detected by staff and rectified promptly. We see a simple check being to use the boreholes to check there is no contamination of groundwater. The Applicant's experts agreed.

[265] We note that the Applicant had proposed a bund to hold the contents of the plant in a catastrophic failure. That appears to us to be a relatively remote possibility and the bund is an adequate method by which to avoid any adverse effects beyond the site. This means some thought would need to be given to the vehicle entry, to avoid a concentrated escape flow. However, given the area involved is some 5,000m^2, and over half is unlikely to be built on, any bund for containment is not likely to be high. As we understand the evidence, the bund was intended to use cut-to-fill and create a Buffer. The bund shown in the diagrams produced seem to serve no containment purpose, given one side has no bund. The Applicant's landscape experts saw no particular merit in bunding for landscape purposes. Various plans show the bund within the Treatment Plant designation, or within the Buffer area. However, the application and supporting documents do not seek to use the Buffer designation for bunding. To be effective, any bunding would need to be within the Treatment Plant designation, to contain any escaped fluids. No further evidence was given as to why the whole site needed a containment bund.

Odour effects

[266] It has traditionally been seen as good practice to provide a physical buffer between wastewater Treatment Plants and adjacent sensitive uses to minimise the potential for adverse odour effects on those uses. We acknowledge that some Treatment Plants do exist close to, or even immediately alongside, sensitive uses and we anticipate these would be designed for very high levels of odour control. Whatever those circumstances and controls might be, that does not alter the requirement for us to ensure that any odour effects from the Matatā Treatment Plant are appropriate to the land uses.

[267] In terms of what an appropriate buffer distance might be, we were assisted by responses to our questions by Mr Iremonger (Transcript pages 831 and 832) that the buffer distance approach is *tried and true* and that EPA Victoria has developed a formula to calculate an appropriate buffer distance based on the population served by the Treatment Plant. Mr Iremonger considered that by using the formula, he would expect a buffer distance of between 100 and 140 metres to be appropriate for the Matatā Treatment Plant. We acknowledge this is not the formal position of the

Regional Council, but respect Mr Iremonger's professional opinion on this matter. We record his estimates are very much in line with the distance of around 150 metres that we had anticipated would be appropriate based on our own experience. To further consider this matter we referred to the document referenced by Mr Iremonger and this indicated a separation distance of around 150 metres was appropriate for a Treatment Plant the size of the Matatā Plant.

[268] Evidence on odour was given to the Court by two relevant experts, Mr Hveldt and Mr Iremonger. Mr Hveldt's modelling showed relatively low odour plumage from the site. The question, of course, was what assumptions were made for the modelling. The application itself discusses odour effects at paragraph [16.9] of the Assessment of Environmental Effects (**AEE**) and notes:

> The wastewater treatment processes that could produce nuisance odour emissions include the following:
>
> - inlet works;
> - anoxic or anaerobic zones of the reactor tanks;
> - biological treatment tanks;
> - storage facility for treated wastewater;
> - treated wastewater pump station;
> - sludge consolidation de-watering facility;
> - de-watered sludge holding tank.
>
> These components will be covered and the odious air extracted and treated using a biofilter or similar. The biological treatment unit, provided with sufficient aeration, generally has low potential to generate odour. Aeration will or may be supplied with natural processes or mechanically aerated, depending on the final design.

[269] The generality of that description is unhelpful, and led to some confusion on the Court as to precisely what was intended. In answer to queries from the Court, Mr RD Shaw, a water resource engineer, advised that everything was to be covered. Questions then arose as to whether this was in order that all air could be extracted and treated through a biofilter. Unfortunately, as the case progressed, matters did not become any clearer. In answer to questions Mr Hveldt advised:

> Our modelling assumes that everything was covered, and everything was extracted to a biofilter. We modelled from the surface of the biofilter.

[270] It was acknowledged by Mr Hveldt and Mr Iremonger that odour escape events occur – not regularly, but not infrequently. It is in the nature of the process that covers are opened for any number of reasons, particularly when there has been a failure of a particular process.

[271] At the time of our visit to the Maketu plant, which was advised to us as an exemplar of the type of design intended here, the sludge cover had been missing for some unknown period of time, and there was a strong and objectionable odour at and near the plant. If there had been residential buildings within 100m, and lower speed winds, it is more than likely that there would have been odour complaints. There was also evidence at the time of our Maketu visit that the emergency dump pond had been previously used, but we are unclear what odour was associated with that. It also appeared that there may have been a number of problems during the commissioning period leading to the release of odour. We note that that Maketu plant is largely uncovered, with only the inlet structures and sludge de-watering elements and aeration compressors covered.

[272] Under questioning, both Mr Hveldt and Mr Iremonger recognised that the 100-150m buffer has the advantage of dealing with these short-term odour releases, which they acknowledged could be problematic in proximity to residential areas. It is clear that both Mr Hveldt and Mr Iremonger prepared their evidence on the basis that this was farmland, and that there were no receptors within 150m of the plant. Mr Hveldt was unhappy with the concept of defining the FIDOL factor location as assuming a residential standard of amenity would need to be maintained at the buffer boundary. This strengthens our conclusion that, as currently proposed, there are likely to be occasions of significant adverse effects of odour if any residential buildings are built within 100m to 150m of the plant.

[273] Given no such residences could be erected without obtaining resource consent, Ms Hamm for the Applicant suggested that we should disregard such a potential effect, notwithstanding the agreement of the Council to provide services to such buildings if they are consented and erected. In doing so she turned the Court's attention to the decision of ***Queensland-Lakes District Council v Hawthorn***[82] and its definition of existing environment.

Is potential Papakainga part of the existing environment for receiving odour impacts?

[274] This brings us to the question as to whether or not cultural expectations, as they lead to a relationship between Māori and their land as a taonga, should be seen as part of the existing environment. We accept Mr Enright's submission that the ***Hawthorn*** decision was not focussed on this issue, and cannot be seen as deciding

[82] (2006) NZRMA 424

that such cultural relationship and expectations are not part of the existing environment.

[275] Clearly, construction of Papakainga would require consent as a discretionary activity. We have therefore concluded that we are not able to take into account Papakainga itself as a part of the existing environment. Nevertheless, we acknowledge that the impact of such odour upon the clear objective of the owners to develop Papakainga and community facilities on this site is a cultural effect which can and must be taken into account under the Act. It would clearly impact on the relationship of those persons with this residue land holding, particularly for its stated purpose as Papakainga and community facilities.

Conclusion on odour effects

[276] We conclude that a failure could occur where the air isn't going through the biofilter, or there is some failure of the biofilter. Mr Hveldt later confirmed that the modelling was done on the basis that the system was working properly, and that there was no odour escaping, ie *all* air had been treated through the biofilter. Mr Hveldt acknowledged that there were problems with covers being removed or doors being opened, extraction fans failing, and bio filters failing.

[277] Given that there was no further evidence advanced as to *how* these contingencies were to be covered, the question then left for the Court is if a building wasn't used to cover the plant, how would the items be covered when any maintenance work (particularly when there had been a failure of a particular item), was being undertaken? Otherwise, in those events where an odour pulse is released, it is uncontrolled and has not been modelled.

[278] We acknowledge Mr Iremonger's concession in questions that a buffer zone of 100-150m is good practice. We agree entirely. That does not mean that a Treatment Plant could not be compatible with housing, if unusual steps were taken to reduce the prospect of propagation of odour.

[279] One way would be to include all the elements of the plant within a building. That would enable an air handling and treatment system that would mean that all elements could be processed and air quality maintained through a single biofilter system. It may be theoretically conceivable to design a system other than a building that would cover all elements of the plant (one assumes including the emergency

pond) and provide some form of either reticulated air handling or individual extraction or biofilter mechanisms for each element.

[280] Accordingly we have concluded that:

(a) without a suitable design for covers and biofilter extraction, there will, from time to time, be objectionable odours at the boundary of the Treatment Plant;

(b) the buffer zone is inadequate to provide any amelioration of such odour and a separation distance of between 100-150m is appropriate.

(c) There could be significant practical difficulties in fully enclosing the Treatment Plant in a building as the Applicant has limited the maximum height to 3.5 m.

(d) This will affect the relationship of the beneficial owners of this land with the land when the clear, common expectation and understanding is that the land is available for community use and Papakainga at some time in the future.

[281] Given the unwillingness of the Applicant to provide any detailed design that might satisfy us that this issue can be overcome, we presently see this as a major impediment, giving rise to significant adverse effects and thus relevant to the question and determination of alternatives under s171(1)(1).

[282] We should finally mention that sludge trucks would be removing material on a regular basis (once or twice a week) to the Kawerau plant, and the issue of ensuring that these are air-tight and do not drip is critical. Odour effects along the roadway and State Highway would have a significantly wider potential impact, as would failure to seal any trucks used to pick up waste material.

Visual effects

[283] Our site visit made it very clear that there were views over the Treatment Plant at Lot 6A from the Ngāti Rangitihi Marae, several hundred metres to the west, and its adjoining urupa and parking area. Similarly, on Lot 7A from the top of the dune behind Ōniao Marae (not on the marae itself), clear views can be obtained over the Treatment Plant area. All of the rear portion of Lot 7A would have a clear view

into the Treatment Plant. Some buildings on the upper portion of Lot 6A and all of the rear area adjacent to the Treatment Plant would have views of the Plant.

[284] We were unable to consider the effects of the roading given the lack of any application for consent, but it appears that this may also create some significant visual effects, particularly if there needs to be a major cut to obtain appropriate gradients from the State Highway over the initial portion of the site. Towards the rear of the site it is likely that the current ground levels would be largely maintained, but the roadway itself would be relatively clear, as would any waste trucks using it.

[285] By the end of the hearing the Applicant had modified its position to suggest that one possible approach would be to utilise a landscape plan for the whole of Lot 6A, which would enable planting to occur that would not only screen the plant, but would provide amenity improvements to the site as a whole, in the event that Papakainga or community facilities were eventually constructed.

[286] From the Court's perspective this would also enable consideration to be given as to whether or not intermediate planting should be provided on the roadway to screen views from Ngāti Rangitihi Marae and the urupa towards the site, and whether other planting elsewhere on Lot 6A may provide strategic relief from views into the site, for example from the land behind the marae. Given the fact that the frontage to the State Highway is higher than the area for the Treatment Plant, intermediate planting provides the opportunity to obscure (partly or wholly) views of the plant and/or building in which the plant is contained. There would be nothing unusual in such an approach given the wide-ranging use of both shelter belts and planting surrounding other buildings in this area.

[287] We acknowledge the thoughtful evidence of the landscape witnesses on these matters and consider, on the basis of a landscape plan covering the whole of Lot 6A and the roadway and accessway, that conditions could be imposed that would render any continuing visual effects minimal.

[288] We have concluded that the visual effects can be addressed by a comprehensive development and planting plan, which takes into account the potential for Papakainga on the site, and that other measures can be incorporated into the conditions to address these concerns.

[289] Intermediate planting between the Ngāti Rangitihi Marae and urupa, the rear of the Ōniao marae on Lot 7A, and the Burt dwelling, would all have the effect of ameliorating views towards this area, and thus mitigating the effects. We appreciate that a building may have more visual effect than elements of the plan itself. The question as to whether piping, as opposed to the bare face of a building, have visual effect is a matter of personal choice, and in the end no witnesses expressed strong views one way of the other on this issue.

Benefits of reticulation to Marae

[290] There was much evidence given to us that the installation of infrastructure and the promise to connect Papakainga was of no real benefit to the owners or beneficial owners. We do not agree. We have concluded that the ability to connect to a wastewater system, to obtain water, and to have the roading placed along the length of the site is a considerable advantage to the owners of the property and would enable the construction of Papakainga, other community facilities such as a camp ground, with relative ease. When this is added to proposals for a comprehensive landscape development plan for the site, there are significant advantages. The question for this Court, which we will need to evaluate as part of the overall exercise, is whether those benefits are sufficient to overcome the potential adverse effect of odour from the property. In this regard we will discuss potential mitigation conditions beyond those proffered by the Applicant later in this decision.

Evaluation of effects

[291] Overall, our concern is that the odour from the plant is a probable intermittent effect of this activity. Although the Applicant frequently stated that there will be no odour, the reality is somewhat different. Mr Iremonger, for the Regional Council, acknowledged that a buffer zone, of between 100-140m is utilised by most councils for good reason. There are exceedences, and this gives an opportunity to avoid or minimise adverse effects. He expressed increasing concern when the concept of having a building with full extraction system was altered to one without a building and full extraction. Even with full covering and exhaust treatment system he acknowledged that there was the potential for actions of individual workers to allow odour to escape.

[292] We have considered carefully the concept of covering various tanks and / or ponds. Though we had understood originally that there was an undertaking that all of

these areas would have the air extracted, and that this is what was stated in the AEE, we are not now clear that the Applicant intends that course of action. The Applicant did not outline a full building solution to cover and extract odour. Otherwise the placement of covers over odorous materials creates an additional concentration of any odour. If the cover is removed then the odour escapes.

[293] Overall we have concluded that the prospect of periodic significant odours arising from this site is clear. Although the Applicant's proposals would mitigate this effect they would not avoid it, and accordingly we must assume that there would be escape of objectionable odour beyond the 20m buffer from time to time. As rural land, the effect of this is not likely to be significant on the nearest houses (some 200m away). However, it represents a significant constraint to the construction of Papakainga within 150 metres of the Treatment Plant. To date we have not seen any mitigation sufficient to satisfy the Court that this activity can be conducted without periodic significant adverse effects of the Treatment Plant on that relationship and legitimate expectation for Papakainga.

Additional matters

Management of surplus excavated material

[294] There was a clear cultural preference to retain the excavated soils on the site and the Applicant intends to do so. Depending on the depth of excavation on the site, there may be considerable material required to be disposed of. At this stage there is no particular arrangement with the Trustees of 6A for the use of that fill on the site. It would appear that if there was sufficient material, there may be benefits in building up 6A more evenly to enable Papakainga, housing and other uses. That is a matter we would expect to be subject to conditions if consent is to be granted.

