbers of these houses being located in Auckland's suburbs and settlements. The suburb of Grey Lynn, developed as the Surrey Hills Estate, is likely to have been the single largest residential subdivision in the country.

[6.12] There is a collective value within these residential suburbs and commercial areas that is greater than the sum of the parts. Collectively, these areas are a significant part of Auckland's



See Schedule 15 Special Character Schedule, Statements and Maps of the AUP, 15.1.1. Background.

cultural expression. They are places that enrich the lives of those that live in them and those that visit. They provide a sense of identity and connection to the community and landscape.

[6.13] They also represent an important historical record of the development of the City and its people from the colonial period to early 20th century and are an expression of our identity and experiences.

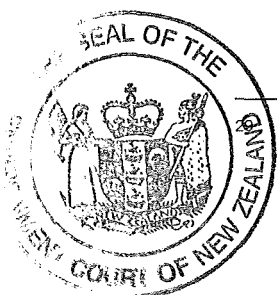
[6.14] In my opinion, these are places of cultural significance with clearly identifiable collective historic, architectural, cultural, and technological values, that can tell us about our collective history and the past that has formed the city of Auckland. These areas are finite and irreplaceable.

[83] The Council also referred to evidence given by Mr Matthews that:

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. In my opinion, the character and amenity of these areas does not exist without the historic heritage values embodied in the physical fabric of these areas.

[84] Mr Matthews listed several qualities and values within the special character areas which, he considered, demonstrate that the areas also exhibit collective historic heritage significance under s 6(f).²⁹ Mr Matthews believed there is an element of historic heritage value in the broader collective values of special character areas when seen in their totality, with the scale varying from area and area. He considered the identification of the special character areas is a combination of both factors – amenity and historic heritage values. It was his view that the historic heritage values contribute to the amenity values. He said there is always evidence of some aspect of historic development in those areas, whether it is the particular houses or the pattern of subdivision and development. It was his understanding that was the motivation behind identifying those areas as special character areas.

[85] Mr Matthews considered that the special character areas (with at least two specific exceptions drawn to our attention and which we covered in the August 2017



Evidence-in-chief [6.2].

Decision)³⁰ had a historic heritage basis. While he agreed that amenity can be a function of things other than heritage, in his opinion the special character areas in Auckland are a combination of both factors – historic heritage and amenity values. Mr Matthews considered there is 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 of what he called “historic character areas” covering a number of streets and others encompassing whole subdivisions.

[86] Mr Matthews gave evidence that he considered RPS Policy B3.5.2(2)(b) (as amended by the Council in its decision) to contain factors consistent with the definition of historic heritage in the RMA and which he understood to encompass a values-centred identification and evaluation approach. Mr Matthews considered historical factors to be historical values in Policy B3.5.2(2). He considered the special character areas to be identified in accordance with that Policy and the material on the qualities of each special character area in Schedule 15 to also reflect Policy B3.5.2(2). He also said that the individual Special Character Area Statements are to be read in combination with a general introduction which provides an overview of Auckland’s historic development, as well as a guide to historic housing styles.

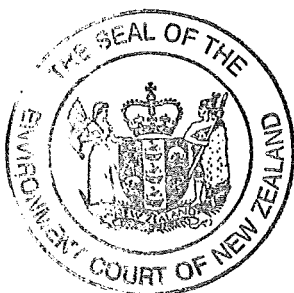
[87] We note that in Schedule 15 each of the special character areas generally have an italicised paragraph at the beginning of the summary stating:

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.

Physical and visual qualities: The area collectively reflects important or representative buildings, types, designs, styles, methods of construction, materials and craftsmanship, urban patterns, landscape, and street qualities.

[88] The italicised part of the summary beginning with the word “Historical” replicates Policy B5.3.2(2)(b) as amended by the Council in its decision. The other one is slightly different from Policy B5.3.2(2)(a), also as amended by the Council in its decision, which reads:

³⁰ One exception is Howick SC Area – Business and we note Schedule 15.1.6.1 under the heading of “Summary of special character values: No special character statement has been prepared for Howick”. Ms Rowe gave evidence that the Council had not recommended the inclusion of this area but that it was an addition made by the Panel. Another is Hill Park, added by the Panel, and which Mr Matthews accepted had not come from the “historic heritage” assessment process that the Council had undertaken.



(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

The two parts of the summary in Schedule 15 are also in a different order from that in Policy B5.3.2(2)(a).

[89] In cross-examination Mr Matthews accepted that the Panel made changes to the character statements prepared by the Council and that in many cases it involved removing the word "historic" but said he did not know why that was done. Regardless of that, it was clear that Mr Matthews considered the special character areas to have historic heritage values.

[90] We mention here the planning evidence of Ms Linzey as we did in our August 2017 Decision, which disagreed with Mr Matthews' evidence that the spatial extent of the special character areas was derived from historic heritage matters. She said that while a significant portion of the overlay appears to be translated from the legacy zones, the objectives of the Residential 2 and 3 zones in the Legacy Auckland City District Plan (Isthmus Section) and other legacy plans were originally derived from a range of amenity and environmental values (as reflected in the objectives of these zones), and not from historic heritage (s 6(f)) attributes.

[91] The Council submitted that Ms Linzey did not have a full understanding of the background to the earlier (or legacy) plan development. It said that Ms Linzey is not a historic heritage expert, and her evidence on this issue should be given little, if any, weight by this Court.

[92] Further the Council submitted that the fact that the Council had not assessed these new special character areas recommended by the Panel in terms of their historic heritage values does not necessarily mean that they may not exhibit any historic heritage values at all. Nor does it mean that historic heritage values do not exist at all in other special character areas as identified by Mr Matthews (and now included in the Unitary Plan). Ms Linzey and Ms Lane (for HNZA) gave evidence that "... 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 Act."



[93] The s 274 parties submitted that if there has been no assessment of special character areas in terms of their historic heritage values, such as Howick - Business and Hill Park, then the new objective will simply not apply to them. That does not negate, or detract from the requirement to have such a provision to afford protection to historic heritage in those special character areas where it does exist (which is almost all of them).

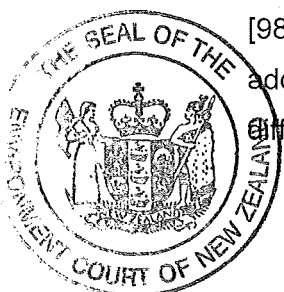
[94] HNZN did not dispute that some, or parts of some, of the special character areas may have historic heritage values. HNZN's argument was that the development of the special character areas as notified and recommended by the Panel were premised on s 7 character and amenity values and not s 6(f) historic heritage values. It said that the lower order provisions of the Unitary Plan, including the mapped areas, provisions and statements reflect that genesis and have language referencing the maintenance and management of the predominant character of these areas, and not the protection of historic heritage within them.

[95] The Council submitted that it is clear from Mr Matthews' evidence that the heritage values associated with identified special character areas are a matter of national significance (rather than national importance), providing a collective value greater than the sum of its parts that are finite and irreplaceable. Accordingly these heritage values warrant appropriate management further to s 6(f) of the RMA.

[96] HNZN considered the evidence of Mr Matthews on qualities and values included in the Unitary Plan for identifying the special character areas relate to s 7 values with a "maintenance and enhancement" focus and not to identifying areas as requiring protection under s 6(f). HNZN particularly drew on the Policy B5.3.2(2) factors as recommended by the Panel for identifying and evaluating special character areas in support of its argument.

[97] Mr Matthews also gave extensive evidence about what he considered to be the management approach necessary for historic heritage in special character areas, and his understanding of whether and how the provisions of the Unitary Plan would deliver that. Mr Matthews was also cross-examined on his understanding of how the current provisions and particularly the RPS policies give effect to the new protection objective.

[98] Mr Matthews considered the implementation of the plan would not change by adding the new objective. When asked whether adding the objective would make any difference to the way the policies are interpreted, Mr Matthews considered that the



objective aids an understanding that historic heritage values, which underlie the identification of the special character areas and make a significant contribution to them, are evident in the areas and require to be managed. He said that the policies focus on the character of the area which derives from how a building contributes to the overall character in that area – the collective historic heritage values of the entire area - and not the individual building. He expected that in areas where there is a demolition control it is going to be difficult to remove a building that for example dates from the 1930s, or not obviously despoil it by subsequent works that are visible from the street.

[99] We now turn to the evidence of Ms Linzey (planner) for HNZC, before considering the evidence of Ms Rowe (planner) and Ms Mein (urban designer) for the Council. We then look at two areas of contention - the treatment of historic heritage in the Unitary Plan and the areas (sites) subject to demolition controls.

The planning evidence of Ms Linzey

[100] Ms Linzey gave evidence that in her view the identification and mapping of special character areas both as notified and as recommended by the Panel (and largely accepted by the Council in its decision) were premised on s 7 character and amenity values. As such, the lower order provisions, including the mapped areas and provisions, reflect that genesis.

[101] She did not disagree that there may be historic heritage qualities and values exhibited within some special character areas. However, from her involvement in the Unitary Plan process and her review of the area covered from those overlays, she did not consider they are the qualities and values that have defined the extent or management of the special character areas. She considered Policy B5.3.2(2) provides specific guidance on what factors have been (and would be) used for identifying and evaluating special character areas.

[102] To her mind this framework appropriately allows for the identification of character areas. It means that character that is not necessarily 'historic' is provided for, such as areas with special architectural qualities that may be modern. She was concerned that what she described as the Council's attempt to refocus the special character areas to historic heritage values may undermine the outcomes that Policy B5.3.2(2) seeks to achieve.



[103] She said that while reference is made to the “historic context” in B5.3.2(2), which may inform the amenity of the area, no reference is made to historic heritage. In her view, there is an important distinction between “historic heritage” values and amenity and what she called “historic/landscape/built form context”. She based this conclusion on her analysis of the Unitary Plan provisions which extended from the RPS through to the District Plan provisions.

[104] In the RPS Ms Linzey found that nowhere other than the newly inserted objective is there any reference to the underlying policy basis in s 6(f). The existing objective refers specifically to the maintenance and enhancement of character and amenity values. The supporting policies in B5.3.2 all refer to maintaining and enhancing the identified character of the areas by way of controls on demolition, design and appearance of new buildings and additions and alterations to existing buildings.

- Policy 1 is specific to maintaining and enhancing places that reflect amenity and character
- Policy 2 sets out the factors used for identifying and evaluating special character areas
- Policy 3 requires that any special character areas that have been identified need to be set out in Schedule 15
- Policy 4 sets out the management approach for special character areas with a ‘maintaining and enhancing’ approach that restricts the demolition or destruction of special features but does not seek to ‘protect’ these areas.

[105] In terms of the District Plan Ms Linzey considered that the objectives in D18.2 also seek the outcome that the special character values identified in the special character areas are maintained and enhanced. She considered that the residential policies in D18.3 all align with the policy direction of s 7 about ‘maintaining and enhancing’ rather than ‘protecting’:

- Policy 1 requires development to have regard to special character values and the context of the area
- Policy 2 specifies the maintenance and enhancement of the built form, design and architectural values of the buildings, and the area
- Policy 3 discourages the removal or substantial demolition of contributing buildings but does not seek to ‘protect’ these areas



- Policy 4 requires that any demolition does not erode the special character values of the area or disrupt the cohesiveness of the streetscape, however, does not seek to 'protect'
- Policy 5 encourages maintenance of the buildings in the areas
- Policy 6 seeks to maintain and enhance the streetscape and special character values of the area
- Policy 7 encourages retention of special features that contribute to the character of the area.

[106] As such, she considered the majority of the policies relate to maintaining and enhancing the special character areas. Some policies seek to discourage the removal of buildings that may erode the special character values (as distinct from seeking to protect these buildings). She said that a key feature of the provisions of the Plan in achieving the special character objectives, is that they anticipate that new development may be undertaken and may reflect and contribute to the character values identified in these areas.

[107] Ms Linzey also looked at Schedule 15. She summarised the Schedule as beginning by describing the purpose of the character area statements and states that these focus on: "the special character values and physical and visual qualities for each special character area and how those elements interrelate and contribute to the predominant character of that area". She considered that the focus is on maintaining and managing these areas, with specific provision for the introduction of compatible new buildings which reference the predominant streetscape character. This appears to be where she draws her reference to "historical context" from, given this is the only place (on a word search) this expression is used in the Unitary Plan.³¹

[108] She then referred to other provisions of Schedule 15:

- The introductory background section setting out attributes that have been identified as contributing to the character of each area, referencing special character values and not making specific reference to historic heritage values for these areas

³¹

The Introduction to Schedule 15 states: "The attributes that contribute to the character of each area include: Historical context, Physical and visual qualities, Built form (Period of development, Scale of development, Form and relationship to the street, Density/Pattern of development, Building types, Visual coherence), Architectural values (Styles, Material and construction), Urban structure (Subdivision, Road pattern, Streetscape, Vegetation and landscape characteristics).



- Listed specific attributes identified as contributing to the special character of each area
- Identified key special character values (the overall notable or distinctive aesthetic, physical and visual qualities of the area and community associations). Assessment of proposals for demolition, removal, additions and alteration are considered against the statements as well as the relevant policies.
- While there are references to historical values (historical context being an attribute contributing to the character of an area) in the statements, there are no references to heritage values, except with respect to scheduled Historic Heritage places (identified in their own right) and not because they fall within a special character area.

[109] Ms Linzey considered that these provisions are contrary to the Council's decision statement recording that because the District Plan provisions and character statements identify the heritage values of the areas, there would be a disconnect if there was no RPS objective which also referred to heritage. In her view, the Council continues to conflate concepts, in that historical context values (which she considered a s 7(c) amenity consideration) are quite distinct from historic heritage.

[110] Ms Linzey's opinion is that the correct approach to the protection of any historic heritage both within any special character area and across any part of Auckland, would be to first identify these areas in accordance with the specific and defined (what she called) criteria of s 6(f) of the RMA and the Unitary Plan, to spatially define these. Once that was done, the statutory process should be worked through to schedule them.

[111] Ms Linzey considered the new RPS objective would require subsequent specific consideration of how the District Plan provisions provide for the protection of these values (rather than the current management focus on maintaining and enhancing amenity values).

[112] In her opinion, the extent of historic heritage values within the identified special character areas are not defined: rather it is left to subsequent "case by case" assessment to firstly confirm either the existence or absence of these values, and subsequent to any such values being identified, their protection. In her view that management approach risks undue burden and uncertainty for a large area of the



region where special character values have been identified and mapped. She also said that its ad hoc nature risks an inconsistent approach to the identification and protection of historic heritage across the region. Furthermore, her evidence was that this approach had not appropriately provided for an adequate and full consideration of the costs and benefits of what she considered a precautionary protection of unidentified historic heritage as against other resource management matters identified as significant to the city.

[113] Given Ms Linzey's opinions on the above, she did not consider there was any disjunct, or gap, either to s 6(f) or to the lower order provisions and that the inclusion of the new objective was inappropriate.

The urban design evidence of Ms Mein

[114] Ms Mein, an urban design expert, gave evidence that from an urban design perspective she considered that historic heritage (s 6(f)), landscape values (s 6(b)) as well as amenity values (s 7(c)) are some of the factors that contribute to the character or amenity of a place. In her opinion, historic heritage is one of the most important contributing factors to the "character" or amenity of the special character areas.

[115] She agreed with the evidence of Mr Matthews that the special character areas are identified on the basis of collective and cohesive values related to a particular era or period within Auckland's settlement history, indicating the importance of historic heritage to the amenity values of the areas. Also that Special Character Area Statements summarise the historic values, and physical and visual qualities, of each of these areas, and that the management framework for these areas is established on the identified historic values as well as other amenity values. She concurred with Mr Matthews that the character and amenity of special character areas is derived from the presence of historic heritage values based on the settlement pattern and built form from distinctive eras in Auckland's urban development.

[116] She considered objective D18.2(1) and a number of the policies within the special character area overlay either directly or indirectly reference not only amenity but also historic heritage values. She also considered that the policies also create a direct link back to the Special Character Area Statements. She said that the discouragement of demolition (through a restricted discretionary activity status) generally suggests the built fabric is of an importance that goes beyond simply streetscape derived amenity and is connected with historic heritage values in terms



of the contribution that building makes to a place and our appreciation of it. Similarly, when undertaking additions or alterations, there is a clear desire within the policy framework to minimise the loss of built fabric and recover or reveal values of buildings and features which suggests the built form within these areas is more than simply an amenity value as defined within the RMA.

[117] She said that while many of the D18.8.2.1 Assessment criteria for restricted discretionary activities are urban design related, including the contribution that a new building will make to streetscape character, others have a stronger link to historic heritage such as reference to the integrity of the building and the authenticity of its component parts. While integrity can refer to structural integrity, in this context it appears to relate more to how well the building has retained the important aspects of its historic construction, appearance and association. Similarly, in her view, authenticity is a term more commonly applied to historic heritage in relation to its physical fabric and construction methods.

[118] She said that other D18.8.2.1 Assessment criteria refer to whether the building has retained its original features. If it were only character and amenity that were being managed, original features would not be of significance, because arguably like could be replaced with like to achieve the same amenity outcome. However, original features are important when discussing historic heritage values as that is part of the historic fabric of the building.

[119] She concluded that the special character area overlay relates to management of not only amenity values but also historic heritage values, insofar as the latter contributes to the identified character of the streets, places and areas within the overlay that the Council is seeking to manage through the special character area overlay provisions. She therefore considered it inadequate to merely refer to amenity in the RPS objective, as this would be inconsistent with the lower order provisions within D18. She also said that the RPS objective and policies as recommended by the Panel fail to acknowledge that the provisions of the special character overlay retain a strong link to historic heritage as well as to amenity. She considered the new objective necessary to acknowledge that identified special character areas contain historic heritage values that contribute to their amenity and character.

[120] Ms Mein was asked why it is necessary to add the new objective (having considered that the addition of the objective will not change the way in which the



district plan controls will be applied, as we referred to in our August 2017 Decision). She considered that there are a number of objectives, policies and assessment criteria in D18 that assume a level of retention which is a matter of protection, and also relate to historic heritage. She agreed those provisions primarily referred to demolition controls which have a focus on the effect of demolition on the character of the area.

[121] When asked, for example, whether the provisions focused anywhere on the inherent quality of the building itself, Ms Rowe referred to Objective D18.2(2) which refers to the physical attributes that contribute to or support the special character of the area are retained. She also mentioned Policy D18.3(2)(g) – minimising the loss of built fabric and encouraging maintenance and repair - believing it to have an emphasis applying to historic heritage as well as amenity. In re-examination on Objective D18.2 and the policies that follow, she said that while there is nothing explicit, the intent still is that historic heritage forms part of that overall assessment in terms of the historical form of the subdivision, the cohesiveness, the relationship of that built form, and the built form and the architectural values itself.

The planning evidence of Ms Rowe

[122] Ms Rowe relied on the evidence of Mr Matthews on what constitutes historic heritage and that the genesis of most of the special character areas was work done on historic heritage. She said Policy B5.3.2(4)(b) seeks to restrict the demolition of the buildings and the destruction of features that define, add to, or support the special character of the area. As Mr Matthews explained in his evidence, the features that do that are described in the special character area statements, and the work done to inform the preparation of those was undertaken through a historic heritage lens. She considered that the primary concern is the contribution the building makes to the collective historic heritage value.