The linking of the three designations

[295] The Court has a significant concern as to the breaking up of these three designations in the way proposed, and the potential to operate some designations but not all. It appears to us that this would need to be addressed by requiring as a condition precedent of all designations that all other designations were also utilised as a unit. Of course difficulties arise in respect of, for example, the access way where the parties may in the end determine to adopt an alternative access way and not utilise the designation. Alternatively, this Court might move the designation to the rear of

the site – that is a matter that would need to be addressed by way of conditions if consent is appropriate.

Groundwater bores for monitoring and water supply

[296] It was noted at least one bore has been placed on site, and we were told by experts that this could easily be used for groundwater monitoring to ensure that there were no leaks to groundwater from the wastewater Treatment Plant. We believe such conditions to be essential and we understand they may now have been included in the proposed conditions.

[297] So far as taking of water is concerned, this is mentioned in the AEE but there was no discussion by witnesses of this. Given there is no evidence on the issue we are unable to consider this matter further.

The Land Application Field (LAF)

[298] The proposed LAF is located on the coastal dunes to the east of Matatā. The dunes rise to approximately six metres above sea level, and form an undulating plateau that extends approximately 150 metres inland from the beach. The back dunes drop sharply to farmland that has an elevation of approximately 1m above mean sea level (**ASL**) and is relatively flat.[83] The pasture extends approximately 300m to the south before it meets the ORC.

[299] The proposed LAF is located on top of fine medium dune sands that extend to 6.5-7.5 metres below the surface and are underlain by pumicsous/rhyolitic sediments comprising predominantly coarse sands and fine gravels. In the fore dune and beach area tidal fluctuation and wave run-up creates groundwater levels in excess of mean sea level near the beach. As groundwater beneath the farmland is approximately one metre below mean sea level, the ground water flow direction under the LAF is inland towards the farm drains.

[300] The Orini River formerly flowed from the Whakatāne River, parallel with the dunes, through to the Rangitaiki River. The Rangitaiki then flowed to the north, then parallel to the ocean (ORC) before joining with the Tarawera River to the west and exiting in front of Matatā.

[83] Mr Kirk, Evidence-in-chief, paragraph [12]

[301] It was suggested by the Regional Council that there may still be some hydraulic connection between the Rangitaiki River and the remnant ORC, but no examination of this has been undertaken. Nor was there a suggestion that there was any significant amount of groundwater finding its way through that channel, given that most of the water is introduced from the farm drainage system. The ORC is either gravity fed from farm drains or, in some cases, such as the Robinsons farm to which the LAF is adjacent, pumped up to the ORC. This is essentially now a perched channel in the middle of the farm paddocks in this area. It is covered by the Tarawera Catchment Plan, and is also part of the Rangitaiki Drainage Scheme.

[302] The Robinson farm paddocks are in the former river bed, as are its surrounding wetlands, and lie between 1 and 2m ASL. This area has always been identified as wetland and swampy, and it was clear to us from our site inspection that, without constant pumping, it would be likely to revert to that condition quickly. We were told it is not stocked in winter and can have standing water in the paddocks.

[303] Given that the area to the west of the Tarawera in front of Matatā is now in wetland-lagoons, we suspect that the Robinson Farm would naturally revert to a similar condition. We have already noted that the water in the ORC flows from east to west, and exits through a flap-gate structure and pump structure at the Tarawera River.

[304] The LAF will have an area of approximately 4.6 hectares, and will be located on sand dunes within the Western Recreation Reserve as shown on Figure 6 in the bundle of drawings. Treated wastewater is expected to be discharged by sub-surface drip irrigation at a depth of up to 300mm below ground, with distribution pipes installed by mole plough. No vegetation clearance is planned. Final details will be determined by the contractor in accordance with a design/build/operate contract. The system will include filters, control valves, a flushing return pumping station and associated rising main (to return chlorinated water used to flush the system to the Treatment Plant), security and communications.

[305] No stripping of grass sward or topsoil is to occur at the LAF site, and the ground cover of the dunes is to be protected as far as possible. Approximately four kilometres of irrigation pipe and associated components will be used, in addition to distribution mains, sub-mains and flushing pipelines. The flushing pumping station will be approximately 1.8m x 1.8m by 1.8m, and partially buried to minimise visual effects. A new access road, approximately 600m long by 6m wide, will be

constructed to connect with the existing access road on the adjoining property. The total volume of earthworks for the LAF and access road will be 5,500m^3, of which 4,900m^3 is within an Erosion Hazard Zone.

[306] Treated wastewater will be applied at a rate of 30mm per day, which at the maximum design wastewater volume of 605m^3 per day will require an application area of 2 hectares. The total irrigation area available is approximately four hectares, which provides capacity to rest disposal areas on a seven day on/seven day off basis.

Cultural landscape in the vicinity of the LAF

[307] As noted above the LAF is situated on the eastern side of the Tarawera River within the fore-dune formation. All the tangata whenua tribes have claimed this area as culturally important to them. The importance of the LAF area is understood by Māori in the context of their history, culture, land ownership and activities centred upon water resources.

[308] We start by noting that on the western shore of the Tarawera River mouth are the Ngāti Awa and Ngāti Tūwharetoa nohonga (occupation site for lawful food-gathering and fishing), both respectively 1 hectare in size, returned to the tribes through the Ngāti Awa and the Ngāti Tūwharetoa treaty settlements in 2005.[84] The Ngāti Awa and the Ngāti Tūwharetoa nohonga are within the Department of Conservation Te Awa o Te Atua Wild-life Reserve at the river mouth.[85] Once Ngāti Rangitihi settle their Waitangi claim it is likely that they will also receive a nohonga in this area.[86]

[309] The settled tribes have statutory acknowledgements for their relationship with the Tarawera River and the Rangitaiki River.[87] In terms of the Tarawera River, both tribes have different stories concerning their creation and how they were named. These different stories are recorded in those statutory acknowledgements.[88] However, for our purposes we note that both statutory acknowledgements include what we have

[84] Ngāti Awa Claims Settlement Act 2005, Schedule 2 & s 92; Ngāti Tūwharetoa (Bay of Plenty) Claims Settlement Act 2005 Schedule 2 & s 75
[85] Application, common bundle Vol 1, page 326
[86] Waitangi Tribunal *The Ngāti Tuwharetoa Ki Kawerau Settlement Cross-Claim Report* (Wai 996, Legislation Direct, 2003) pages 34-42
[87] Ngāti Awa Claims Settlement Act 2005, Schedules 11 & 12; Ngāti Tūwharetoa (Bay of Plenty) Claims Settlement Act 2005 Schedules 7 & 8
[88] Ngāti Awa Claims Settlement Act 2005, Schedule 12; Ngāti Tūwharetoa (Bay of Plenty) Claims Settlement Act 2005 Schedule 8

called the ORC, due to its fresh water content, whether it is a stream or modified watercourse.[89] Once Ngāti Rangitihi settle it is likely that they will also receive such a statutory acknowledgement.

[310] On the eastern side of the river is the cemetery, Otaramuturangi urupa (set apart as a Māori reservation under Te Ture Whenua Māori Act 1993) and in which Ngāti Rangitihi, Ngāti Awa and Ngāti Tūwharetoa have an interest.[90]

[311] The cemetery abuts land owned by Ngāti Awa which was returned to them pursuant to the Ngāti Awa Claims Settlement Act 2005. That land is known as Te Toangapoto.[91] It is depicted on early maps of the area.[92] The land is land-locked and is classified as a reserve subject to s 17 of the Reserves Act 1977.[93] Ngāti Awa wishes to have access via the informal road along the coast formalised, if the LAF proceeds.[94] The Pt Allotment 273 Rangitaiki Parish Recreation Reserve upon which the LAF will be situated is immediately adjacent to and bordering this land along the coastal dunes.

[312] Ngāti Tūwharetoa also has a block in the coastal dunes known as Te Wahieroa south-east of the LAF. It was returned as part of their settlement in 2005.[95] It is also adjacent to the Pt Allotment 273 Rangitaiki Parish Recreation Reserve upon which the LAF will be situated.[96] Te Waihieroa is depicted on early maps of the area.[97] The land is classified as a reserve subject to s 17 of the Reserves Act 1977.[98] Waihieroa was described by the Waitangi Tribunal as the point midway between the mouths of the Tarawera and Rangitaiki Rivers, where hapū with joint whakapapa to Ngāti Awa and Ngāti Tūwharetoa demonstrated customary allegiance to both iwi.[99] It was a significant landing place for many waka, an ancient canoe-building and marae-site and mahinga kai (food-gathering) area.[100]

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[89] Ibid
[90] Application, common bundle Vol 1, p 341 for Ngāti Rangitihi, p 328 for Ngāti Awa; p 345 for Ngāti Tūwharetoa
[91] Ngāti Awa Claims Settlement Act 2005, Schedule 1; Proposed Matatā Wastewater Scheme - Map Book, Figure 6
[92] see also Exhibit "K" Map 3
[93] Ngāti Awa Claims Settlement Act 2005, s 32
[94] Application, common bundle Vol 1, pp 325, 329
[95] Ngāti Tuwharetoa (Bay of Plenty) Claims Settlement Act 2005, Schedule 1; Exhibit "J" Map 1 & 2; and see Proposed Matatā Wastewater Scheme - Map Book, Figure 6
[96] Proposed Matatā Wastewater Scheme - Map Book Map 6; Application, common bundle Vol 1, p 345
[97] see also Exhibit "K" Maps 3 & 4 and Exhibit " J" Maps 1 & 2
[98] Ngāti Tuwharetoa (Bay of Plenty) Claims Settlement Act 2005, s 28
[99] Waitangi Tribunal *The Ngāti Awa Report* (Wai 46, Legislation Direct, 1999) p 20
[100] Waitangi Tribunal *The Ngāti Tuwharetoa ki Kawerau Settlement Cross-Claim Report* (Wai 46, Legislation Direct, 1999) p 38

[313] Effectively this means that the Whakatāne District Council Reserve and LAF site is between both the Ngāti Awa and Ngāti Tūwharetoa settlement lands. Given the District Plan requires the Treaty settlements to be identified, it is curious that the reference in the AEE simply identifies the Treaty statutory acknowledgements, not the re-vesting.

[314] In addition, we note that the land directly opposite the current access via the bridge and road access to the Robinson property leading to the LAF site, and at V15/1209 in the archaeological evidence, is referred to as the Matatā Pā.[101] This pā along with the Omarupotiki Pā (now on the opposite side of the ORC facing the Te Toangapoto block – in evidence as V15/1020) were once Ngāti Awa island pā and are now (after drainage) Māori land blocks.[102] Having checked the Māori Land Court record, the first block is Lot 102 Parish of Matatā and the second is Lot 100 & 101 Parish of Matatā.[103] These blocks were awarded back to "Loyal Natives" under the Confiscated Lands Act 1867.[104]

[315] Given the topography of the area, any contaminants in groundwater from the LAF that may be discharged into the ORC will flow through Lot 100 & 101 Parish of Matatā toward the Tarawera River or it could flow back upstream.[105]

Effects of the LAF

[316] The issues for the LAF can be separated into two themes:

(a) cultural issues; and

(b) potential impact on surface waters, particularly the ORC and Tarawera River.

Cultural issues

[317] There are four issues raised relating to the LAF, being:

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[101] Exhibit "H" Archaeological Assessment of Proposed Matatā Waste Water Scheme, Matatā, Eastern Bay of Plenty (April 2014) p 10; and see Māori Land Court Record - Lot 102 Parish of Matatā

[102] Waitangi Tribunal *The Ngāti Awa Report* (Wai 46, Legislation Direct, 1999) p 61; see also Exhibit "K" Maps 3 & 4 and Exhibit " J" Map 1; Ngāti Awa Claims Settlement Act 2005, Schedule 12; Application, common bundle Vol 2, p 632, and see Māori Land Court Record Lot 100 & 101 Parish of Matatā

[103] LINZ Identifier 308871 & LINZ Identifier 308885

[104] LINZ Identifier 308871, attached plan 16052; see also Waitangi Tribunal *The Ngāti Awa Report* (Wai 46, Legislation Direct, 1999) p 82

[105] Proposed Matatā Wastewater Scheme - Map Book, Figure 2

(a) original names;

(b) food gathering and fishing sites;

(c) potential earthwork impacts on cultural sites and koiwi; and

(d) views from nearby Māori land

Original names

[318] All the iwi of the Tarawera Catchment wanted the original place names used for the ORC, Wahieroa, Te Toangapoto, Te Awa o te Atua or Tarawera River.[106] The Applicant has agreed to this and we would require this in the conditions if the consent is granted.

Food gathering and fishing sites

[319] In terms of food gathering sites, there was no evidence that the ORC has been used for food gathering. Food-gathering in the main occurs on the Tarawera River or at the mouth. Given the importance of the nohonga for the iwi at the river mouth, the inanga hatchery and the clear terms of the NZCPS, we conclude that improving the discharges from ORC will provide benefits for food-gathering and fishing.

Avoiding significant cultural sites and Koiwi

[320] The area adjacent to the Tarawera River to the west of this particular site has been identified as the urupa – Otaramuturangi. Immediately next to it is Te Toangapoto, the LAF site and then Te Wahieroa. Opposite the LAF and in the vicinity are the two Māori land blocks. We would require the Applicant to make every effort to avoid any disturbance of these sites.

[321] In terms of koiwi, Mr Potter raised the question of whether or not koiwi are buried within this area of fore-dune across the subject site. The view of the Raupatu Trust is that the proper course is to use ground-penetrating radar to identify these and ensure that they are either left undisturbed or, if they must be disturbed, that they are removed in a culturally appropriate way.

[106] Ms Hughes, Evidence-in-chief, paragraph [36]

[322] The Applicant has proposed a discovery protocol, which has been agreed to at an iwi level, but is not accepted by the Raupatu Trust. Mr Potter summarised their position as a concern that the people using the digger will not be looking to see what they are disturbing, even if somebody is on site as a cultural advisor.