[123] Ms Rowe gave evidence that notwithstanding that the words “historic heritage” do not appear in the Unitary Plan in relation to special character areas (apart from in the new objective) in her view “special character” is referring to both the historic heritage values in the area and the amenity values that are derived from those historic heritage values. In Ms Rowe’s analysis the heritage elements are a key determinant of the amenity values and not a subset of the amenity values.



[124] Ms Rowe gave evidence that the lower order provisions seek to manage historic heritage values, commensurate with the level of significance afforded to those values, and the new objective is not only necessary to give effect to Part 2 and the purpose of Act but to link those parts of the Act through to lower order provisions. She considered the new objective (and presumably also the policy and other amendments) completed the picture already evident in the lower order provisions and the spatial extent of overlay and reflected generally in the Panel's recommendations to the Council.

[125] Ms Rowe considered there to be a gap in the RPS provisions between the single objective and s 6(f). She accepted that the policies in B5.3.2 do not specifically use the word "protect" but said that the RPS policies relating to the historic heritage overlay do not refer to the word "protect" although they do use the words "avoid" and "retain." Her view is that the term "special character" is referring to both the historic heritage values that collectively contribute to the character in the area and the amenity values that are derived from those historic heritage values. She considered that under Policy B5.3.2(2) identification and evaluation of special character areas, areas would only qualify if they receive a "tick" under both characteristics. She also referred to Policy B5.3.2(4)(b) which seeks to control the demolition of the buildings and the destruction of features that define, add to or support the special character of the area.

[126] On the basis for her opinion that there is a disjunct with the lower level district plan provisions, justifying the inclusion of the new objective, Ms Rowe specifically referred to several policies (and held a different opinion from Ms Linzey). At the district plan level Ms Rowe referred to:

Policy D18.3(2)(g) seeks to minimise the loss of built fabric which is related to the management of historic heritage values.

Policy D18.3(3) which relate to discouraging the removal or substantial demolition of buildings that contribute to the continuity or coherence of the special character area as identified in the special character area.

Policy D18.3(7) seeks to retain special features (such as boundary walls, fences, paths and plantings) that contribute to the character of the area.

[127] She considered that these policies all relate to Objective D18.2(2) which seeks to retain the physical attributes that define, contribute or support the special character of the area. And she thought that the outcomes also sought in those policies reflect similar outcomes sought in policies in the historic heritage overlay that relate to the



setting, minimising the loss of fabric, and supporting actions that recover or reveal heritage values of a place and encouraging maintenance and repair.

[128] However, Policy D18.3(2) when read in full states:

Maintain and enhance the built form, design and architectural values of the buildings and the area, as identified in the special character area statement, so that new buildings, alterations and additions to existing buildings, infrastructure and subdivision (where applicable):
(emphasis added) ...

(g) minimise the loss of built fabric and encourage maintenance and repair;

[129] Ms Rowe did not consider the lower order provisions need to be changed as a result of the insertion of the new objective. She considered in the round the policies that flow from the RPS reflect the significance of the historic heritage values that are evident within those areas. She said the areas constitute in part historic heritage values of a lesser significance to scheduled historic heritage places and historic heritage areas but the matters they relate to are the same. While there are historic heritage values evident in areas, the significance of those values is less than those reflected in the historic heritage overlay. In her view the outcomes and activities the special character overlay seeks to achieve and to manage reflect similar outcomes and activities in the historic heritage overlay.

[130] Ms Rowe was asked whether, given there is a section on historic heritage that does not cover all historic heritage elements, there might be a concern about adding another objective to do with historic heritage. Why could it not stand alone and have a series of policies (and rules) that follow it? She considered that the key driver of the values that exist in these special character overlays is historic heritage, albeit of a lesser significance than those exhibited in the historic heritage areas and scheduled historic heritage places, but those values are the key driver of what is worth managing in these particular areas.

[131] She was questioned about whether the policies reflect that point. It was put to her that the identification Policy B5.3.2(2) talks about physical and visual qualities and then the word “legacy” and now “historical” and that those are not necessarily historic heritage but are wider and cover amenity. She said her opinion was an interpolation based on her knowledge of methodology used to refine the spatial extent of overlay through the hearings process.



[132] She did not agree that adding the new objective would elevate the historic heritage values, given her view that it is not an outright protection but a protection from what is inappropriate in terms of the significance of those values. She said that the historic heritage value that contributes to special character areas is collective, and not based on an individual building within the overlay but is the collection of the values across the area a whole.

[133] Ms Rowe was asked about the position in areas with no demolition controls and questioned as to whether these warrant the additional level of control that might be implied in the new objective. She considered the provisions in entirety hark back to historic heritage values and amenity values.

[134] Ms Rowe considered that the demolition controls in the special character areas do not seek to have same effect as those in the historic heritage overlay and provisions. She said that the demolition provisions in the historic heritage overlay are about the particular building or historic area in issue, and the demolition provisions in the special character area overlay are dealing with the character of that area. She said that is because the significance of historic heritage values associated with the significant places in the scheduled historic heritage places is attributed to a specific building or place. In her view, the historic heritage values evident in a special character area overlay are attributed to the area as a whole in a collective way. She also said that there is a range of other provisions in the plan relating to amenity values e.g. height, HIRB, building setbacks and yards etc.

[135] Ms Rowe was asked whether a better approach would be a different overlay dealing with historic heritage concerns at a lower level than provided for in the historic heritage overlay that would leave the special character provisions to function for s 7 reasons. Ms Rowe did not consider such an approach would provide greater certainty for a landowner, given her view that there is no need for any change to the lower order provisions.

[136] She also did not agree that the simplest way to reflect accurately the presence of historic heritage values and special character areas and their contribution would be to say something along the lines of the following in the explanation:

These special character areas generally have areas with historic heritage values which make a significant contribution to the overall character and amenity of these areas.



In her opinion that was because the objective clearly relating to Part 2 is necessary to lead to the RPS Policy B5.3.2(4)(b) which seeks to manage identified special character areas by “restricting the demolition of buildings and destruction of features that define, add to or support the special character of the area”. She considered that the features defining, adding to or supporting the special character of the area are covered in the specific special character area statements. Her view was that consideration needs to be given to the primary concern, which is the contribution the building makes to the overall values of the area.

Treatment of historic heritage in the Unitary Plan

[137] As we said in our August 2017 Decision, Ms Linzey considered historic heritage should be dealt with under the Unitary Plan’s historic heritage approach, which involves identifying and scheduling significant historic heritage (the historic heritage overlay). The s 274 parties pointed to Ms Linzey accepting in cross-examination that, if there is historic heritage in special character areas which is not scheduled, that historic heritage should be protected. Ms Linzey was then asked to point to any plan provisions which, absent the objective under contention, provide the required protection for that unscheduled historic heritage. The s 274 parties submitted that she was unable to do so, because there is none. In its submissions in response to the 2018 Minute, HNZA submitted that D17 sets out the historic heritage overlay and includes the following explanation regarding the approach to unscheduled historic heritage within the provisions of the Unitary Plan:

Unscheduled historic heritage ...

Presently unscheduled historic heritage places that meet the criteria for scheduling will be evaluated for inclusion in the schedule through future plan change processes.

This explanation was not amended by the Council in its decision.

[138] Ms Rowe made much of the special character areas and their treatment of historic heritage filling the gap for historic heritage which is not significant and therefore not scheduled in terms of a matter of national importance in s 6(f). She considered, looking at the resource the Unitary Plan is managing, which is the extent of the special character overlay, that it has historic heritage values and therefore justifies a reference to those values in the RPS objective.



The areas (and sites) subject to demolition controls

[139] As noted in para [7] the maps in Schedule 15 show some of the special character areas as containing “sites subject to demolition, removal and relocation

rules”. During the hearing there was considerable cross-examination of witnesses on what was referred to as “demolition controls” and we therefore use that terminology.

[140] A focus of the HNZC case was the implications of the demolition controls in the areas and sites where these applied. Council witnesses were unsure as to why demolition controls only applied to some buildings in some special character areas in circumstances where demolition is a key activity to manage, if the intention is to protect historic heritage values. Indeed, Ms Rowe opined that if there is no demolition control on a site, it is likely a building on that site will not be assessed as contributing to overall collective historic heritage values.

[141] We had no evidence on the basis for the demolition controls, with none of the witnesses (including Mr Matthews) able to assist us in understanding why particular special character areas (and even sites within them) had demolition controls and others did not. HNZC’s cross-examination of the Council witnesses on the demolition controls seemed to indicate a particular concern that the new objective might be interpreted to mean that what was previously a single objective involving “maintenance and enhancement” might not apply, or have a lesser priority, when considering a resource consent application for demolition.

[142] HNZC asked Mr Matthews if a “protection” objective specifically applying to buildings subject to the demolition regime would make it clear to landowners what they are facing when applying for a resource consent. That was in response to what HNZC considered to be the present position, where there is a new objective and policy on demolition, and no clear connection or logical flow between the two. Mr Matthews did not accept HNZC’s point and believed the Council’s Alternative Solution provides the clarity needed.

[143] When questioned about the D18.8.2 Assessment criteria for restricted discretionary activities Mr Matthews said that in some areas houses require consent to demolish and others do not. He was asked to consider sites with a cross-hatch subject to demolition, removal and relocation rules in Mt Albert and whether that was of any assistance in identifying whether to protect (a historic heritage issue under s 6 under the new objective) or simply an amenity issue to maintain and enhance under section 7. He deferred to Ms Rowe, but said he understood the cross hatching only meant that the property was subject to demolition control rules.



[144] As was pointed out to us by some witnesses, D18.3 Policies Special Character Areas Overlay – Residential include:

- (4) Require any application for demolition or removal of a building in a special character to, or on its own or cumulatively as a result of other removals or demolition, demonstrate that the loss of the building:
 - (a) would not erode the identified special character values of the area;
and
 - (b) would not disrupt the cohesiveness of the streetscape and wider special character area, including links with scheduled historic heritage places.

Assessment criteria for a restricted discretionary activity for total or substantial demolition or the removal of a building or relocation of a building within the site (D18.8.2.1) include that Policy along with other policies. Ms Mein, Ms Rowe and Mr Matthews referred to several assessment criteria in support of including the new objective for protecting historic heritage.

Some Matters Listed in the High Court Decision

[145] Before proceeding to undertake an assessment of the Alternative Solution against the statutory provisions and framework as summarised and determined in *Man O'War Station v Auckland Council* [2014] NZRMA 335 (EnvC), we consider a number of matters listed in the High Court decision that may have a bearing on our assessment.

The certificates of compliance granted to HNZC

[146] HNZC submitted³² that it is difficult to reconcile the Council's assertion that the Environment Court erred by taking into account the irrelevant consideration of the certificates of compliance held by HNZC to demolish dwellings on sites included within the special character areas, when this was a matter raised by the Council and Ms Arlov. HNZC considered that the evidence simply illustrated how HNZC had acted to minimise the adverse effects of the Council's efforts to transform the special character area provisions into historic heritage provisions, but no party claimed it should determine the outcome of the Environment Court hearing.

[147] The Council submitted³³ that the Corporation's certificate of compliance applications, and any practical implications relating to the exercise of those



[7.4]-[7.5].
4.17.

certificates, are irrelevant to the statutory test and have no bearing on the Court's assessment of the objective.

[148] We covered the situation with HNZC's applications for certificates of compliance for the demolition of two thirds of the 379 dwellings in the special character areas and the arrangement that HNZC has with the Auckland Council to only process these as required by HNZC for completeness.³⁴ Both Mr Burns and Mr Loutit made much of them to support an argument that HNZC was overstating the potential impact of the alternative solution on its ability to access and develop land for housing in the special character areas. The position with certificates of compliance for the demolition of dwellings in the special character areas granted to HNZC, or applied for and yet to be granted, had no influence on our decision. We note that Mr Osborne, the witness for HNZC on economic effects, did not take into account the certificate of compliance applications.

The extent to which objectives should be considered when assessing a restricted discretionary activity

[149] The Council submitted³⁵ that the extent to which the new objective should be considered when assessing restricted discretionary resource consent applications is separate from, and independent of, the matters that are before the Court. It said that it is not necessary to consider the consent authority's approach when considering such consents in order to determine the appropriateness of the new objective. The Council also submitted that the new objective was not operational and need not be applied when considering a restricted discretionary activity, drawing on the joint witness statement from the planners.

[150] Even if it is not operational, an objective may lend colour to policies (and other implementing provisions such as descriptions, individual special character areas, assessment matters etc). However, on reflection these are matters for another day, and detailed planning and legal argument in relation to the Unitary Plan provisions on individual applications. It is not necessary for the Court to determine the consent authority's approach to assessing a restricted discretionary activity application when considering the appropriateness of the new objective.



[73]-[75].
[4.18]-[4.19].

The Council's processing of a resource consent for a Buchanan Street property

[151] The Council submitted that this matter is not relevant to the assessment of the appropriateness of Objective B5.3.1(1) under the statutory test. The Council had submitted that little, if any, weight should be given to Ms Lane's evidence, given that it related to a single consent application, and should not (in any event) be determinative of the appropriateness of an RPS objective. We concur.

Future possible implications of the Alternative Solution for resource consenting

[152] The Council submitted³⁶ that the issue as to whether the Council's RPS objective would have, as alleged by HNZC, undesirable implications for the consenting regime in terms of future development is an irrelevant matter. The fact that HNZC "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 area" is irrelevant.

[153] Further, the Council submitted that the evidence of Ms Lane (for HNZC) in terms of her experience relating to the processing of resource consent applications within the North Shore Special Character Areas overlay is also irrelevant. The Council's witnesses considered that the new objective would make no difference to the outcome of the consenting process. The Council said that in the light of these matters, the Court may have concluded that the Council's objective left the Court in considerable doubt as to the rationale for, and potential implications of, including the new objective.³⁷ If so, the Court's conclusion was based on considerations which were irrelevant to the assessment of appropriateness of RPS objectives, in terms of the statutory test and relevant case law.

[154] HNZC submitted that the Council's concern in terms of this question relates to the failure of the Court to make a substantive assessment of the implications of retaining or deleting the new objective. In summary HNZC submitted:

- If the new objective is fundamentally flawed in terms of Part 2 and s 32 of the RMA then it was not necessary to explore the implications of retaining or implementing it. Put another way, any positive implications of retaining the new objective could not overcome its inherent legal flaws.
- In any event, the Court discussed the evidence on the implications on retaining or deleting the new objective. The Council's counsel and



[4.20]-[4.24].
August 2017 Decision [86].

witnesses were adamant that retaining the new objective would have no practical implications. HNZC's witnesses expressed concerns regarding the adverse implications of retaining the new objective.

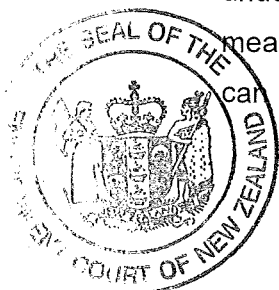
- There was no evidence before the Court as to positive practical implications of retaining the new objective. As a consequence, the implications of retaining the new objective could only have a neutral or negative impact in the decision – the implications could not improve the prospect of the new objective being retained.

[155] In addition, HNZC submitted that the Environment Court already had the benefit of the Panel's recommendations on the issues, considered in the context of the Unitary Plan as a whole (and those recommendations were explicitly referred to at paras [6] and [94] of the August 2017 Decision). Further potential implications raised were also acknowledged in the decision at paras 25, 56, 65-66, 71 and 80.

[156] HNZC submitted that it was clearly open for the Court to conclude that there was considerable doubt as to the implications of the new objective. HNZC also submitted that it was also open to the Court to say that the Council had not established that there was a consistency or linkage issue between the RPS and the lower order provisions for special character areas, when none of the Council witnesses were able to clearly and definitively state how the unchallenged lower order provisions would give effect to the protection of historic heritage under s 6(f) if the new objective was introduced.

[157] Further HNZC submitted that notwithstanding the Council's argument that the introduction of the new objective would have no practical implications as to how consents were processed, cross examination of Council's witnesses indicated some confusion as to how a historic heritage focus on 'protection' would be realised at a consenting level. For example, Mr Matthews was unable to provide a clear response to how the introduction of a historic heritage focus is given effect to at the lower order consenting level, given that the current provisions were accepted by the Council in their decision on the special character areas.

[158] Mr Matthews was asked what kind of analysis would need to be done to understand whether an application is subject to historic heritage that needs protection, meaning "retain the old building", as opposed to a level that simply means the building can be removed but it is necessary to maintain and enhance the amenity of the area



generally. Mr Matthews did not accept that the new objective would make it harder for a landowner to understand what is required.

[159] Nor did he agree that the Council should propose a plan change with an objective identifying where protection is needed and the land to which it applies, rather than landowners being asked to do this on a case by case basis through a resource consent process. Mr Matthews referred to the character statements setting out the historic development patterns as well as the physical and visual qualities, and to assessment criteria in the rules which contain a number of matters to be considered when contemplating development within that special character area.

[160] When asked how historic heritage is to be protected other than by not demolishing a building Mr Matthews said:

Well I think that the provisions of the Plan are more permissive in what can be done within an individual place within this character area as opposed to a place which may have historic heritage values itself, it would either be an individual building or a building within a historic heritage area as distinct from these areas.

Q. So if the objective is to protect the historic heritage value but the provisions aren't strong enough to do that, they're not giving effect to that objective, are they?

A No I believe that we're talking about the historic heritage values over a wide area rather than the individual property and I think ... that the provisions as they are do enable ... those historic values to be retained.

Possible future changes to the Unitary Plan

[161] In its response to the 2018 Minute the Council submitted that the possible implications for future district plan changes are irrelevant in terms of the statutory test. It disagreed with HNZC's allegation that 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.

[162] In our August 2017 Decision we stated that there were differences in position between the parties as to whether the new objective would necessitate a future plan change to amend the lower order provisions to give effect to it. The Court noted that:³⁸

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

[76].



Linzey did not agree stating such a future plan change is "probably necessary" because the lower order provisions do not achieve a protection focused outcome.

[163] The Council submitted that its submissions at the hearing before the Environment Court addressed this particular issue as a "peripheral matter", stating:

The short point is that any future changes to the lower order provisions would need to be considered by way of Plan Changes which will be subject to further evaluation, analysis and hearings. With respect, it is not possible to speculate on the nature of those changes or their costs until the content of any Plane [sic] Change is known. Therefore, any concerns in this regard are irrelevant.

[164] In considering this matter further, we make it clear that we do no more than recognise that the Council has the opportunity to propose changes both to its RPS and also to its district plan at any time. Under the RMA there are now a number of pathways, with different public participation opportunities, which the Council (and, in some circumstances, others) may be able to avail themselves of. (These include new approaches which were introduced in the 2017 amendment to the RMA).

What is the gap or disconnect?

[165] In our August 2017 Decision we said:

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) ...