[323] We have carefully considered these concerns and have concluded that we can accommodate that issue through conditions. We note the Applicant recognises the need to properly train operators and all workers in this area, and there is an extensive induction process intended to ensure that the workers doing this work are aware of what to look for, and their obligations under the resource consents and in terms of cultural protocols. Although the wording of the cultural protocol might be improved, it is clear that its intent is to recognise and provide for the relationship of the various iwi to this area, to ensure that a proper procedure is adopted, firstly to identify any matters of cultural interest, and secondly to ensure that they are treated in a culturally appropriate way.

[324] Given the limited impact of the LAF field, we are satisfied that these matters are currently addressed by the application without the need for further conditions. Any potential adverse effects would be minimal, given these conditions.

Views from Te Toangapoto and Te Wahieroa to the LAF site

[325] In terms of the request for some screening of Te Toangapoto and Te Wahieroa, we consider that this may be achieved by appropriate planting of species such as Thornton Manuka in keeping with the environment and we will require a new landscape plan to be developed with Ngāti Awa and Ngāti Tūwharetoa to discuss the details.

Groundwater

[326] The Applicant's case was prepared on the basis that there would be full attenuation of all human pathological substances before the wastewater reached the first intercept drain, which we understand to be in the position approximately of BH806 or the lateral drain between SW3 and SW2. Refer to **Annexure E** (figure 8).

[327] We are told that wastewater travelling from the LAF through the dunes and surfacing by whatever means at those positions is likely to have been at least one year

from discharge, and accordingly any pathogens would have died well before reaching that exit point.

[328] However, both the expert witnesses for the Applicant made an assumption that there would be no attenuation of Nitrogen (N) or Phosphorus (P) in that process. They recognised that:

(a) this was a worst case scenario, and most wastewater would have travelled a further distance through the ground before surfacing;

(b) given that the wastewater was placed in the root zone it is likely that some N or P would be caught up in that plant growth;

(c) bacterial and other adsorption characteristics of the sand would develop over a period of time, and likely utilise some of the N and P;

(d) as a result they would expect some attenuation of N but probably little in respect of P.

[329] The end result of these formulations was to achieve contaminant of N and P at the levels of contaminants in the drain water being discharged to the ORC and other locations downstream shown in the Table 5 from Dr Chen's evidence as follows:

Table 5 Estimated contributions of TN and TP from treated wastewater into the aquatic receiving environment.

Parameter	Treated Wastewater	Groundwater		Surface Drainage Network		Orini Stream				ANZECC 2000 Guidelines Trigger Level
		Background	Impacted	Background	Impacted	Current background	Impacted (within 20m radius of discharge point)	Impacted further upstream or downstream (assuming 6:1 dilution)	Impacted further upstream or downstream (assuming 20:1 dilution)	Lowland rivers, slightly disturbed ecosystem in New Zealand
TN (mg/L)	15	0.2-1.5	10-11	0.3-1.5	2.5-3.5	1.5-2.0	2.25-3.05	1.92-2.58	1.62-2.18	0.614
TP (mg/L)	10	0.02-0.1	7	0.05-0.2	1.5-2.0	0.05-0.16	0.5-0.75	0.30-0.49	0.12-0.26	0.033

[330] It is clear that the estimated level of discharge, in particular of N and P is a significant increase over the current level. It is acknowledged that there would be an adverse impact on water quality in the ORC; however the position for the Applicant is that the water quality levels for N and P particularly are already above those of the ANZEC guideline levels. Given that they are below the new national freshwater policy, and that there was no effect on ecology, their view is that the increase in discharge was acceptable.

[331] In short, the water discharged from the drains to the ORC would represent a significant increase in contaminants, N and P. As we set out later this appears to fly in the face of the various planning documents relating to this area that seek variously improvement in water quality, reduction in contaminants and maintenance of water quality.

Is the LAF the best practicable option?

[332] It was suggested that increased contaminants to the ORC was the best practicable option. However, the relevant Applicant and Council witnesses acknowledged that the treatment of surface waters within the Robinson farmland would lead to a significant improvement in the N and P levels. In fact one witness commented that the exclusion of stock from this area would, in itself, lead to a significant improvement.

[333] From this we conclude that best practice in this case would be that the farm area between the LAF and the ORC be retired from farming and allowed to revert to wetland. That is clearly not within the scope of any application before the Court at the current time, and the land is not subject to any right by the Applicant to undertake such work. The scale of the work necessary to attenuate the extra N and P from the LAF is also unclear. No specific evidence was given to us as to what portion of the site would need to be retired from farming and/or planted in wetland to achieve maintenance or improvement of the N and P levels from the Robinson farmland.

[334] Some witnesses suggested that even a wetland planting at the toe of the dunes, say 5-10m deep, would improve the water quality entering the farm drains and thus being pumped into the ORC. Furthermore, it appears that riparian planting, at least along the main lateral drain, and along the drain leading to the pump, may also have some beneficial effect even if stock remain on the paddocks. Again, there was no quantification of this so we are unable to reach a firm conclusion as to what level of work would be required on this land before existing discharge levels of nutrients could be maintained or improved.

[335] However we conclude that there are options available to treat wastewater reaching the surface. Given there is already a lease in place for the LAF with the Robinson family we had no explanation as to why the treatment discussed could not be undertaken.

Does the level of the nutrients in the ORC matter?

[336] As we have already noted, the ORC is already enriched over ANZEC guideline values, and the stream itself is not limited for plant growth as to either N or P. In short it is a poor quality arterial drainage channel and discharges into the Tarawera River several hundred metres from its outlet to the sea. In broad terms, the volume of the Tarawera River is so great that the dilution of the ORC waters would result in no detectable change after reasonable mixing. There seems to be an assumption that its discharge so close to the river outlet means it can be discounted as an impact on the river

[337] Again, the question of reasonable mixing was one that was not explicit, and we are unclear whether this means 1-metre, 10-metres or some other figure. Nevertheless, the clear evidence was that given the current condition of the Tarawera River there would be no more than a negligible impact upon the water quality, after such reasonable mixing. The water is likely to exit fairly immediately to sea. We make the point that this position was strengthened after further information was obtained about the drainage works. It appears that the drainage channel releases during the outgoing tide and closes on the incoming tide. Although we acknowledge that some waters mixed with the river water would be driven up the channel before the flap gate closes, the majority of water would leave the channel during the outgoing tide.

The impacts on the Tarawera River

[338] The Tarawera River is already significantly compromised due to other contamination, notably the pulp and paper mills. This matter was subject to a separate decision by the Environment Court several years ago, and the Court consented to the discharges on the basis of an improving water quality regime during the 35 year period of the consent. As well as this, the Catchment Plan seeks to improve inputs generally, and this involves issues relating to the Edgecumbe and the Kawerau wastewater Treatment Plant and other discharge points, including from the Rangitikei Catchment System.

[339] We were told that there would be no ecological impact on the inanga hatchery just adjacent to the outlet, or on the bird colony on the opposite bank. Furthermore, given the negligible impact on water quality generally within the Tarawera River, any stream waters that are discharged on an incoming tide and are

driven up the Tarawera River or the channel are unlikely to have any discernible differences from the Tarawera River generally. It is clear that there are already increased nutrient levels in the river, including N and P, and lignite leads to a dark colouring of the river and accordingly limits light penetration.

[340] Nevertheless this estuarine area is very important, as is the confluence of the River with the sea. This is evident by the Department of Conservation areas adjacent, birdlife and inanga hatchery. We are told of its cultural importance although a remnant of the Te Awa o te Atua.

Conclusions as to impacts on the Tarawera River

[341] It is the Applicant's case that there would be no discernible impact on the river's water quality after reasonable mixing. Provided there was a condition to that effect, and that the mixing zone is reasonable and avoids the inanga hatchery, bird breeding colony and nohonga areas, then we can conclude that the impact upon the coastal marine area and, in fact, the sea and shore, would be negligible.

[342] The issue that arises, however, is if the Tarawera Catchment is generally improved, and the ORC discharge may in those circumstances compromise the quality of the Tarawera River. It is difficult to imagine that this would be so, given the dilution levels involved, but nevertheless it was acknowledged by the Applicant that the Regional Council had the power to review the consent if the Tarawera Catchment Plan or other plans affecting the river imposed a higher standard. Although we acknowledge that Councils have this power, it has been rarely exercised in practice. Our preference would be to see an explicit provision requiring the consent be reviewed in the event that a new catchment plan is imposed that has a higher standard than that currently applying to the Tarawera River catchment, or the CMA within this particular area.

[343] Provided the above condition is imposed, the issue is the impact upon the ORC rather than the Tarawera River. Given our views that there are methods that would improve the water quality being pumped into the ORC, particularly through wetland or riparian planting, and even removal of stock, we are at this stage not convinced that it is not possible to reduce the level of N and P entering the ORC to levels close to or better than those of the current discharge. We conclude that impacts would be avoided if there was an improvement in the N and P levels being pumped

from this part of the Robinson farm to the ORC. We conclude this is technically and practicably feasible.

Is the discharge prohibited?

[344] One possibility raised by the plans, in particular rule 15.8.4(r) of the Tarawera Catchment Plan, is whether the discharge to the ORC is a prohibited activity. Chapter 15.8.4(r) provides:

> Except for the provisions of the operative Onsite Effluent Treatment Regional Plan, and for the provisions of the Kawerau Township and Edgecumbe Township set out in (a)-(d) of this rule, and the provisions of Rule 15.8.4(x), all new or existing discharges of human sewerage or contaminants derived from human sewerage into surface water within the Tarawera River catchment will become a prohibited activity on the date on which this regional plan becomes operative.

[345] Chapter 15.8.4(x) provides for discharge of human sewage from the Kawerau township into surface water in exceptional circumstances. No-one suggested the other exceptions applied to this application.

[346] The context of this rule is explained in 15.4.6, which deals directly with sewage discharges. After noting the cultural objections, it notes:

> While some liquid wastes, including this sewage, may be treated to a higher degree before being discharged, this does not overcome the adverse effect of these discharges on the Mauri life force of a water body, unless the waste has first been passed through the cleansing properties of earth.

[347] Of course, this provision does not assist us with the question of what is a discharge to surface water.

Discharge to a water body

[348] The primary position for the Applicant was the discharge was to ground in circumstances where it then joined groundwater and/or flowed through sand before joining surface water near the Robinson's farm drains. On the other hand, the Catchment Plan identifies particularly high phosphorus levels at Matatā, and includes a comment on nitrogen:[107]

> It is apparent, therefore, that any effluent treatment measures that reduce the discharge of dissolved nutrients, particularly ammonium nitrogen, to

[107] Under figure 14, page 159 Tarawera Catchment Plan

> the Tarawera River, will benefit the oxygen supply of the lower reach of the Tarawera River.

[349] It is also recognised in the Catchment Plan 15.4.10(a) that nutrient sources from agricultural sources are difficult to control. As consents officer for the Regional Council, it was Miss JL Hollis's view that the overall concern of this aspect of the plan was towards direct discharge to surface water, rather than indirect discharge through ground.

[350] We have discussed the general purport of the Catchment Plan already, and we have concluded that the plan is particularly focussed on nutrients reaching the Tarawera River. The wording of the Rule 15.1.8(r) is ambivalent; it is not clear from its wording whether it is intended to apply to indirect as well as direct discharges. The use of the words *contaminants derived from human sewage* may be indicative that it is dealing with indirect discharges. On the other hand, as Ms Hamm submitted *it could clearly be suggesting that the direct discharge of water after it had been through a waste Treatment Plant to surface water would not be permissible.*

[351] It is in this regard that, from the Court's perspective, the real concern is that the Applicant has presented evidence on the basis that there would be no attenuation of N or P from its discharge in the LAF to its appearance in the surface waters of the drain. Our view overall is that it *must* be the intent of this rule of the Catchment Plan that there be further attenuation for indirect discharge to surface water. In answer to questions, some of the witnesses acknowledged that there probably would be attenuation, both through utilisation within the root zone by plants, and also with the bacterial and other adsorption that would occur in the sands. Overall, however, it is difficult for us to reach a conclusion that this would not amount to an un-attenuated discharge unless we can be satisfied that there will be a reduction.

[352] On balance, we have concluded that the methodology to achieve that is easily available to the Council and the landowner by adopting a riparian planting, wetland, or stock reduction approach, or a combination of these. Provided we were satisfied that there is reasonable attenuation of N and P, we would agree that the rule on its face is not intended to catch every contaminant derived from human sewage, even after treatment. It is the lack of any attenuation proposed in respect of N or P that creates the Court's difficulty.

[353] So far as the degree of attenuation to be achieved once discharged to ground at the LAF, we would have thought that this needs to be at a reasonable level. We

would expect something in the order of one half by the time of discharge to the ORC but no direct evidence as to the appropriate attenuation that would ensure this is not an indirect discharge was given. An example of an unacceptable indirect discharge might be where a waste treatment discharge was put through a chamber of earth prior to discharge to a river or poured on a rock. The rule cannot be intended to be circumvented so readily, and ground-based discharge seems to be based on the assumption that there will be reasonable attenuation, if not total attenuation, through the earth.

Modification of the wastewater discharge to ground

[354] In addition to the methods we have already discussed, we did ask questions around whether or not the discharge to ground through the LAF at 300mm underground was necessary. It appeared to be accepted by the experts that if discharge was made to surface, this would mean greater uptake of N and P by vegetation. We accept there may be difficulties with interference of the hardware by animals or people. The major concern of the Consent Authority however, was that this, as public reserve land, should still be available for public access and surface discharge would compromise that. Given the lack of evidence from the Applicant, we will not consider this possibility further given the sites proximity to Māori land and the possibility of cultural issues and Reserves Act 1977 issues arising.

The application of the various statutory documents

[355] We have considered all the planning instruments which we were directed to and we list them here for completeness:

- National Policy Statement for Freshwater Management – 2014 (National Freshwater Policy)
- New Zealand Coastal Policy Statement – 2010 (NZ Coastal Policy)
- Bay of Plenty Regional Policy Statement – 2014 (Regional Policy Statement)
- Bay of Plenty Regional Water and Land Plan - 2008 (Water and Land Plan)
- Bay of Plenty Air Plan – 2003 (Air Plan)
- Regional Plan for the Tarawera River Catchment – 2004 (Tarawera Catchment Plan)

- Regional Coastal Environment Plan – 2003 (Coastal Plan) (and proposed Coastal Plan)
- Off-Site Effluent Treatment Regional Plan – 2006 (OSETRP)
- Operative (2012) and Proposed Whakatāne District Plan (2013) (District Plan)

[356] Given that there is no discharge from the Treatment Plant, and it is outside the coastal environment, the National and Regional documents are of limited relevance. Overall, however, the LAF application matter is impacted significantly by two particular factors. The first is the relationship between the Freshwater Policy Statement and the NZCPS, given that the water from the ORC enters into the Tarawera, which is within the CMA. The second major issue is that the ORC is within the Tarawera Catchment area, and therefore subject to the Tarawera Region Catchment Plan.

[357] Both policy statements have a similar overall thrust: towards maintenance and enhancement of values. However, the different wording can lead to some confusion in cases such as the present, where waters of the Tarawera move from Freshwater to the CMA.

[358] We acknowledge that the Regional Coastal Plan has been notified to address recent changes to the NZCPS, but these changes are yet to be resolved. In relation to the Freshwater Policy Statement, no regional policy statement or plans are yet in prospect.

[359] We will now examine both national documents to identify the interrelationship for this case.

[360] The Freshwater Policy Statement is new, but nevertheless is intended to give explicit application of the Act to freshwater. It contains a number of objectives and policies that seek to maintain or improve the quality of fresh water. The NZCPS is, of course, also of significant importance in the hierarchy of documents, as confirmed by the Supreme Court in ***King Salmon***.[108] Objective 1 of the NZCPS provides inter alia:

> Maintaining coastal water quality and enhancing it where it has deteriorated from what would otherwise be its natural condition with significant adverse effects on ecology and habitat because of discharges associated with human activity.

[108] [2014] NZRMA 195

[361] We have not set out our full examination of each instrument here because that is simply not necessary given the overlap and common theme to many. We have ordered the following section with the higher order documents first, consistent with their hierarchical relationship. We have spent some time on the national policy instruments, particularly the Freshwater Policy Statement, as this document is key to parts of our decision, and being very new has not made its way to be reflected in the lower order documents.

Freshwater Policy Statement

[362] The national significance of fresh water and Te Mana o te Wai is set out at page 6 of the Freshwater Policy Statement. It states:

> This national policy statement is about recognising the national significance of fresh water for all New Zealanders and Te Mana o te Wai. A range of community and tāngata whenua values, including those identified as appropriate from Appendix 1, may collectively recognise the national significance of fresh water and Te Mana o te Wai as a whole. The aggregation of community and tāngata whenua values and the ability of fresh water to provide for them over time recognises the national significance of fresh water and Te Mana o te Wai.

[363] The Bay of Plenty Regional Plan requires amendment to reflect the Freshwater Policy Statement, and we were told that process is underway. Objective A1 concerns safeguarding the life supporting capacity, ecosystem and indigenous species including their ecosystems. It also concerns safeguarding the health of people and communities at least as affected by secondary contact with freshwater.

[364] Objective A2 requires that the overall quality of freshwater within a region is maintained or improved while, particularly relevant to this application at subsection(c), improving the quality of freshwater in bodies that have been degraded by human activities to the point of being over-allocated.

[365] The term over-allocated is defined and relies on freshwater objectives being set for management units. Thus, until a regional plan is established in accordance with the requirements of the Freshwater Policy Statement, we don't know precisely what allocation level we are working with. We note an allocation refers to both quantity and quality (see definitions in the Freshwater Policy Statement).

[366] Policy A3(b) sees Regional Councils in preparing Regional Plans, where permissible:

> ...making rules requiring the adoption of the best practicable option to prevent or minimise any actual or likely adverse effect on the environment of any discharge of a contaminant into fresh water, or onto or into land in circumstances that may result in that contaminant (or, as a result of any natural process from the discharge of that contaminant, any other contaminant) entering fresh water

We conclude permissible is a reference to permissible in terms of the Objectives of the Freshwater Policy Statement and RMA.

[367] Policy A4 sets out directions under s55 RMA which provides an interim arrangement until the Councils have carried out the necessary changes to their regional plans. Subsection 1 requires[109]:

> 1. When considering any application for a discharge the consent authority must **have regard to** the following matters:
> a. the extent to which the discharge would **avoid contamination that will have an adverse effect on the life-supporting capacity** of fresh water including on any ecosystem associated with fresh water and
> b. the extent to which it is **feasible and dependable that any more than minor adverse effect on fresh water, and on any ecosystem** associated with fresh water, resulting from the discharge **would be avoided.**
>
> [emphasis added]

[368] Objective CA1 indicates that the approach to be taken in establishing objectives for fresh water will recognise regional and local circumstances as well as being nationally consistent. The scheme of the framework is set out in Policy CA1 which indicates that a regional council is to identify freshwater management units that include all freshwater bodies within its region. This then would include the ORC.

[369] Without getting in too much detail, Policy CA3 requires the Regional Council to set freshwater objectives for compulsory values set out in appendices Freshwater Policy Statement, and these values must not go below the national bottom lines except where this is caused by naturally occurring processes (or there is existing infrastructure which are to be listed in an appendix not yet added).

[370] Objective D1 concerns Tangata Whenua roles and interests, which talks of providing for the involvement of iwi and hapū to ensure tangata whenua values and interests are identified and reflected in freshwater management.

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[109] Subsection (4) indicates Subsection 1 applies and subsection (5) indicates subsection (2) does not apply because the applications were lodged prior to the date the Freshwater Policy Statement took effect being 1 August 2014 (ie 28 days after gazette notice 4 July 2014)

[371] National values and uses for freshwater are set at Appendix 1. There are Compulsory National Values and Additional National Values. The compulsory values address the maintenance of ecological processes, biodiversity and resilience to change and matters to be taken into account for a healthy freshwater ecosystem including the management of contaminants and changes in freshwater chemistry, excessive nutrients, algal blooms low oxygen and invasive species and essential habitat.

[372] This instrument is relevant to the LAF proposal. It is apparent the ORC is degraded by human activities. Whether it is considered over-allocated to a point where a freshwater objective is no longer being met is a moot point. The Freshwater Policy Statement defines Freshwater Objective as being a description of an intended environmental outcome in a freshwater management unit. A Freshwater Management Unit is defined as meaning *the quality of the fresh water at the time the regional council commences the process of setting or reviewing freshwater objectives and limits in accordance with Policy A1, Policy B1, and Policies CA1-CA4.* While the Regional Council has commenced this process the outcome is unknown and some way off. On this basis we rely on what is available to us now and that is contained in the Water and Land Plan and the Tarawera Catchment Plan.

[373] We conclude that the ORC is over-allocated because the regional documents provide a clear direction towards reduction of contaminants and enhancement. Further, the ORC, through its interaction with the Tarawera River, is contributing to the reduction of health and mauri of that river. These compulsory values would seem to put the ORC clearly in the frame of the directives of the Freshwater Policy Statement for maintenance and enhancement. It would not meet Objective A1(a) of the Freshwater Policy Statement. As a contributor to the Tarawera it must fall under A2, which signals *maintained* or *improved.*

[374] The question of the use of the word *overall* in A2 is an issue. It would seem the Applicant relies on an interpretation that, provided the quality in the region is maintained or improved *overall,* consent to reduce the quality in one area may be appropriate. In other words an *overs and unders* approach. We need to be careful confirming that this is indeed the interpretation to be given to this objective. Could it be simply an adjective referring to the overall goal to maintain/ not let things slip backwards? The Freshwater Policy Statement references this overall quality to the region. The region is clearly made up of more than one catchment.

[375] Reference to Part 2 of the Act is instructive in understanding this wording. The Act has a single purpose expressed in Section 5 and interpreted in Part 2 and the various documents prepared under it. The hierarchy requires that there must be a consistency in documents achieving the overall purpose of the Act and superior documents. In this regard the overall purpose phrase used in the National Freshwater Policy must be referable to Section 5 subsection (2)(a), (b) and (c). It would be contrary to the Act for the National Freshwater Policy to mean that individual catchments could fail to meet (a), (b) and (c). Further, there are the Regional Council's functions as set out in s30 RMA, the most relevant parts for current purposes, we set out here:

> 30 Functions of regional councils under this Act
>
> (1) Every regional council shall have the following functions for the purpose of giving effect to this Act in its region:
> (a) the establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the natural and physical resources of the region:
> (b) 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:
> (c) the control of the use of land for the purpose of—
> (i) soil conservation:
> (ii) the maintenance and enhancement of the quality of water in water bodies and coastal water:
> (iii) the maintenance of the quantity of water in water bodies and coastal water:
> (iiia) the maintenance and enhancement of ecosystems in water bodies and coastal water:
> (iv) the avoidance or mitigation of natural hazards:
> (v) the prevention or mitigation of any adverse effects of the storage, use, disposal, or transportation of hazardous substances:.....
> (f) the control of discharges of contaminants into or onto land, air, or water and discharges of water into water:.....
>
> [emphasis added]

This section indicates towards maintenance or improvement of all water bodies:

[376] The ORC is highly eutrophic. It does not meet objective A1(a) of the Freshwater Policy Statement. We were told further nutrients will not increase its ecological limitations. We were told there is an upper limit to that situation but the proposal would be below this. The suggestion then is that the stream is so ecologically compromised that the further addition of nutrients to certain limits will not make the ecological situation significantly worse.

[377] In relation to the interim provisions which the Regional Council must apply (Policy A4) adverse effects from contamination under A4(1) are to be avoided. Under

A4(2) it needs to be both *feasible and dependable* that any more than a minor adverse effect is avoided. This raises the issue of cumulative effects and long term effects. Once we consider the primary objective to safeguard the life supporting capacity and sheet this home to Part 2 and the Regional Council's functions, we conclude that maintenance at least must be assumed. Adding to an existing background level albeit degraded, will not achieve maintenance.

[378] By increasing the level of contamination of the ORC, there is the potential for the overall input from this source to the Tarawera River to increase and therefore to have a negative impact on the river. We have accepted beyond an undefined area of reasonable mixing and provided certain areas are outside the mixing zone then that risk is negligible.

[379] Concerns were raised by iwi over possible contamination of freshwater and groundwater. Those impacts are confirmed by expert evidence. There is no indication in the evidence of how the Te Mana o te Wai aspect of the National Freshwater Policy (and Objective D1) is to be addressed. In terms of cultural effects as discussed elsewhere, this would need to be addressed in order to meet Part 6 RMA matters which clearly seem to be enshrined in the Freshwater Policy Statement.

Does the Freshwater Policy Statement mean that contamination of water can occur to the Appendix 2 levels?

[380] Given the overall thrust of the documents, the proposition that increased pollution of the ORC, increased discharges of N and P, are acceptable seems counter-intuitive. The Applicant points to the fact that the discharges, although an increase over current discharges, and in excess of the ANZEC guidelines are nevertheless lower than those set out in the 2nd Schedule to the Freshwater Policy Statement.

[381] If the suggestion is that the Freshwater Policy Statement provides some permit to drive to the bottom line, or a licence to pollute, then that concept is entirely rejected by the Court. Schedule 2 needs to be read in the context of the NZCPS, the Freshwater Policy Statement as a whole, Part 2 of the Act, and the other documents related to it. As we say, overall, the NZCPS and other documents seek to maintain and improve water quality and reduce discharge of contaminants to waterways.

[382] We expected some form of nutrient or water balance argument. However, in this case the evidence as to reduction in discharges to water from the septic tanks in

Matatā was very general. The general information was that there was little, if any, attenuation through the septic tank system and its discharging to soil, particularly in respect of N and P. But there was no particular suggestion that septic tank discharges were reaching surface water with significant levels of N and P. There was some evidence of water quality around Matatā, and this did show particularly elevated areas in the lagoon area adjacent to the Matatā Hotel. However, a note to these reports indicated that a nearby owner had been discharging sewage directly to the stream, and this may explain the elevated levels. One of the other higher levels was at the upstream end of the Waitepuru Stream, above any areas of residential activity. We can only assume, therefore, that the level of contamination in that reach was due to other causes rather than human sewage.

[383] We undertook the site visit to better understand whether or not septic tanks might be generally concluded as discharging to the lagoon and/or streams. Unfortunately, the results of our site visit did not assist in this understanding. The majority of Matatā is on higher land – probably created by former debris flow, and/or collapse of the escarpment. We would need detailed evidence on groundwater, permeability and testing to have any certainty about potential contamination of waterways from septic tanks.

[384] The lagoon itself is a wetland, and would deal with N and P relatively efficiently. Certainly since the lagoon rehabilitation after the 2005 debris flow, this area has significantly improved, and the wetlands appeared in good condition, with the area functioning largely in accordance with the development concept.

[385] The land rises fairly steeply from the State Highway and the businesses and houses fronting it, and there was no evidence given that septic tank waters in these higher areas would necessarily reach groundwater or the lagoon via groundwater. Rangitihi Marae has a complex treatment system and field disposal system on the slope above State Highway 2, only 50 or so metres from the lagoon, and there was no evidence given of contamination from that either.