The Council and the s 274 parties submitted that the Court had not adequately addressed this issue and should have given it was the basis of the Council's decision.

[166] HNZC submitted that with respect to whether or not we were obliged to decide if the deletion of the new objective would result in a gap or disconnect:

- The question reflects the Council's failure to acknowledge that the new objective, with its focus on historic heritage, is simply inappropriate in the context of provisions regarding special character.
- The special character area provisions in the Unitary Plan fully address Council's obligations under s 7. If the Council considers that the Unitary Plan does not adequately address its obligations under s 6 regarding historic heritage (i.e. there is a "gap in the RPS") then, as suggested by the Panel, that 'gap' should be addressed through a plan change focused solely on the s 6 matters.



[167] We find that there is no “disconnect in the cascade between the RPS and the district plan” in the special character area provisions in the Unitary Plan. That is because, in the absence of the new objective, the single remaining objective and related policies and rules are entirely consistent and provide a complete set of provisions with respect to the Council’s single objective regarding special character.

[168] Nowhere in the Unitary Plan special character provisions, other than the new objective, is there reference to the underlying policy directives of s 6(f), as reflected in the new objective. The objectives and policies in the Unitary Plan refer to the “maintenance and enhancement” of character and amenity values or identified special character values and not the “protection of historic heritage”. That is the case in both the RPS and the lower order district plan provisions. Furthermore, in addition to the relevant policies, any proposal for demolition, removal, additions and alteration and/or new buildings within a special character area will also be assessed against the special character values and attributes set out in the statements. While these statements contain reference to historic values (in the sense of historical context), there are no references to historic heritage values.

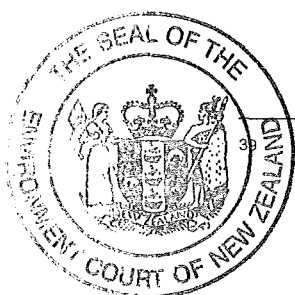
[169] As we said in our August 2017 Decision the Council’s counsel submitted, and witnesses gave evidence, that retaining the new objective would have no practical implications. None of the Council witnesses were able to clearly and definitively state how the unchallenged lower order provisions would give effect to the protection of historic heritage under s 6(f) if the new objective was introduced. There was no evidence before the Court as to any positive practical implications of retaining the new objective.

Assessment of the Alternative Solution

[170] The Environment Court’s decision in *Man O’War Station v Auckland Council* considered the standard statutory provisions and also determined:³⁹

[8] ... In the circumstances of this Council initiated Plan Change, the otherwise lengthy list of factors to be analysed can be compressed. We consider whether the terms of the Plan Change:

- accord with and assist the Council in carrying out its functions so as to meet the requirements of Part 2 of the Act;
- take account of effects on the environment; and
- are consistent with, or give effect to (as appropriate) applicable national, regional and local planning documents.



Man O’War Station v Auckland Council [2014] NZRMA 335 (EnvC) at [8]-[9].

[9] We adopt this framework together with Section 32 when determining the current appeals.

[171] We included the version of s 32 RMA that applies in our August decision.⁴⁰ Section 32 includes consideration of whether the objectives of the proposal are the “most appropriate way to achieve the purpose of the RMA”. We return to s 32 later in this decision.

[172] The Council submitted that while the August 2017 Decision restated the relevant statutory framework, there is nothing in that decision to suggest that the Court assessed the Council's evidence against that framework, or took into account the Panel's recommendations in coming to its Decision. It repeated its opening submissions which refers to the evidence of Mr Matthews that states:

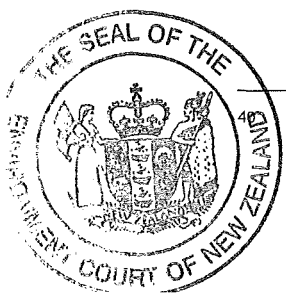
The RPS objectives for Special Character Areas in the AUP refer to both the historic heritage values and character and amenity values of identified Special Character Areas. Special Character Areas are identified and evaluated based on their physical and visual qualities and their historical values. **Therefore, it is appropriate and necessary for the RPS objective to refer to the appropriate management of historic heritage values, as the values inherent in the identified Special Character Areas include historic heritage.** (emphasis added)

[173] The Council submitted that the Alternative Solution is the most appropriate way to achieve the purpose of the Act, and is the optimum planning solution to manage the identified historic heritage and amenity values within the Special Character Areas. It submitted that is clear from the Council's evidence that the identification and management of Special Character Areas is informed by their historic heritage and amenity values and that the amenity values present are principally derived from those historic heritage values.

The Council's functions

[174] We recognise that the regional council is engaged on a task that is based upon its stewardship of the region. Also, that the purpose of a *Regional Policy Statement*, as set out in s 59 of the Act, is to achieve the purpose of the Act (that is, the sustainable management of natural and physical resources) 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.



[10].

Further, that the council must prepare and change the *Regional Policy Statement* in accordance with its functions under s 30. These specifically include:

the preparation of objectives and policies in relation to any actual or potential effects of the use, development, or protection of land which are of regional significance.

[175] In addition, we appreciate that s 61(1)(b) requires the Council to prepare its *Regional Policy Statement* in accordance with the provisions of Part 2. In this case we are considering a matter of national importance in terms of historic heritage (s 6(f)) and the s 7 matters of amenity values and quality of the environment. We should say here that while there was a lot of emphasis on what the (five) different legacy plans involved, and their influence on the approach in the Unitary Plan, there has been considerable effort put into taking a regional approach to the issues.

[176] HNZN submitted that the relationship between historic heritage under s 6 and special character under s 7 are at the core of the Panel's recommendations and conclusions. The Council's failure to distinguish between those matters resulted in our expressing uncertainty in paras [88]-[90] of the August 2017 decision as to the basis on which Council's decision had been made. Further HNZN submitted that the Council's Alternative Solution conflated the Council's obligations and, as a consequence, retaining the new objective would compromise its ability to carry out functions to meet Part 2 requirements.

[177] The Council's submission was that its decision to include the two RPS objectives for special character areas most appropriately manages both historic heritage and amenity values under sections 6 and 7 of the Act, and does not conflate these sections. Further that approach to the management of special character values addresses Part 2 as a whole.

[178] The Council's case was very much about what it perceived it needed to do to meet the requirements of s 6(f) of the Act. Its starting point was that the special character areas identified and protected historic heritage along with amenity values and environmental quality. The Council submitted that the standard of "protection" was "maintenance and enhancement".

[179] The HNZN case questioned whether the foundations of what had been done in the development of the special character area meets the requirements of s 6(f) and considered s 7 as the genesis of the approach to special character areas and their identification. HNZN also referred to PC163 and a series of Environment Court



decisions on the legacy plan provisions covering special character areas in Auckland Isthmus⁴¹ as supporting its view. HNZC also considered that the lower level Unitary Plan provisions recommended by the Panel, and which the Council had accepted, did not align with the Council's arguments for including a new objective using the language of s 6(f).

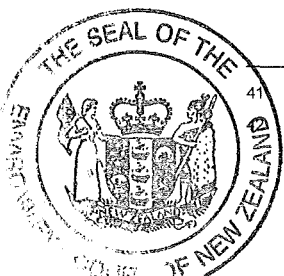
[180] For the reasons we give in paras [212]–[218] we see that there are considerable uncertainties as to whether the new objective would assist the Council in carrying out its functions so as to meet the requirements of s 6(f).

The effects on the environment

[181] We now consider the effects on the environment - which includes any positive or adverse effect, temporary or permanent effect, past, present, or future effect as well as cumulative effects arising over time or in combination with other effects (see s 3 of the Act).

[182] The Council submitted that without the RPS objective responding to the identified historic heritage values in the special character areas, any historic heritage values within special character areas that are not managed through the Unitary Plan's historic heritage overlay (which schedules significant historic heritage) would effectively 'slip through the cracks'. The Council's decision addresses this "nationally important" issue by ensuring that the overlay appropriately identifies, and responds to, the significance of the historic heritage values within the special character areas.

[183] The evidence of HNZC was on the potential for adverse economic and social effects in its access to land for housing, and the redevelopment and development of land well located and suited to more intensive housing, particularly social housing. That evidence was that notwithstanding the possible constraints of the zoning on numbers of residential dwellings, their height and form etc, the special character overlay imposes procedural and potentially substantive constraints on housing development. We covered that evidence extensively in our August 2017 decision.⁴²



New Zealand Heavy Haulage Association Inc v Auckland Council [2013] NZEnvC 240. [65]–[78].

[184] For completeness, we note that the competing economic evidence, which we covered in our August 2017 decision,⁴³ was of limited assistance in our consideration of possible economic effects.

[185] We find that the RPS policy framework, without the new objective, deals adequately with the effects of concern. Those effects are to the characteristics and qualities of the special character areas identified in Schedule 15 in accordance with the policy directions in B5.3.2(1)-(3) and which are to be maintained and enhanced through the methods referred to in Policy B5.3.2(4).

Relationship with planning documents higher in the hierarchy

[186] The parties did not make a case that the National Policy Statement – Urban Development Capacity, which came into effect on 1 December 2016, at this stage of its implementation by the Council, would inform our decision-making on the approach to the RPS provisions in front of us. As we said in the August 2017 decision,⁴⁴ below that we are dealing with the RPS, a document at the top of the hierarchy of planning documents as summarised in the oft cited Supreme Court *King Salmon* decision.

[187] HNZC submitted (on paras [11]-[14] of the August 2017 Decision) that our conclusion (that relevant national and regional planning documents would not inform our decision) is entirely logical given that the Council’s Alternative Solution failed to correctly distinguish between tests (although we do not consider them to be “tests” in that sense) in s 6 and s 7.

[188] In response to the 2018 Minute the Council submitted that it is required to prepare its RPS in accordance with any National Policy Statement, the New Zealand Coastal Policy Statement and national planning standards, and have regard to other management plans and matters. Further that the Council’s decision gives effect to, and is consistent with, the relevant planning documents.

[189] We see no need to deal with the planning documents higher in the hierarchy than the RPS and are conscious that district plan provisions are to give effect to the RPS. The district plan provisions were not part of the Alternative Solution, although the Council’s decision relied on them in its reasoning that there was a disjunct between the RPS and the lower order provisions. We also note that the evidence and



[79]-[80].
[13].

submissions of both parties referred to the lower order provisions to inform their arguments on the most appropriate RPS provisions.

Some Specific Matters Relating to the Decision

[190] We now set out the relevance to the Environment Court's decision of a number of matters and the extent to which those matters should determine or affect the outcome of the decision. We generally start by setting out the submissions made in response to the 2018 Minute.

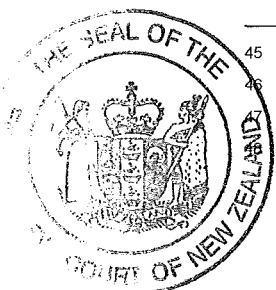
The Council Decision

[191] As we said in the August 2017 Decision,⁴⁵ the Council's Decision was very short. It starts from the premise that there should be a new RPS objective based on s 6(f), given the terminology in the added wording – (1) Historic heritage values of identified special character areas are protected from inappropriate subdivision, use and development. In our August 2017 Decision, we said:⁴⁶

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.

[192] The Council submitted⁴⁷ that the Council was not required to provide detailed or extensive reasons for its decision and it had discharged its statutory obligations. The Alternative Solution was set out in Attachment A to the Decision Report. This included the Objective and additional amendments, such as to the Policies (B5.3.2) and explanation and principal reasons for adoption (B5.4) of the RPS.

[193] The scheme of the LGATPA afforded the Council very limited decision-making powers – it was not, by virtue of the 20-day time period in which the LGATPA required it to make its decision, required or able to conduct a rehearing of the matters considered by the Panel over an 18-month period. The truncated manner in which Council's decisions were required to be made on the Unitary Plan was canvassed recently by the High Court in *Hollander v Auckland Council*.⁴⁸



⁴⁵ [88] and [94].

[88].

[4.35]-[4.41].

Hollander v Auckland Council [2017] NZHC 2487 at [63].

[194] We have had regard to the Council's Decision in making our decision on the Alternative Solution, considering the requirements of s 6(f); the nature and values of the special character areas addressed in the district plan provisions; the cascade down from the RPS to the District Plan, and any disconnect between the RPS and the district plan under various headings. However, we are not bound to follow the Council's Decision or confined to the reasons it gave for adopting the Alternative Solution.

The Hearing Panel recommendations and reasons

[195] The Council submitted⁴⁹ that it is the Council's decision that is subject to appeal, and to which the Court must have regard further to s 290A of the Act, which does not include the Panel's recommendation (nor the reasons for the Panel's recommendation). That would be nonsensical when the Council's decision is to reject the recommendation. The Council's submission notes that the Court itself does not state that the Council's decision included the Panel's recommendation (at [94] in the August 2017 Decision). Accordingly, the Council submitted that the Panel's recommendations and reasons are irrelevant considerations.

[196] HNZC submitted that the statutory reference for considering the Panel recommendations and reasons is s 290A RMA which provides that the Environment Court must have regard to the decision that is the subject of the appeal. In the context of the Unitary Plan, it submitted that the Council's decision that is the subject of the appeal necessarily included the Panel's recommendation.

[197] We refer to the Hearing Panel's recommendations and reasons as the context for understanding the Council's Decision.

[198] The central arguments raised by HNZC on the Hearing Panel Recommendations and reasons were:

The Panel recommended that the Special Character Overlay remain named as such and not be renamed as the Historic Character Overlay. It also recommended the removal of the pre-1944 building demolition control overlay because it considered it was not the most appropriate method of achieving the objectives of the unitary plan.



[4.42].

[199] Specific reasons in the Report for the recommendation given were:

B5 Built heritage and character (Topic 010) – The sub-section on historic heritage is focused on scheduled sites, buildings and extent of places. Policies purporting to protect unidentified historic heritage, including the Pre-1944 building demolition control overlay, are deleted. The sub-section on special character is focused on maintaining the amenity values of identified areas and neighbourhoods. The relief sought by the Council of recasting special character as historic character is not recommended.

8.3.7. Renaming the Special Character Overlay (page 81)

The Council sought to rename the Special Character Overlay as the Historic Character Overlay (Topics 010, 029-032 and 079). The central issues are the statutory foundation for heritage and character protection in sections 6(f) and 7(c) of the Resource Management Act 1991 and the subject matter of the overlays for historic heritage, special character areas and the pre-1944 building demolition control.

In the Unitary Plan as notified, the overlay maps for “Built environment” include the special character overlay while the maps for “Historic heritage” include the pre-1944 building demolition control, yet in the text, the rules for the special character overlay are separate from the historic heritage overlay rules but include the pre-1944 building demolition control. The treatment of these provisions did not demonstrate any consistent approach to the distinct identification of historic heritage and amenity values such as special character.

As held by the Environment Court in *NZ Heavy Haulage Assn v Auckland Council* (the final decision on Plan Change 163 to the operative Isthmus section of the District Plan), the word ‘historic’ is not appropriate in describing places which are to be protected principally for their character. The Panel considers that to warrant protection under section 6(f) requires the identification of some element of the item which is important because of one or more of the qualities listed in the definition of “historic heritage” in section 2 of the Resource Management Act 1991. The word “historic” is not an appropriate qualifier of ‘character’ in general terms and there was no evidence which demonstrated that the character areas met the thresholds identified in the plan for significant historic heritage worthy of specific protection.

Having considered the legal submissions and expert evidence presented by a number of submitters (including the Council) the Panel considers that it is clear that historic heritage is quite different to special character as an element of amenity values, as those terms are defined in section 2 and listed in sections 6(f) and 7(c) of the Resource Management Act 1991.

On that basis the Panel recommends that the special character overlay remain so called but that the name be amended to clarify that it covers both residential and business areas: the Special character areas overlay – residential and business.



[200] For completeness, we mention that the Panel recommended against the retention of the pre-1944 building demolition control (and the objective, policy and rules relating to it), which applied to the special character area and the Council accepted this recommendation.

Possible implications if the new objective is included

[201] In our August 2017 Decision we made no finding on whether there is a gap in the RPS in respect of historic heritage.⁵⁰ We did that deliberately. Section 6(f) does not differentiate between significant historic heritage and other historic heritage, unlike the other provisions of s 6 which contain qualifiers such as “significant” (s 6(c)) and “outstanding” (s 6(b)), a point made at the hearing in the Council’s opening. It is clear that one policy choice was made in the Unitary Plan to deal with significant historic heritage in a particular way within the RPS policy framework with the scheduling of significant historic heritage places and areas and the historic heritage overlay. However there was disagreement between the parties as to whether that policy choice was an exclusive one. There was also disagreement as to whether that policy choice left room for an alternative policy framework and provision for historic heritage which was not significant.

[202] Even if it were accepted that historic character may contribute to or be a factor in “character” (or “amenity”) there is an absence of the word “historic” in the special character provisions of the RPS. There is the Council’s decision to include the word “historical” in RPS Policy B5.3.2(2) in the factors informing the identification of special character areas, and the use of “historical context” in the Introduction and the “historical” heading in the summaries in Schedule 15. These provisions leave open an argument as to whether such historic character is “historic heritage” as defined in the RMA, notwithstanding that term contains the word “historic” and the definition includes the word “historic” more than once. We find that the inclusion of the broad objective effectively restating s 6(f) does not clarify matters.

[203] If there is a gap in respect of s 6(f), such that the approach in the Unitary Plan is confined to historic heritage that is significant or that the way that it deals with historic heritage (such as in relation to collective values) is deficient, there are likely to be options for dealing with it which are not in front of us. We had no substantive



[90].

evidence on this. Those options are still available to the Council, through a plan change process.

[204] We are of the view that if there is a gap in the Unitary Plan's treatment of "historic heritage" under s 6(f), that should be addressed through the Council considering a change to the RPS and district plan. A change process requires robust policy analysis and consideration of the requirements of the RMA. Importantly too, it provides for what should be well-informed public participation opportunities to consider and address the issues in the knowledge of a clear, settled, and operative Unitary Plan. We have concerns that the process followed in the Unitary Plan by the Council for the matter before us falls short in this regard.

[205] We do not have any comfort that the general public was aware of the finer points of what has been argued before us. That is notwithstanding the submissions being prepared in the context of the Auckland Plan, a matter to have regard to, and referring to "historic character". We do not see that the point made by Mr Burns and the Council about the relative lack of involvement by communities and individuals in the appeal, with only a few s 274 parties, can be said to support the Council's decision. Accordingly, we have a concern about endorsing an RPS new objective which we consider was not the subject of full and public consideration through the Unitary Plan process.

Man O'War Station Ltd v Auckland Council [2017] NZRMA 121 (CA)

[206] We now consider whether the relevance of an assessment of the Alternative Solution against the framework as determined in *Man O'War Station v Auckland Council* [2017] NZRMA 121 (CA).⁵¹

[207] HNZA submitted that:⁵²

read together, recent cases such as the Supreme Court decision in *King Salmon*⁵³ and the Court of Appeal decision in *Man O'War Station v Auckland Council* provided that the lawful approach for providing for section 6 matters within planning documents was to first identify those attributes, in this case historic heritage, and then to determine the appropriate policy

⁵¹ *Man O'War Station Ltd v Auckland Council* [2017] NZCA 24, (2017) 19 ELRNZ 662, [2017] NZRMA 121.