[386] We conclude, as a general principle, that the wastewater Treatment Plant will significantly reduce N nutrient contaminant levels, but will have more limited effects in terms of reducing P. We have no information on which we can quantify the benefit from the removal of that waste from the septic tanks when compared to its addition to the ORC. Although we accept as a basic principle that with the reduction in the contaminant levels, improvement or maintenance of the waterways might be

seen on a catchment or wider basis than the ORC, and include Matatā, or even the catchment area, there was no evidence on which we were able to reach a positive conclusion of benefits. We do accept, as did the planners for the parties, that there is a general benefit in the removal of septic tank waste and its processing this through a wastewater Treatment Plant. However this does not enable us to reach any firm conclusion as to whether the increase in nutrients into the ORC is balanced by a reduction in nutrients reaching groundwater or surface water elsewhere.

[387] So far as the NZCPS is concerned we accept that no contaminants are likely to reach the coastal waters via the groundwater directly. The impacts on the coastal waters of the Tarawera River are likely to be negligible.

Te Mana o te Wai and the LAF

[388] The Freshwater Policy Statement records the following as matters of national significance:[110]

> This national policy statement is about recognising the national significance of fresh water for all New Zealanders and Te Mana o te Wai.
>
> A range of community and tāngata whenua values, including those identified as appropriate from Appendix 1, may collectively recognise the national significance of fresh water and Te Mana o te Wai as a whole. The aggregation of community and tāngata whenua values and the ability of fresh water to provide for them over time recognises the national significance of fresh water and Te Mana o te Wai.

[389] We considered the Matatā community values concerning water by considering their responses to this application under the heading Consultation above. We note that a significant number of the community support full reticulation.

[390] We have also addressed the particular matters raised by the Appellant in this decision, and consider that in total community values have been addressed. What we have not yet completed is an analysis of what additional tāngata whenua values may be relevant and what those might add to Te Mana o Te Wai and the aggregation of values concerning freshwater in the Tarawera catchment. We note the term is not defined in the Freshwater Policy Statement, but it includes, but not limited to, those values as appropriate from Appendix 1.

[391] We also note the Preamble, the objectives and, in particular, Objective D1 and Appendix 1, must add to the term. The Preamble records that addressing tāngata

[110] Freshwater Policy Statement-FM 2014

whenua values and interests across all the well-beings in the Freshwater Policy Statement, and including iwi and hapū in the overall management of the well-beings are key to meeting obligations under the Treaty of Waitangi. In addition, it records that freshwater objectives for a range of tāngata whenua values are intended to recognise Te Mana o te Wai. It records that iwi and hapū recognise the importance of freshwater and that they have reciprocal obligations as kaitiaki to protect freshwater quality.

[392] The values listed in Appendix 1 all incorporate aspects of tāngata whenua values, and the term "mauri" is used in relation to the first three national values Under Objective D1 local authorities must take reasonable steps to involve iwi and hapū in the management of fresh water and ecosystems. They must also work with iwi and hapū to identify any additional tāngata whenua values and interests in fresh water and freshwater ecosystems, and reflect those in their management and decision-making for the region.

[393] Ms Hamm also helpfully referred to the document *Proposed Amendments to the National Policy Statement for Freshwater Management 2011 – A Discussion Document.*[111] That document, under the heading "Articulating tāngata whenua values" states that the term represents "the innate relationship" between the first three national values (now reflected in Appendix 1 of the Freshwater Policy Statement). Before the Freshwater Policy Statement was promulgated it was a term that referred to the "inherent mana of water".

[394] We were also referred to Exhibit "R" which was produced by the Minister for the Environment pursuant to s52(3) (c) of the RMA. Under that provision the Minister is required to produce a summary of recommendations and a summary of decisions made on the Freshwater Policy Statement. According to the *Summary*, the key reason for the decision to include the new term Te Mana o Te Wai related, in the Minister's view, to the *need for regional variation in the expression of tāngata whenua values*. Thus the Minister believed *that a flexible and high level approach was needed.*[112] Since that date there have been attempts to restrict the ambit of the term through draft guidelines. However, as Mr Mikaere agreed, the term must include more than mauri and thus the definition of Te Mana o te Wai in the *Ministry for the*

[111] Exhibit Q
[112] National Policy Statement for Freshwater Management 2014 – Summary of Recommendations and Minister for the Environment's Decision, Exhibit R, page 6

Environment's Draft Guidelines on the National Fresh Water Policy Statement was deficient.[113]

[395] Taking all these documents together we have concluded that the term can only be fully taken into account by reference to any additional local tāngata whenua values that aggregated with community values add to those already articulated in the Freshwater Policy Statement.

[396] In attempting to understand what those are and given that caring for the mauri of the waters in the catchment was an important issue for the local iwi, we have also asked what the relationship of te Mana o te Wai is with the term mauri. In this respect we were first assisted by the evidence given by Dr Daniel Hikuroa. He advised the following: [114]

> In terms of a key definition of mauri, a key one is derived from the Reverend Maori Marsden where he ... suggests that mauri is present in land, forests, waters and all the life they support. Together with natural phenomena such as mist, wind and rocks they all possess mauri. Clive Barlow talks about mauri as being the binding force between the physical and the spiritual. ... It is the life energy force or unique life essence that gives being and form to all things in the universe.

[397] Dr Hikuroa noted that as mauri occurs very early in the stages of the genealogical table of Māori cosmogony, it is the force that *inter-penetrates all things to bind and knit them together and as the various elements diversify, mauri acts as the bonding element creating unity and diversity.*[115] In other words, mauri is associated with the beginning of all matter in its various forms.

[398] Whilst he was not so comfortable defining the expression mana, he considered that mauri has a relationship with mana.[116] In terms of the Freshwater Policy Statement, he suggested that Te Mana o Te Wai would need to be defined by reference to tāngata whenua values and from a mātauranga Māori (Māori knowledge) base which was context specific.[117] His view was that in order for Te Mana o Te Wai to be accurately taken into account, it would have to come down to the mana of the tangata whenua.[118] Thus if the mauri of a catchment was negatively impacted, so therefore the mana was impacted. If efforts are made to restore the mauri of the

[113] Mr Mikaere, Transcript, page 632
[114] Dr Hikuroa, Evidence-in-chief, Transcript pages 719-720
[115] Ibid page 720
[116] Ibid, page 721
[117] Ibid, page 721
[118] Ibid, pages 721-722

waters, that would in turn, restore the mana of the people.[119] It was his view that one is not separate from the other as they are inextricably linked.[120]

[399] Consistent with Dr Hikaroa's views on Māori cosmology, Maanu Paul noted that Te Mana o Te Wai refers to Te Kauwaerunga (the celestial/heavenly world) and Te Kauwaeraro (the terrestrial/physical world) which are inter-connected.[121] Water has within it, he explained, the potential to link the celestial and terrestrial worlds and the whakapapa between Ranginui and Papatuanuku, the sky father and the earth mother.[122] For the Ngāti Awa people, as river people, they imbued their rivers with mana and mauri.[123] Where degraded, such as the ORC, it was his view that the mauri can be ... *returned in an enhanced position, is not destroyed, it is in abeyance until it can come back to its original condition.* He stated:[124]

> The mauri cannot be destroyed because the Te Mana o Te Wai, the power of the water is maintained by the people and as long as Ngāti Awa people live the mauri of the Orini will continue to live because it is the people who give the mana ... that results in the mauri, which is essential to think, to understand as Dr Dan Hikuroa said, it is the tangata i roto i te whenua, the people who are in the land who determine the mauri.

[400] When asked to clarify whether he was giving expert cultural evidence for both Ngāti Awa and Ngāti Rangitihi on this issue, he confirmed that he was.[125]

[401] In terms of Ngāti Tūwharetoa, the evidence we have came from Ms Vercoe who opined that mauri can never be modified by man as it is from the celestial realm.[126] In terms of water, mauri included *the currents, the water flow, the gravitational pull, everything that is not visible, it's intangible ... life forces.*[127] She described mana as the quality control tool in the physical world.[128] But, she explained, this form of management could only be assigned to those who were endowed with esoteric knowledge, namely tohunga, because they had the skills to mediate tapu – tapu being the link that tied the heavenly and physical worlds together.[129] Tohunga generally undertook such work for the benefit of their people.

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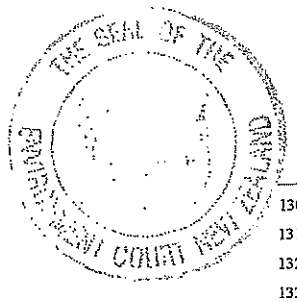
[119] Ibid, pages 722-724
[120] Ibid, page 724
[121] Mr Paul, Evidence-in-chief, Transcript, page 1034
[122] Ibid, page 1033
[123] Mr Paul, pages 1033-1034
[124] Ibid, page 1033
[125] Ibid page 1042, line [25]
[126] Mr Vercoe, Questions from the bench, Transcript pages 992-993
[127] Ibid, page 993
[128] Ibid, pages 992-993
[129] Ibid, pages 992-993

[402] It is at this juncture where the evidence of Mr Paul and Ms Vercoe demonstrate that there is a relational aspect to the term Te Mana o te Wai that is central to tāngata whenua values and their kaitiakitanga responsibilities. This relational aspect is consistent with Mr Mikaere's view when he linked Te Mana o te Wai with the identity of tangata whenua and particular water-bodies, noting the use of water bodies in tribal pepeha (proverbs).[130] He agreed that the term means something more than *mauri* and that it encapsulates the entire water body, including the banks and beds.[131] Thus we find that there is a relational value which is an additional value associated with Te Mana o te Wai in the Tarawera Catchment.

[403] This relational value was recorded in the evidence of Ms Hughes, the cultural advisor for the Applicant, who noted that the various iwi voiced concerns for all the water bodies within the Tarawera catchment, including the ORC. This concern was expressed in the interim CIAs provided by those iwi who responded before the hydrological evidence was released.[132] After the hydrological evidence became available to them, all affected iwi continued to indicate that they wanted the Applicant to prevent wastewater seepage or discharge into water, including salt water.[133] Their approach is consistent with what is recorded of their values concerning water in Chapter 8 of the Catchment Plan.

[404] The implications for this Court, relate to the Applicant's need for a consent for the discharge of treated wastewater into land, in circumstances that may result in the treated wastewater entering water. We note the evidence concerning the potential N and P loading into the groundwater was not expressed clearly in the hydrological evidence until the hearing, and we doubt the iwi were fully appraised of the issue.

[405] While not a wastewater seepage or discharge into water per se, we consider from the views expressed in evidence before us including the CIAs and in the Catchment Plan, that all of the iwi would consider that the mauri of the waters, would be affected by this proposal given the certainty that there will be some nutrient and phosphorus loadings discharged into the ORC and from there into the Tarawera River.



[130] Mr Mikaere, Questions from the bench, Transcript pages 630-631
[131] Ibid page 632
[132] Ms Hughes, Evidence-in-chief, pp 464-465 [26]
[133] Ibid, paragraph [36]

NZ Coastal Policy Statement

[406] The purpose of the NZ Coastal Policy is to state policies in order to achieve the purpose of the Act in relation to the coastal environment of New Zealand. The coastal environment has characteristics, qualities and uses that mean there are particular challenges in promoting sustainable management. These include:[134]

> The coast has particular importance to tangata whenua, including as kaitiaki
>
> Continuing decline in species, habitats and ecosystems in the coastal environment under pressures from subdivision and use, vegetation clearance, loss of intertidal areas, plant and animal pests, poor water quality, and sedimentation in estuaries and the coastal marine area

[407] The lower reaches of the Tarawera River below the Thornton Road Bridge are within the Coastal Marine Area (CMA) boundary. The ORC feeds into the lower reaches of the Tarawera River below this point therefore directly into the CMA and approximately 450m from the rivers confluence with the Pacific Ocean.

[408] The application of the NZCPS relevant here includes:[135]

> ...a consent authority, when considering an application for a resource consent and any submissions received, must, subject to Part 2 of the Act, have regard to, amongst other things, any relevant provisions of this NZ Coastal Policy (section 104(1)(b)(iv) refers);
>
> when considering a requirement for a designation and any submissions received, a territorial authority must, subject to Part 2 of the Act, consider the effects on the environment of allowing the requirement, having particular regard to, amongst other things, any relevant provisions of this NZ Coastal Policy (sections 168A(3)(a)(ii) and 171(1)(a)(ii) refer);

[409] Objective 1 is concerned with safeguarding the integrity, form, functioning and resilience of the coastal environment and sustaining its ecosystems, including marine and intertidal areas, estuaries, dunes and land by:

- maintaining or enhancing natural biological and physical processes in the coastal environment and recognising their dynamic, complex and interdependent nature;
- protecting representative or significant natural ecosystems and sites of biological importance and maintaining the diversity of New Zealand's indigenous coastal flora and fauna; and

[134] NZCPS Preamble
[135] NZCPS 2010 Application of Policy Statement, page 7

- maintaining coastal water quality and enhancing it where it has deteriorated from what would otherwise be its natural condition, with significant adverse effects on ecology and habitat, because of discharges associated with human activity.

[410] Objective 2 concerns the preservation of the natural character and protection of natural features and landscapes. The LAF site is within the coastal environment being a coastal sand dune which we were advised comprises a threatened land environment and an endangered ecosystem. This objective encourages restoration of the coastal environment and introduces the principles of the Treaty of Waitangi and the obligations concerning kaitiakitanga for tangata whenua, incorporating Mātauranga Māori into sustainable management practices and recognising and protecting characteristics of the coastal environment that are of special value to tangata whenua. This relationship is further set out in Policy 2 of the NZCPS.

[411] Objective 4 is to maintain and enhance the public open space qualities and recreation opportunities of the coastal environment. We note the LAF site is a Recreation Reserve. Objective 5 concerns management of coastal hazard risk.

[412] Perhaps most relevantly Objective 6 is an enabling objective which seeks to enable people and communities to provide for their social, economic, and cultural wellbeing and their health and safety, through subdivision, use, and development, recognising that amongst other things

- the protection of the values of the coastal environment does not preclude use and development in appropriate places and forms, and within appropriate limits;
- some uses and developments which depend upon the use of natural and physical resources in the coastal environment are important to the social, economic and cultural wellbeing of people and communities;
- functionally some uses and developments can only be located on the coast or in the coastal marine area;
- the protection of habitats of living marine resources contributes to the social, economic and cultural wellbeing of people and communities;
- the potential to protect, use, and develop natural and physical resources in the coastal marine area should not be compromised by activities on land;

- the proportion of the coastal marine area under any formal protection is small and therefore management under the Act is an important means by which the natural resources of the coastal marine area can be protected;

[413] Policy 4 refers to integrated management of natural and physical resources in the coastal environment and activities that affect the coastal environment.

[414] Moving to Policy 7 (not ignoring the relevance of the other policies) a Strategic Planning policy that sets out what is required when preparing regional policy statements and plans. These documents are required to consider where, how and when to provide for future residential, rural residential, settlement, urban development and other activities in the coastal environment at a regional and district level, and amongst other things (at subsection (2)):

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

[415] As with the Freshwater Policy Statement, this instrument is relevant to the LAF proposal. We have not set out all of the objectives and policies relevant to the matters before us here but have considered them. The LAF is not an activity that by its nature needs to be located in a coastal environment. It has the potential to compromise the recreation/public open space function of the site and we have recognised this in our commentary later concerning the Reserves Actl 1977. We understand that the intention is for the public to continue to be able to enter the site and for signage to be installed explaining its use. We question the practicality and realistic use of the site for recreation purposes.

[416] However, the site is covered with predominantly exotic species and the proposal provides an opportunity to improve upon this with the planting of natives being enabled through the application of the LAF "water" and managed restorative planting. We also note it is fenced and we were told little use of it is made for recreational purposes other than passing by it to reach or enjoy the coastal foreshore.

[417] In addition, management of the greater dune area is proposed as part of the application with a draft Restoration Plan prepared by Wildlands and incorporated in the draft conditions put before the Court. That could be considered as an off-set

mitigation but was not offered for that purpose. We do not know the reality of this work given the ownership of the adjacent dune areas and what agreements may or may not be in place in that respect. We have not been able to place a great importance on this restorative project as it does not directly relate to the freshwater environmental impacts which we find to be a significant potentially adverse feature of the LAF.

[418] The retirement of the LAF from grazing albeit that is used for such purposes for limited periods of the year only, will also provide for the opportunity to enhance the ecological characteristics of the dunes and perhaps make this area more resilient and encourage biodiversity.

[419] There is no potential for contaminants to enter the coastal environment/sea directly based on the hydrological characteristics described to us.

[420] The remaining concern in terms of potential contaminants within the coastal environment and the CMA in particular, is the discharge of the ORC into the Tarawera River. That confluence is a sensitive area with inanga and bird ecological breading communities. Objective 1 of the NZCPS seeks to safeguard the coastal environment by in particular:

> ... maintaining coastal water quality and enhancing it where it has deteriorated from what would otherwise be its natural condition with significant adverse effects on ecology and natural habitat, because of discharges associated with human activity.

The Tarawera is such a coastal environment where the ORC discharges and thus the emphasis on its enhancement.

[421] We have discussed the issue of potential cultural effects including koiwi in relation to the LAF.

[422] The project as a whole will enable the Matatā community to provide for their social, economic, and cultural wellbeing and their health and safety through an improved wastewater treatment system which will address current needs and growth. However, this needs to be balanced against the matters set out in Objective 6 and as we comment above there are important sensitivities around the LAF site and the LAF operation which need to be addressed.

Conclusions on National Policy Statements

[423] We conclude from this evidence in relation to freshwater policy that wastewater seepage or discharge from the LAF into surface water is not acceptable to tangata whenua, and increased N and P will affect their relational values associated with Te Mana o te Wai in the catchment. These values are more consistent with the improvement and enhancement of the ORC and require adequate mitigation.

[424] Nevertheless, we acknowledge both policy documents overall seek to improve existing contamination. We conclude that the National Policy Documents would be met if:

(a) human wastewater is significantly attenuated;

(b) all e-coli are removed;

(c) levels of N and P discharged to the ORC are reduced;

Regional Policy Statement

[425] The LAF is (Map 25 Appendix I) located on the Thornton Dunes within the Coastal Environment and is within a High Natural Character Area. The attributes for which are set out in Appendix J of the document. This particular High Natural Character Area encompasses the dunes from the Rangitaiki River to the Tarawera River. It includes the Tarawera River from the sea up to the Thornton Road Bridge and therefore the confluence of it and the ORC.

[426] Objective 2 requires the preservation, restoration and, where appropriate, enhancement of the natural character and ecological functioning of the coastal environment. It relies on a series of implementation methods many of which are to be enshrined in regional plan and district plan controls.

[427] Section 2.9 deals with water quality and land use. Objectives 27 and 29 are particularly relevant requiring the quality of the mauri of water in the region to be maintained and where necessary to meet identified values to be enhanced. Land use activities are to be undertaken within the capability of the land and integrated with wider environmental values including the capacity of receiving waters to assimilate discharges.

[428] Section 2.6 of the Regional Policy Statement addresses iwi resource management. Relevant objectives include:

> Objective 13
> Kaitiakitanga is recognised and the principles of the Treaty of Waitangi (Te Tiriti o Waitangi) are systematically taken into account in the practice of resource management
>
> Objective 15
> Water, land, coastal and geothermal resource management decisions have regard to iwi and hapū resource management planning documents
>
> Objective 16
> Multiple-owned Maori land is developed and used in a manner that enables Maori to provide for their social, economic and cultural well-being and their health and safety, while maintaining and safeguarding its mauri
>
> Objective 17
> The mauri of water, land, air and geothermal resources is safeguarded and where it is degraded, where appropriate, it is enhanced over time

[429] The resource management issues of significance to iwi authorities taken up in the objectives and policies of the Regional Policy Statement need to be reflected in the lower order planning instruments and also in the practice adopted by consent authorities in the consideration of applications for resource consent and NOR. These issues are particularly on point relative to this project in respect of both sites.

[430] These objectives relating to kaitiakitanga require a positive action. Kaitiakitanga has not been recognised in the proposals as they were presented to the Court. Consultation is identified in the Plan as a part of meeting this objective but the nature of the account taken of kaitiatikanga connects from the start of a proposal, through planning, to its implementation. In situations which involve particular sensitivities to Māori such as the cultural characteristics of a site and the health of natural resources such as waterways, this is not a matter of just accidental discovery protocols but requires a positive action to include this practice in consenting decisions. For example, the Court is familiar with conditions in other projects where technical peer review regimes have been imbedded in the consent conditions (for instance water quality management) with iwi representation on the peer review panel. Receiving a monitoring report is part of the action required but we have not found a mechanism proposed for addressing good practice in accordance with Māori kaitiakitanga obligations.

[431] Objective 16 of the Regional Policy Statement goes to the aspirations for the owners of the land at lots 6A and 7A. This is an issue which is at the heart of their concerns with the proposed Treatment Plant in particular. The objective poses the

question as to whether the social, economic and cultural well-being of these persons is enabled. We have addressed that in detail elsewhere.

[432] We were told the mauri of the ORC has been adversely affected and we could see that for ourselves when we visited the LAF site. This concern holds true for the Tarawera River too. The Regional Policy Statement indicates that where degradation has occurred *where appropriate* this should be enhanced over time. We see this as a direction picked up in the Catchment Plan which we come to later.

[433] Issues around the physical sensitivity of the LAF site are addressed in the application and we anticipate can be avoided or mitigated. This includes the hazard implications of the site and this was a not a particular matter advanced in evidence. Restoration in terms of planting is a practical mitigation although plant species suitable to combine with the LAF operation are limited. The site is however, in poor condition as far as natural flora is concerned so the proposal can be said to promote objectives around restoration. However, matters concerning the discharge and whether that can be said to be *within the capacity of receiving waters to assimilate* have not been addressed to the satisfaction of the Court, as set out elsewhere. There is a prospect though with further mitigation this concern can be addressed.

Water and Land Plan

[434] The Water and Land Plan is a key instrument in the consideration of the proposal as it implements the higher order documents in this environmental subject area. Several resource consents are required under it. These relate to site works in preparation for the Treatment Plant and the LAF and discharge to land and water at the LAF. There are, as we have indicated elsewhere, some resource consents that have been either overlooked or simply left to be applied for later. Some of these consents form a critical aspect of the proposals. They are needed to implement the activities. The earthworks at the Treatment Plant site are a good example. In addition, the provision of access to the Treatment Plant designations is key to that part of the project.

[435] This Plan carries through the objectives concerning Māori interests and Treaty principles. We do not propose to repeat those here. The Plan drills down into the detail of how the higher order documents are to be achieved. It provides specific methodologies for achieving them. It addresses integrated management of land and water. One of the issues identified is the degradation of waterways through natural

processes and human intervention, particularly to do with agricultural processes. Objectives 8 and 9 deal with this issue of integrated management. Objective 10 deals with the stewardship of natural resources which (amongst other things) sustains the life supporting capacity of soil, water and ecosystems.

[436] Objective 13 is particularly relevant to the LAF and requires that the water quality in rivers and streams is *maintained or improved* to meet the Water Quality Classifications set in the Water Quality Classification Map, and sets out relevant environmental outcomes. The ORC is classified *Drain Water Quality* and the Lower Tarawera *Fish Purposes*. The environmental outcomes listed from (a) to (h) as part of that objective do not appear to directly relate to either of these water bodies. However, the Drain Water Quality terminology is picked up within the Plan where at Schedule 5 *Maintenance Areas of River Schemes and Drainage Schemes* (Map 14) the ORC is shown to be within the *Rangitaiki Drainage Scheme Maintenance Area.* This qualification affects the application of the rules at Chapter 9 of the Plan. Objectives 15 to 19 appear relevant although not all of these were set out in the table appended to Mr Scrafton's evidence in chief. They are reproduced below:

> Objective 15: Maintenance of high quality groundwater.
>
> Objective 16: Degraded groundwater quality is improved where appropriate.
>
> Objective 17: Riparian margins are appropriately managed to protect and enhance their soil conservation, water quality and heritage values.
>
> Objective 18: Achieve the sustainable management of riparian margins (excluding artificial watercourses, and ephemeral flowpaths), which may include retirement, in the following priority catchments:...[136]
>
> Objective 19: Protect vulnerable areas from erosion.

[437] Policies which follow seek to *maintain or improve water quality* in streams and rivers to meet their Water Quality Classification. Policy 21 is to manage land and water resources within an integrated catchment management framework to amongst other things:

> k) Promote and encourage the adoption of sustainable land management practices that are appropriate to the environmental characteristics and limitations of the site to:
>
> ...
>
> (v) Take into account the assimilative capacity of the soil
>
> ...
>
> (vii) Maintain or improve the protective function of coastal sand dunes.
> (viii) Manage land and water resources according to realistic management goals that are appropriate to the existing environmental quality and heritage values (including ecosystem values) of the location.

[136] The list at Objective 18 is not relevant to this site.

[438] These objectives and policies translate into rules that allow the discharge of water from a pumped drainage area such as the receiving environment from the LAF, to discharge to surface water as a permitted activity subject to some conditions (Rule 22) and relevantly:

> (a) The discharge shall not cause the effects listed in (i) to (v), as measured at a downstream distance of three (3) times the width of the stream or river at the point of discharge:
> (i) The production of conspicuous oil or grease films, scums or foams, or floatable or suspended materials.
> (ii) Any conspicuous change in the colour or visual clarity, except where the discharge is from peat soils.
> (iii) Any emission of objectionable odour.
> (iv) The rendering of fresh water unsuitable for consumption by farm animals.
> (v) Any more than minor adverse effects on aquatic life.

[439] It is unclear however, whether this would allow for water not associated with drainage per se to be discharged through the same system. Rule 37 captures the following as Discretionary Activities:

> Any:
> 1 Discharge of a contaminant to water.
> 2 Discharge of water to water.
> 3 Discharge of a contaminant onto or into land in circumstances which may result in the contaminant (or any other contaminant emanating as a result of natural processes from that contaminant) entering water.
> 4 Discharge of a contaminant from any industrial or trade premises onto or into land
> that is not:
> (a) Permitted by a rule in this regional plan.
> (b) Permitted by a rule in any other Bay of Plenty regional plan.
> (c) Prohibited by a rule in this regional plan.
> (d) Restricted discretionary status by a rule in this regional plan.
> (e) Controlled status by a rule in this regional plan.
>
> [emphasis added]

[440] The Applicant considers that the discharge which makes its way through land to water to then be pumped into the ORC is permitted by Rule 22. The discharge pathway from application at the LAF is through the sand dune and emerges in the farm drain (water). Water by definition (page 443 of the Plan) would include the open farm drainage system. That part at least was acknowledged as requiring consent and has been included in the subject of these proceedings.

[441] As discussed already, that water will then pass to the ORC with an elevated concentration of N and P. This phenomenon would mean that that discharge would lower the quality of the water of the ORC and has a consequential potential impact on the Tarawera River. So while the discharge at the farm drain might be controlled,

passage beyond that, it is suggested, is not. We have difficulty seeing how that would fit with the overall thesis of the objectives and policies within which these rules sit. Our analysis is provided elsewhere where we have examined the likely environmental effects anticipated and how these might be addressed.

[442] Further we note the caveats on the nature of the permitted discharge at Rule 22 and suggest that the cumulative effect of the proposal could have an impact on some of those measurable outcomes. It is the Court's view that overall the objective and policy guidance is at a minimum to seek to maintain water quality. We also refer to Objective 18 which seems to seek to obtain some improvement.

Tarawera Catchment Plan

[443] This Plan embodies many of the objectives and policies that we have already discussed but it is focused on the Tarawera Catchment, which includes both sites and the ORC to its mouth. Beyond that point the Tarawera River is within the CMA, and thus addressed by the Regional Coastal Plan. Thus it is the ORC and the LAF which are the focus of our discussion here. This location is described as the catchment of the Lower Reach of the Tarawera River.