⁵² *Man O'War Station Ltd v Auckland Council* [2017] NZCA 24, (2017) 19 ELRNZ 662, [2017] NZRMA 121[61]-[62].

⁵³ *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] 1 NZLR 593: NZRMA 195; [2014] NZSC 38.



framework for protecting or preserving that identified attribute. That is, because the standard for inappropriateness relates back to the attribute that is to be preserved or protected – what is inappropriate in the case of section 6(f) needs to be interpreted against the backdrop of what is to be protected or preserved.

[208] HNZC's case was that while some of the special character areas may include historic heritage, that is not the reason for the spatial definition of those areas (and their attributes) in the Unitary Plan.⁵⁴ HNZC's position was that the Council had correctly first identified the places and areas that reflect the relevant resource management values/issues (special character areas) as identified in higher order planning documents (under s 7). Once those were identified, it then correctly put in place the appropriate policy framework to achieve the appropriate management response as directed by that higher order instrument (i.e., maintain and enhance). HNZC considered that in circumstances where historic heritage values that require protection are identified in special character areas, the Council should follow the process set out in the Unitary Plan and schedule the sites, places or areas with historic heritage values accordingly.⁵⁵

[209] The Council traversed reasoning in *Man O'War Ltd v Auckland Council* in support of its submission that:⁵⁶

It is not the activities that determine the extent (or identification) of the Special Character Areas (and that is not a matter before the Court). Rather, it is whether any adverse effects arising from subdivision, use and development are inappropriate in the context of the inherent historic heritage values within these areas. "Inappropriateness" needs to be judged in terms of the context of the value being protected. Inappropriate activities may not be prohibited, but through the restricted discretionary activity status for a number of activities within the residential special character areas, the Council retains the necessary (and appropriate) degree of discretion and control in the context of the values being managed.

The Council's Objective ... is therefore appropriate to achieve the purpose of the Act because of the context and values of the identified Special Character Areas that are being managed.

[210] There is disagreement between the parties on the fundamentals of the approach in the Unitary Plan to identifying special character areas and values and the appropriate planning and management response in the RPS. We have traversed



[6.10].
[6.2]-[6.3].
[4.9].

these matters extensively in our decision. We do not find that the arguments of HNZC or the Council in relation to *Man O'War Ltd v Auckland Council* take matters further.

Section 32

[211] We look now at the requirements of Section 32 of the Act. First, we deal with those that deal with the sole objective, which requires us to examine the extent to which the objective being evaluated is the most appropriate way to achieve the purpose of the Act. That evaluation is informed by our earlier consideration of the issues.

[212] We are not convinced by the proposition that there is a need to recite s 6(f), or an objective to similar effect, in the special character provisions.

[213] We find that there is no disconnect between the RPS and the district plan in the absence of the new objective. The sole objective clearly sets out the outcomes of “maintenance and enhancement” and these are given effect to in the settled district plan provisions.

[214] Adding a “protection” objective has the potential to confuse the situation. Such a new objective could divert attention from the specificity of the characteristics and qualities of each special character area, and the need to maintain and enhance them, which are the focus of the lower order provisions.

[215] Furthermore, we do not accept that it is appropriate to include the new objective in order to be able to deal adequately with effects on the values of the special character areas in terms of the policy framework in the RPS.

[216] On the face of it, the Council’s witnesses did not consider that the inclusion of the new objective would make a difference to the consideration and outcome of resource consent applications. On the one hand that may be said to provide some comfort to its inclusion. However, some of the responses of Mr Matthews to cross-examination and the evidence of Ms Linzey rather indicates that the position is more uncertain than that. That is particularly the case where demolition and relocation of buildings is involved. In any case we cannot assume that the Council witnesses are correct in their assessment of the likely matters to be considered and the result of decision-making on individual applications.



[217] If there is a gap in the RPS (and we make no finding on that) this is not the way to fill it. The new objective has the potential to leave the position unclear for special character areas.

[218] The change process is available to the Council to fill any gap. It has the benefit of providing the opportunity to consider and address the issues in the knowledge of a clear, settled, and operative Unitary Plan. It would require robust policy analysis and to well-informed public participation.

[219] We see that there are major uncertainties as to whether the new objective would assist the Council in carrying out its functions so as to meet the requirements of s 6(f).

[220] Accordingly, we conclude that including the new objective is not the most appropriate way to achieve the purpose of the Act.

[221] Second, we examine whether the other provisions in the Alternative Solution are the most appropriate way to achieve the sole objective. That involves identifying other reasonably practicable alternative options for achieving the sole objective, assessing the efficiency and effectiveness of the provisions in achieving the objective and summarising the reasons for deciding on the provisions. The assessment of efficiency and effectiveness must identify and assess benefits and costs and if practicable, quantify them and also assess the risk of acting or not acting if there is uncertain or insufficient information.

[222] An option would be to disallow the amendments made by the Council in its decision on the other provisions in the Alternative Solution. That would leave provisions recommended by the Panel that are not the most appropriate way to achieve the sole objective. While the Council could promote a change to the RPS, that may take some time.

[223] HNZN questioned Council witnesses on other ways of recognising or assisting a reader's understanding of the difference between the identification and treatment of and contribution of historic heritage in special character areas and the historic heritage regime in the Unitary Plan, such as through explanatory material. That is another option.



[224] In assessing the efficiency and effectiveness of the provisions in achieving the objective, we have concluded that there would be benefits that would outweigh costs in better describing and dealing with the difference between how special character areas and historic heritage are identified and treated both in policy and the supporting explanatory material in the Unitary Plan. Such revised provisions would assist the understanding of users of the plan and are likely to result in less uncertainty and a more certain direction and outcome in consenting and future plan changes. There would be environmental, economic and social benefits from that alone.

[225] We turn now to detailed consideration of additional and consequential amendments to the Alternative Solution and our findings on the most appropriate provisions to achieve the sole objective.

Additional and Consequential Amendments to the Alternative Solution

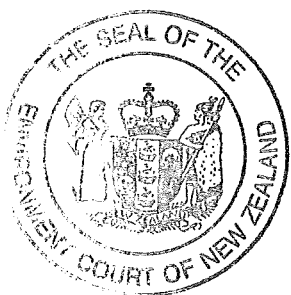
[226] Our decision is to not uphold the new objective. We now look at Issue B5.1, Policy B5.3.2 and the explanation and principal reasons for adoption in the Alternative Solution and examine whether these provisions are the most appropriate way for achieving the sole objective in terms of the scope we conclude is available to us.

[227] As to the amendments to the provisions other than the new objective, the Council made no submissions directly referring to them. All it submitted was that these were “additional” and not “consequential” and therefore not subject to appeal by HNZN. However, there was evidence to inform our consideration of these provisions.

Issue B5.1

[228] The Panel’s version was confined to “amenity” values and the Council’s decision deleted the word “amenity”. We can only speculate that this may have been because the Council considered this to narrow the issue too far.

[229] An alternative option is to align the issue with the sole objective in B5.3.1(1) which refers to both “character and amenity” values. We conclude that reinstating the words “amenity values” but adding “character” to B5.3.1(1) more accurately reflects the issue and gives direction to the single objective for special character areas.



Policy B5.3.2(1)

[230] This policy sets up the purpose of and basis for identifying special character areas. The Council's decision deleted the Panel's limitation of it to "amenity values", with the Panel not carrying through the objective of "character" alongside "amenity values" from what was then the sole objective (now B5.3.1(2) in the Alternative Solution). Whatever the reason for it, the Council's decision now refers to "places" which some might consider to be more the language of "historic heritage" (and is found in the historic heritage overlay). However, we note that the special character area schedule also uses this term.

[231] Similarly the Panel's Policy B5.3.2(1) referred to "the amenity values of" but does not refer to "character" and does not reflect the single objective (consistent wording would have been "... the character and amenity values of places ... "). The Council's way of dealing with this inconsistency was to delete the words "the amenity values of".

Policy 5.3.2(2)

[232] In the Alternative Solution this policy sets out factors for identifying and evaluating special character areas under two headings – the first is "physical and visual qualities" and the second "historical" (the latter replacing the term "legacy" recommended by the Panel). The headings (and the amplification of each one) are generally reflected in each special character area in Schedule 15 - with one exception which was drawn to our attention. A summary of special character factors follows under the two headings in reverse order to how these appear in Policy B5.3.2(2).

[233] The Council's addition of the word "historical" in both (a) and (b) of the Alternative Solution was not a return to the notified version of the RPS. For completeness, we note that this Policy in the notified Unitary Plan was worded as:

Identify special character areas using the following criteria:

- a. Physical and visual qualities: groups of buildings or the area collectively reflects an important or representative aspect of architecture, design and/or landscape or streetscape, or is distinctive for its aesthetic quality.
- b. Legacy: the area collectively reflects an important or representative a [sic] significant period of settlement within the region or locality
- c. Social: the area collectively has symbolic, spiritual, commemorative, traditional or other cultural value or reflects the identity of a particular community.

We also note that the notified Unitary Plan Appendix 10 summary had the three



headings of Historical, Physical and Visual Qualities and Social.