[444] The justification for this Plan is set out at section 1.3 where Environment Bay of Plenty (the Regional Council) sets out the following reasons which contributed the desirability of having such a Plan.

> (a) Significant conflicts in terms of differences in attitude between industry and community groups as to the level of protection required for Tarawera River water quality.
> (b) Significant community demand for the protection of the Tarawera River by a continued reduction in the discharge of contaminants into the river.
> (c) Significant concerns expressed by tangata whenua on the effects of contaminant discharge to the river.
> (d) The need expressed by community survey to actively restore the deteriorated state of water quality in the Lower Reach of the Tarawera River.

[445] These reasons provide some understanding of the focus of the Plan. Section 4.8 identifies a number of iwi planning documents which the Regional Council had regard to in the preparation of this Plan. These are:

- Tūwharetoa Ki Kawerau Strategic Plan – Te Runanga o Tūwharetoa Ki Kawerau

- Issues for Ngāti Awa regarding participation in Statutory Resource Management Planning – Te Runanga o Ngāti Awa Trust Board
- Ngāti Awa Policy Statement – Tarawera River – Te Runanga o Ngāti Awa Trust Board
- Ngāti Tikanga Tiaki I Te Taiao – Māori Environmental Management in the Bay of Plenty; consultants report for the Operative Bay of Plenty Regional Policy Statement

[446] The Tarawera Catchment Plan was prepared against a background of community concerns that amongst other things including the lower reaches of the Tarawera River being degraded by discharges. Further, in respect of identified resource management issues of significance to Māori, there was concern for the lack of care and respect for the mauri and continued degrading and use of river water to transport or treat contaminants. Specifically the iwi indicated that the discharge of human bodily waste, either untreated or treated, to local water bodies must cease.[137]

[447] Map 6[138] describes the Lower Tarawera Environment and the ORC is described as an Artificial Watercourse Open to Fish Passage. Various standards (relating to oxygen, colour and clarity, toxicity, temperature and pH) are set in the rules pertaining to its qualities and all of its tributaries (except drains) to protect aquatic life. Relevant objectives include:

> 13.5.2(a) Protection, maintenance and enhancement of the life supporting capacity of surface water bodies in the Tarawera River catchment.
>
> 13.5.2(b) Protection, maintenance and enhancement of the indigenous vegetation, habitat and migration pathways of the remnant wetlands, lakes, rivers and their margins in the Tarawera River catchment.

[448] Policies which follow include:

> 13.5.3(a) To ensure that the natural character of wetlands, lakes, rivers and their margins is not further degraded but is enhanced or protected from inappropriate subdivision, use and development.
>
> 13.5.3(b) To ensure that wetland, river and riparian values are provided for when maintaining and establishing drainage systems.

[449] Specific provisions relating to surface water are found at Chapter 15 of the Plan. The Plan specifically addresses the history, options and ongoing management of the sewage discharges within the Tarawera catchment (15.4.6). The tenor of those provisions is to reduce and eventually remove sewage discharges. However, the

[137] TRCP Chapter 9, section 9.2
[138] TRCP Chapter 13, Map 6, Page 101

regime applying to drains differs from that applying to other waterways. The following is set out at Clause 15.5.5 under the section of the Plan discussing water quality standards:

> Drains and Canals and Wetlands on the Rangitaiki Plains
> Environment Bay of Plenty does not consider that the water quality of the wetlands in the lower river catchment, or the drains and canals on the Rangitaiki Plains, require managing through the imposition of water quality standards. Environment Bay of Plenty favours the prohibition of all discharges to wetlands, other than those associated with controlling wetlands water levels, facilitating fish passage, and eradicating plant pests.

[450] The relevant objective is 15.8.2 set out below:

> 15.8.2 Objective
> Enhance surface water quality in the Tarawera catchment to a level which safeguards the life supporting capacity of the water and meets the reasonable needs of people and communities, especially:
> (a) Reduction in the production of waste and discharge of contaminants throughout the catchment; and
> (b) The maintenance of "Fish Spawning" water quality standards in the Upper Reach of the Tarawera River and its tributaries; and
> (c) The establishment of "Fish Purposes" water quality standards in the Lower Reach of the Tarawera River; and
> (d) The conservation of lakes and tributaries in their Natural State; and
> (e) The enhancement of the water quality in Lake Okaro to that suitable for contact recreation; and
> (f) To recognise that staged changes in industrial processes and waste treatment systems will be necessary to achieve the water quality goals of this regional plan.
> (g) Unless there are exceptional circumstances there shall be no discharge of sewage into the surface water of the Tarawera River.
>
> [emphasis added]

[451] More relevant policies (15.8.3) which follow from this objective include:

> 15.8.3(a) To establish a range of surface water quality classes that provide standards for the management of surface water bodies in the catchment. The purposes of these classifications are as follows:
> .....
> (iii) The quality of water in the tributaries of the Tarawera Lakes, the tributaries of the Tarawera River, excluding the canals and drains and wetlands on the Rangitaiki Plains, and the Upper Reach of the Tarawera River will be managed for fish spawning purposes (FSUT) (see Rule 15.8.4(f).
> (iv) The quality of water in the Lower Reach of the Tarawera River will be managed for fish purposes (FPLT) (see Rule 15.8.4(h)).
> 15.8.3(b) To promote reduction of contaminant discharges into the Tarawera River
> 15.8.3(c) To reduce the discharge of contaminants into wetlands, canals and drains on the Rangitaiki Plains.
> ...

> 15.8.3(e) To encourage dischargers to avoid, remedy or mitigate any actual or potential adverse effects arising from their direct or indirect discharge of contaminants into water by:
> (a) Limiting and reducing quantities and concentrations of discharged contaminants, in particular, contaminants which can reduce the life supporting capacity of aquatic ecosystems.
> (b) Promoting discharges to land in preference to discharges into water in areas of the catchment of the Tarawera River where groundwater is not vulnerable to adverse effects from resulting contaminants *and where runoff of contaminants into water can be controlled.*
> (c) Reducing adverse effects from non- point-source discharges of contaminants to water bodies by supporting and promoting appropriate land and riparian management practices, and discouraging the application of sprays and fertilisers adjacent to or over surface water bodies.
>
> [emphasis added]
>
> ...
> 15.8.3(n) To encourage a reduction in human sewage discharges into the Tarawera River or its tributaries
> 15.8.3(o) To discourage and eventually prevent the degrading of the purity of water caused by the discharge of human sewage by:
> (a) encouraging the use of sewage treatment systems designed in consultation with tangata whenua to enhance or restore the mauri of receiving water;
> (b) prohibiting any new sewage discharges to surface water;
> (c) encouraging a shift to land based sewage treatment and disposal systems;
> 15.8.3(p) To encourage communities to develop land based treatment systems for sewage disposal.
> 15.8.3(q) To encourage the grant of consents for the discharge of treated sewage to land.
> 15.8.3(r) To allow the discharge of sewage to the Tarawera River and to its tributaries only in exceptional circumstances where no other practicable options are available, but limited in time to the duration of those circumstances.

[452] We have set out these provisions in some detail because they provide a finer grain of guidance for freshwater management relative to the LAF and they also relate to the project as a whole. As we have mentioned earlier, Ms Hollis in her evidence in chief opined that rule 15.8.4(r) *was not intended* to prohibit the discharge of treated wastewater to land in circumstances where it may enter water. We have discussed this rule earlier.

[453] If we take a look at the theme of the Tarawera Catchment Plan there is a clear direction towards reduction and enhancement of degraded waterways. This includes drains. The key objective (15.8.2) and the policies we have referred to above, indicate that this kind of discharge is to be discouraged.

[454] The Plan makes it clear that discharges to land should be promoted. However it does place a caveat on that by seeking to reduce adverse effects from non-point-source discharges of contaminants to water bodies by promoting appropriate

land and riparian management practices. This policy has not been addressed in the proposal and as a result the likely adverse effect of the LAF on the ORC has not been mitigated. We pick up on this issue elsewhere in the decision with a view to considering whether this issue is able to be addressed.

[455] As we have indicated above, the mauri of the ORC as it currently exists is already compromised. We do not understand this to be an issue in dispute. It follows then that any further degradation or restriction on the ability of that situation to be remedied would be contrary to the objectives and thrust of this Plan. Therefore we would need to see a positive move towards reduction to confirm that this Plan has been satisfied.

Coastal Plan

[456] There is in place a proposed Regional Coastal Environment Plan (2014) and the period for further submissions on it closed on 1 December 2014. For present purposes it was generally agreed given the weight that be attributed to the proposed plan this early in the process, the operative plan is most relevant here. We note that the operative plan has been updated in reference to the latest NZCPS as required under sections 55 and 57 of the RMA.

[457] We were referred to the Natural Character, Tangata Whenua Interests and Coastal Hazards sections of this plan. Many of these provisions mimic those of the other instruments we have already referred to. Matters worth discussing further are those related to natural character and coastal hazards where it clear that:

- The Council has recognised the dune system upon which the LAF is to be located as an area that requires protecting and that cumulative adverse effects upon these areas should be avoided (Objective 4.2.2 and Policy 4.2.3(c)) and that natural character must be restored where appropriate in areas where it has degraded.
- There should be no increase in the total physical risk from coastal hazards (Objective 11.2.2) and features that provide natural hazard protection such as dunes should be protected
- Matters concerning Māori are consistent throughout the Plans.

On-Site effluent Treatment Regional Plan 2006

[458] Mr Scrafton addressed this plan on the basis that it provides objectives and policies related to the management of on-site effluent treatment, and sets the background to the existing environment for the Matatā community which is currently serviced in this way. We do not consider we need to address this plan any further other than to say we have considered it and note that the Matatā community is identified in it as a *confirmed reticulation zone* on the basis that sewerage reticulation of the community will be completed by 1 December 2018. New development would enable better use of the urban land in Matatā given no onsite treatment system would be required if there was a reticulated sewer. We understand the beneficial use of the land resource that might follow although we were not provided with any specific evidence of it.

District Plan

District Plan operative

[459] Our attention was drawn to Objectives LRS1, LSR2, LRS6 and LRS7 and more relevant policies related to these objectives which appear to be the overarching objectives and policies in the Plan from which the finer grained specific objectives and policies flow. At this level we specifically note the intent of Objective LRS1 which seeks to avoid, remedy or mitigate the adverse effects of *incompatible use* and development on natural and physical resources. Its policies address separation as a tool and discourage location where reverse sensitivity issues might arise.

[460] LSR2 is particularly relevant:

> To **maintain and enhance** the traditions, lifestyle and cultural identity of Māori
>
> [emphasis added]

[461] Amongst the policies which follow this objective is the directive to maintain the mauri of water and other natural resources of significance to tangata whenua when considering the effects of subdivision, use and development.

[462] Objective LRS6 deals (relevant to these proceedings) with the maintenance and enhancement of public access along the coast and sets out a number of policies which promote this. Policy 2 however, sets out circumstances where access might be

restricted and here we note specifically the need to *protect* areas of significant indigenous vegetation and habitat, *protect* cultural values, and *protect* public health and safety.

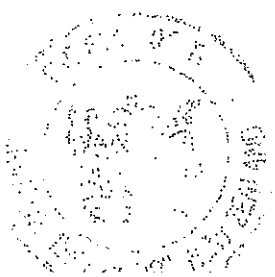
[463] Objective LRS7 deals with managing residential growth and this is directed towards encouraging infill (we take to mean increasing the intensity of development on lots which already have a house) and housing in identified growth areas where infrastructure /reticulation is provided.

[464] More specific objectives are found in the Built Environment section of the plan (2.2) where we note in addition to BE2, BE1 would appear relevant. Objective BE1 seeks to maintain and enhance the visual character of rural environs and the policies which follow address matters such as the visual effect of structures relative to their location, size, height, bulk and materials and seek to ensure physical separation of dwellings. In the explanation for these provisions of the plan we note the following passage:

> ...The focus on physically separating dwellings, but not other buildings, recognises that a dwelling is often the trigger for other buildings. On land without a dwelling, few buildings are usually constructed. Non-residential buildings are unlikely to have more than a minor effect on the visual character of a rural area. The rural character is defined in Section 2.2.1.1.
>
> Particular land activities can be visually intrusive, justifying some form of landscaping or screening. Sensitive locations are not to be compromised by visually intrusive activities.....

[465] BE2 seeks the maintenance and enhancement of the health and safety of people and communities from nuisance effects. The policies which follow include *to avoid, remedy or mitigate the adverse effects of intrusive noise, odour, glare or vibration. The policies also address dust suppression during construction and earthworks and also from vehicle access and parking and manoeuvring areas.* In the explanation for these provisions of the plan we note the following passage:

> The Council is seeking to avoid, remedy or mitigate nuisance and adverse environmental effects in rural areas so as to maintain a healthy, safe working and living environment.
>
> The Council's policy is to control intrusive noise, glare and vibration to the extent necessary to avoid, remedy or mitigate adverse effects on the health and safety of people and communities. In addition, the District Council has a limited and defined role in respect of odour and dust suppression...
>
> It is acknowledged that the rural environment includes activities such as farming, forestry or aggregate extraction which will generate nuisance effects at times. There are also activities near rural zones which can generate infrequent nuisance effects...



[466] Specifically in relation to sewage disposal Objective BE8 and its single policy are relevant. These are set out below for completeness.

> Objective BE8
> To prevent uncontrolled or unauthorised disposal of stormwater, wastewater and sewage into the environment.
>
> Policy 1
> To ensure stormwater, sewage and other wastewater is detained, collected or removed from a lot or a site without causing an adverse effect on the natural environment or to other property, or to people.

[467] Policy 5 is particularly relevant to the Treatment Plant site and access formation to it. We set out the policy below.