[234] As amended by the Council in its decision by adding the word “historical” Policy B5.3.2(2)(a) reads:

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;

Schedule 15 of the Decisions Version of the RPS uses:

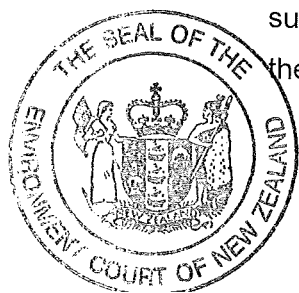
Physical and visual qualities: The area collectively reflects important or representative buildings, types, designs, styles, methods of construction, materials and craftsmanship, urban patterns, landscape, and street qualities.

[235] Ms Rowe gave evidence that the Council’s reworded policy could be somewhat limiting, given its conjunctive nature and perhaps also an interpretation of the word “historical” as including “historic heritage”. She accepted that there may be special character areas that may only have amenity values.

[236] Earlier in this decision we set out some dictionary and RMA definitions of terms: - see eg para [12ff]. The Council’s decision inserted the word “historical” in two places into Policy B5.3.2(2). It is not expressed to be “historic heritage” as defined in the RMA. It could be said to do no more, or little more, than reflect what is in (1) (which defines the purpose of identifying special character areas) where the reference is to “over time”. Indeed in our August 2017 Decision we referred to the special character areas being “microcosms of time”, an impression enhanced by our site visits following the hearing.

[237] Looking at the Council’s amendment to Policy B5.3.2(2)(a) in more detail we conclude that there is no need to add the word “historical” to “building types or styles”.

[238] The Panel used the word “legacy” in Policy B5.3.2(2)(b). We note that the notified Unitary Plan used the term “legacy” (as did the summary of special character in Appendix 10 which preceded Appendix 15 in the operative Unitary Plan). We had some concern about the use of the word “legacy” given the now broad meaning it has come to have and also as exemplified in the constant references throughout the submissions, evidence and hearing to “legacy plan” provisions. We indicated this to the parties in our 2017 Minute.



[239] We have considered this further. We are aware “legacy” was a word used in (legacy plan) provisions in the Auckland Isthmus decision on special character area provisions. We see that there are advantages in the word “legacy” as it includes, but does not require, the “historical” threshold to be met. However, to avoid further debate and inform users of the Unitary Plan we consider that there should be an indication that legacy may include historical. That could be done in several ways. We have considered adding “legacy including historical” to Policy B5.3.2(2)(b) directly, or through a footnote to that effect, and/or a reference to it in the explanation. We conclude that the most appropriate approach is to add to Policy B5.3.2(2)(b) directly so it reads “Legacy including historical” so that the intention is clear and can be reflected in the explanation.

[240] We are also mindful that Schedule 15 generally contains the heading “Historical” in relation to the description of each special character area overlay.⁵⁷ Our approach to the Policy (and the explanation and principal reasons for adoption) means that there is no need to amend the headings (and the substantive content) of Schedule 15 even if we had scope to do so.

Policy B5.3.2(3)

[241] This policy was not amended in the Council’s Decision. It requires the inclusion of an area with special character to be included in Schedule 15 Special Character Schedule, Statements and Maps. There was such a schedule notified in the Unitary Plan and the Council’s Decision made no amendments to the Panel’s recommendations in relation to Schedule 15. Policy B5.3.2(3) requires no amendment.

Policy B5.3.2(4)

[242] This policy sets out the management approach to the identified special character areas. The Panel’s recommendation based this on being to “maintain and enhance the amenity values of”, which again does not refer to the “character” element contained in the then single objective. The Council’s decision deleted this phrase and



⁵⁷

There is an exception in the Special Character Area Business: Howick which reads under the heading “Summary of special character values. “No special character statement has been prepared for Howick”. Ms Rowe’s evidence [56] was that Council Officers did not support including this one as a Special Character Area.

replaced it with “manage”, a more neutral term that is then expanded on (“by all of the following”) in terms of (a)-(d).

[243] Mr Matthews considered that Policy B5.3.2(4) will ensure that the collective historic values evident will be maintained. When questioned, Mr Matthews considered that policy assists the protection of collective historic heritage values. When asked whether it would be harder to obtain a resource consent as a consequence of the new objective coming in, in terms of an assessment against these policies, he did not believe so, but said he was not a planner.

[244] The first element (a) “requiring new buildings and additions and modifications to existing buildings to maintain and enhance the special character of the area” repeats the direction in what was the single objective.

[245] The second element is (b) “restricting the demolition of buildings and destruction of features that define, add to or support the special character of the area”. Mr Matthews understood this to be the policy framework for the specific sites that are identified as needing a consent to demolish buildings and not to other sites. He considered that this element of the policy did not apply to sites that do not have this requirement. He did not know why some special character areas require consent to demolition applying to some of the area but not others, but understood it was to do with a previous plan change.

[246] The third element is (c), implementing or using the approach in the single objective, “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”. This method manages change in the context of the values which are identified in those character areas.

[247] The fourth element is (d) “avoiding, remedying or mitigating the cumulative effect of the loss or degradation of identified special character values”. That policy assists in maintaining and enhancing collective special character values.

[248] For consistency with the single objective, we conclude that Policy B5.3.2(4) should start with “Maintain and enhance the character and amenity values of” and delete the word “manage”. That returns the wording to the Panel’s recommendation but adds the words “character and”. We do not see that what could be described as



methods to achieve maintaining and enhancing the character and amenity values of identified special character areas (even (b)) imply s 6(f) “protection” of historic heritage.

B5.4 Explanation and principal reasons for adoption

[249] In considering these, we keep in mind that they should accurately reflect the approach in the Unitary Plan. The Council's decision made only one amendment. In line with the amendments made to the Issue and Policy, the Council deleted the qualifying words “amenity values (particularly the character or appearance) and the quality of the environment (particularly of the streetscape)” and replaced them with “[t]he identified character”. We note that the quality of the environment is a s 7(f) matter. The explanation now states: “The identified character of these special character areas should be maintained and enhanced by controls on demolition, design and appearance of new buildings and additions to alterations to existing buildings”.

[250] As we have said, we did not find the Panel's use of the word “protection” in the explanation correctly reflects the objective and policy framework to “maintain and enhance the character and amenity values of special character areas”. The Panel's use of the word “protection” (which the Council's Alternative Solution did not amend perhaps because of the inclusion of the new objective) does not accurately describe the policy framework for special character areas and that word should be replaced with the words “maintenance and enhancement”.

[251] The proposition put to Mr Matthews by HNZN was adding some words to the explanation to the effect that “amenity” of course includes historic heritage aspects in places rather than the approach in the Alternative Solution. While he did not agree to that proposition, he observed the importance of understanding that historic heritage values do underlie the identification of the character areas and make a significant contribution to the values of such areas.

[252] We are mindful that some special character areas have demolition control for specific identified properties, and of the concern by HNZN about what a landowner would understand of that.⁵⁸ Also that while previous studies, such as the Heritage Assessment Balmoral Tram Suburb Special Character Area, prepared by Auckland



[56].

Council Heritage Unit in August 2013, are not included in the Unitary Plan, they have the potential to be considered as an “other matter” under s104(1)(c) during resource consent processing.

[253] Further, HNZA referred to the final decision of the Environment Court on the legacy plan Isthmus provisions which recognised that the amenity or character of an area might be derived from historical features and buildings, without being historic heritage under s 6(f).⁵⁹

[254] We propose amendments to the wording of the explanation and principal reasons for adoption as better reflecting what we understand to be the existing or potential circumstances for identifying special character areas. In the outcome, we include a possible version of the explanation that addresses these points.

[255] We will offer the parties the opportunity to comment on the approach and terminology to be used in amendments to the Council’s Decision.

Outcome

[256] For the reasons discussed, we consider that the following amendments are required: first, amend Issue B5.1 to read:

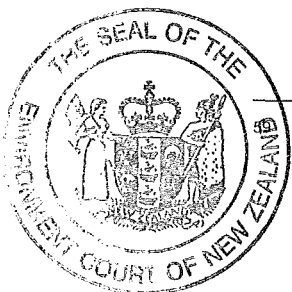
B5.1 Issues

3. Areas with special character should be identified so their particular character and amenity values can be maintained and enhanced.

[257] Amend Policy to read:

B5.3.2 Policies

- (1) Identify special character areas to maintain and enhance the character and amenity values of 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 (building types or styles), and/or landscape or streetscape and urban patterns, or are distinctive for their aesthetic quality; and
 - (a) legacy-including historical: the area collectively reflects an important aspect, or is representative, of a significant period and pattern of community development within



New Zealand Heavy Haulage Association Inc v Auckland Council [2013] NZEnvC 240.

the region or locality.

- (3) Include an area with special character in Schedule 15 Special Character Schedule, Statements and Maps.
- (4) Maintain and enhance the character and amenity values of identified special character areas 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.

[258] Amend explanation and principal reasons for adoption to read:

B5.4 Explanation and principal reasons for adoption ...

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 and places of special architectural or other built character value, exemplifying a collective and cohesive importance, relevance and interest to a locality or to the region. Historic heritage values may underlie the identification of special character areas and make a contribution to the character and amenity values of such areas, but the special character areas are dealt with differently from significant historic heritage identified and protected in terms of the separate policy framework for identifying and protecting Historic Heritage in B5.2. The attributes of the character and amenity values and the environmental quality of a special character area, including buildings and streetscape, might be derived from its historical legacy, without being historic heritage under section 6(f) of the RMA.

The identified character 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 maintenance and enhancement of the overall special character of an area from 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 nature of the special character for each area and are an important reference in assessing any application for resource consent in that area.

[259] We offer the parties the opportunity to comment on the terminology and approach set out above. HNZN should respond with 10 working days from the date of issuing of this decision, and the Council within a further 5 working days. A prompt and final decision will then issue.

Costs

[260] For the moment, costs are reserved.

Dated at Wellington this 28th day of September 2018

For the Court


C J Thompson
Environment Judge