> Avoid, remedy or mitigate the adverse effects of earthworks associated with development and ensure the integration of earthworks with the natural landform and vegetation patterns

[468] The provisions of the plan related to natural hazards are also relevant although we did not find that this issue was particularly contentious (we do note the earthquake vulnerability of the Treatment Plant site and the vulnerability of the LAF to tsunami and coastal erosion). The sites are also part of a rural landscape where Objective LS2 and its related policies seek to maintain the character and diversity. Objectives and policies (CE1 and policies 1 and 3) are specific to the coastal environment. This objective seeks to preserve the natural character of the coastal environment and protect it from inappropriate subdivision, use and development. The LAF site is clearly in focus for this section of the plan (2.8.3). The policies which follow include a requirement to *maintain and enhance the natural ecology* of the coastal environment.

[469] Finally and specific to works and network utilities (2.6). The District Council has acknowledged in this plan the inadequacies of existing reticulated sewerage systems. In the discussion around these facilities (2.6.1.2) the district plan indicates Council will adopt the best practicable option over time to improve environmental performance. Our understanding here is that this proposal is considered a best practicable option given the community characteristics and the particular methodology adopted. Objective WNU1 provides for the Council to facilitate the development, operation and maintenance of works and network utilities throughout the district, while avoiding, remedying or mitigating adverse effects on the environment. Policies 1 and 3 associated with this objective were highlighted and they require Council to consider the benefits derived from a proposal and technical

requirements to enable efficiency, and to ensure adverse environmental effects are addressed.

District Plan Proposed

[470] The Proposed Whakatāne District Plan was notified in June 2013 and although the submission period has closed and hearings are underway we were advised by Mr McGhie (Team Leader - Consents Planning Whakatāne District Council) that no decisions relevant to these proceedings have been made. However there are provisions at Chapter 15: Indigenous Biodiversity, rules 15.2.1 (1-14) and 15.2.2 and Chapter 16: heritage rules 16.2.1 (1-10) that have immediate effect. This means that the SIB status takes immediate effect. However, a number of submissions have been received on both these areas of the proposed plan so they currently carry little weight.

[471] Both of the two sites subject to the designations are zoned *Rural Coastal* in this Plan and the LAF site is located in an area covered by a coastal protection overlay zone. It is shown as being subject to erosion risk and inundation however the actual LAF site is apparently outside both these risk areas.

[472] The LAF is also identified as within a *Significant Amenity Landscape* and a *Significant Indigenous Biodiversity Site* (SIB) (Thornton Dunes). We were told that the policy framework for the two sites is very similar and Mr McGhie identified two areas where the proposed plan does not have equivalents in the operative plan. These are:

- Objective CP1 and policies 1 and 2 (addressing natural character).
- Objective IB1 and IB2 and policies 1 and 2 for each which address the maintenance and enhancement of the full range of indigenous habitat and ecosystems and the retention and protection of identified indigenous vegetation and habitats of indigenous fauna from adverse effects of land use changes.

These provisions seem to provide more consolidation around the protection regime set out in the older plan.

[473] The separation of incompatible uses is one of the foundations of the zoning tool used for the drafting of district plan documents. Other tools include the setting of standards which limit generated effects so that differing activities can co-exist. In this

case, the general accepted practice of a buffer to account for the mitigation of odour has not been part of the proposal before us. We can understand that this may be so because the general thesis of the Plan is for there to be rural activities on the Treatment Plant site. There are activities (as acknowledged in the Plan where is deals with rural amenity) which generate effects that might be acceptable in rural areas but may not be acceptable in residential/urban areas. Odour is one of these generated effects from certain farming activities.

[474] However, the site condition here is complicated by the nature of the ownership of both the subject site and its neighbour where Māori Land expectations for the utilisation of their lands needs to be taken into account. The Applicant has been aware of those expectations, and for potential complaints about the Treatment Plant. We have addressed odour in our discussion on the environmental effects and it can be seen in relation to the provisions of the District Plan this issue is not satisfied in many ways including the actual potential for the adverse emission of odour as well as the hindrance to the maintenance and enhancement of the traditions, and relationship of Māori with their ancestral lands. The Applicant's response has been to require a non-complaint covenant in its Deed of Lease for Lot 6A. Such a clause does not avoid the potential adverse effects on Lot 6A, or Lot 7A, and the legitimate expectations of the beneficial owners.

[475] The use of the sand dune area for the LAF clearly has the potential to restrict public access to this area even though we were told foot access would be permitted. However, in a practical sense we doubt the practicality of this as we were also told of signage which would warn persons of its potential health risks and the area will be enclosed by a fence. On the positive side, the access to the foreshore will be restricted to defined locations so that this area can, with the assistance of a weed management and a planting program, be restored with indigenous plants. This feature of the proposal will enhance the environmental outcome in respect of the dune site. We consider that on balance, the use of this site (if the discharge issues can be addressed) will not be contrary to the scheme of the objectives in both the operative and proposed District Plan.

[476] We do not consider that all of the aspects of this proposal have been brought before us in a manner that we are able to make an informed decision in respect of the Treatment Plant. Particularly this relates to the effects of the formation of access to the Treatment Plant site and effect that may have on the character of the area. Further, we have not been provided with a clear understanding of mitigation measures

so that we can understand the impact of building(s) which might be employed to mitigate odour for instance. It is unclear to us in these respects whether the Treatment Plant on site 6A will meet the objectives and policies around maintenance and enhancement of the rural character, although we accept that the planting buffer must have a positive impact.

[477] We acknowledge that once sewage is reticulated that it is likely the objectives guiding residential growth will be further realised and this is a positive contribution of the project.

[478] We also acknowledge that in the general scheme of the provision of sewerage systems this project demonstrates best practice compared to existing facilities in the district. However, some of the adverse environmental effects have not been adequately addressed in respect of the Treatment Plant (protocols for excavation, incomplete details for implementation, lack of appropriate and dependable odour management), and in respect of the LAF concerning mitigation measures for discharges to fresh water. We have addressed these effects elsewhere. In light of that assessment the Treatment Plant cannot fulfil the objectives of the District Plan (nor the proposed plan). We conclude though, that with further attenuation of the LAF discharge and improved protocols regarding ground disturbance this part of the proposal is consistent with and in some cases promotes objectives and policies of the District Plan.

Iwi Management Plans

[479] We were not made aware of the specifics of iwi management plans, which it would seem do exist and would likely be relevant to this project. We understand the proponents reliance on cultural impact reports and consultation to address matters likely canvassed in these plans. We have addressed the cultural impacts and the efficacy of the consultation elsewhere in this decision.

Overall Conclusion Planning Instruments

[480] As noted we have also integrated our discussion on parts of the various planning instruments as we have considered the effects related to certain subject areas of the proposal. This has been necessary due to the approach taken in this decision given its complexity and the numerous issues. What is clear is that the purpose of the proposal is consistent with aspects of the community's aspirations as set out in the

Tarawera Catchment Plan and the District Plan to better manage the treatment of sewage. That is an intended positive environmental objective of the consents being sought. However that does not of itself outweigh the negative effects to sustainable management of the environment as we have set out elsewhere and which are clearly articulated in the relevant plans.

[481] It is clear that a number of documents are relevant to the application of Part 2, and the consideration of this application for land discharge. These include the NZCPS, the Freshwater Policy Statement, Regional Policy Statement, and the various plans including the Land and Water Plan, Coastal Plan, Tarawera Catchment Plan.

[482] Overall, it can be seen that these various documents point towards:

(a) a cautious approach to constraints within the coastal environment;

(b) a desire to maintain and enhance water quality and reduce contaminants in water;

(c) a desire to improve the natural ecology, particularly of coastal dunes and wetlands.

Reserves Act 1977

[483] We were told the LAF site is within a Recreation Reserve. The Reserves Act 1977 provides:

> **17 Recreation reserves**
> (1) It is hereby declared that the appropriate provisions of this Act shall have effect, in relation to reserves classified as recreation reserves, for the **purpose of providing areas for the recreation and sporting activities and the physical welfare and enjoyment of the public, and for the protection of the natural environment and beauty of the countryside, with emphasis on the retention of open spaces and on outdoor recreational activities, including recreational tracks in the countryside.**
> (2) It is hereby further declared that, having regard to the general purposes specified in subsection (1), every recreation reserve shall be so administered under the appropriate provisions of this Act that—
> (a) the **public shall have freedom of entry and access** to the reserve, **subject to the specific powers conferred on the administering body by sections 53 and 54**, to any bylaws under this Act applying to the reserve, and to such conditions and restrictions as the administering body considers to be necessary **for the protection and general well-being of the reserve and for the protection and control of the public using it**:
> (b) where scenic, historic, archaeological, biological, geological, or other scientific features or indigenous flora or fauna or wildlife **are present on the reserve**, those features or that flora or fauna or wildlife **shall be managed and protected to the extent compatible with the principal or primary purpose of the reserve**:

> provided that nothing in this subsection shall authorise the doing of anything with respect to fauna that would contravene any provision of the Wildlife Act 1953 or any regulations or Proclamation or notification under that Act, or the doing of anything with respect to archaeological features in any reserve that would contravene any provision of the Heritage New Zealand Pouhere Taonga Act 2014:
> (c) those qualities of the reserve which contribute to the pleasantness, harmony, and cohesion of the natural **environment and to the better use and enjoyment** of the reserve **shall be conserved**:
> (d) to the extent compatible with the principal or primary purpose of the reserve, its value as a soil, water, and forest conservation area shall be maintained.
>
> [emphasis added]

[484] Given this is a recreation reserve, the activities that can be conducted there are prescribed by ss17, 53 and 54, together with any relevant bylaws. We note that the LAF will only occupy some 4ha of what was described as a 385 hectare reserve. However, we see various titles, and there was no explanation as to what made up the larger reserve, and whether this includes the lands returned to iwi under the Treaty settlements.

[485] Some activities require prior ministerial approval, including leasing the site (except for farm grazing or afforestation) (s 53(1)). The Court expressed some concern at the hearing as to whether the LAF could be located in a recreation reserve without ministerial approval.

[486] The site is gazetted (January 1975, page 17) as recreation reserve with no special conditions. We conclude that a ministerial consent may be required, but that would not prevent a resource consent being issued with a condition that any consent for the activity on the recreation reserve would be obtained prior to the activity commencing. Such a condition would need to be inserted.

[487] Public access to and along the coastal marine area is of considerable importance under 6(e), but it was not suggested the LAF would affect this. The reasons for this are that the LAF is already fenced on the seaward side to allow leased grazing. Beyond the fence there is a flat area 20-40m to the top of the seaward dunes and then a similar distance to high water. There is access along the entire beachfront, and behind the seaward dunes in this area. On our site visit we noted vehicles using an informal track between the foredunes and the fence. That enables ready access along the coastal Marine Area, and there is access to this area both at the Tarawera Mouth (several kilometres west) and at various points to the east, including the Cut for the Rangitaiki River.

Part 2 issues

[488] Some issues in this case arise directly as a function of Part 2, including the question of economic impact and the health and welfare of the local community. Unsurprisingly, there are different views on these issues.

[489] Many section 6, 7 and 8 issues have been part of the evaluation of this proposal or are captured by the many statutory documents affecting the sites or catchment. Given our conclusion that the proposed Treatment Plant is not in the coastal environment, s 6(a) bears upon the consideration of the LAF as it affects the Coast and rivers. We accept the proposal would only have minimal effects on natural character, particularly if the N and P discharge to the ORC was reduced. The land surface and coastal margin will not be affected provided conditions are imposed on the discharge to land consent and regarding vegetation.

[490] We accept that s 6(b) and (c) will not apply on the facts, provided significant vegetation is protected as proposed by the Applicant.

[491] We have discussed s 6(d) in relation to the LAF, and these issues do not arise on Lot 6A. We conclude that access will be maintained with the proposal.

[492] Both s 6(f) and s 6(g) are marginally relevant, depending on one's view as to whether Lot 6A or 7A represent historic heritage. Adequate protection of koiwi is provided by the Protocols.

[493] This leaves the question of 6(e) and the relationship of Māori with Lot 6A, Lot 7A, the ORC, the Tarawera River, the coast and the area around the LAF. We conclude there is very strong evidence of that relationship recognised in ownership of Lot 6A and Lot 7A and the vesting of land in the immediate vicinity of the LAF. The new Freshwater Policy Statement, the Tarawera Catchment Plan and other statutory documents also recognise the relationship of tangata whenua with the waters. These relationships have been the focus of much of this case, and remain the dominating influence in relation to both sites.

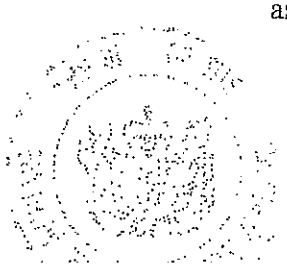
[494] Mr Harris, for Sustainable Matatā, believes the local community is having foisted on it a very expensive system, which will be expensive to maintain and will mean that all Matatā residents will be required to pay rate payments in respect of wastewater for not only their own services but those within the rest of the district into

the foreseeable future. He considers that that is an impost that residents in Matatā can ill afford. He says that it would be better to spend a significantly smaller sum of money (unspecified) on upgrading individual septic tank systems to modern requirements as required. Mr Harris acknowledges that there may be difficulties with the payment of public monies for individual property owners, and also recognises that some individual owners may be faced with significant costs of installing appropriate treatment systems depending on their personal situation.

[495] The role of the Court is not to make a policy decision on what is the appropriate wastewater treatment system for Matatā. This is a matter that is properly be addressed by the ratepayers and the District Council, and the concern of this Court under the Act is to be satisfied that the proposal put before it meets both the purpose of the Act and various documents prepared under it, in particular the designation objectives. To this end, our enquiry is not to decide which is the best alternative under s 171(1)(1)(b), but rather whether there has been adequate consideration of the alternatives. That can include alternative sites for the Treatment Plant in certain circumstances. These factors are part of our overall evaluation subject to Part 2 of the Act.

[496] We do note, however, the evidence of the Applicant in this case that the impost on individual ratepayers was being kept to a minimum by spreading the cost over the entire district. We also note that, of the estimated $12m in costs, over $8m appears to have been sourced from the regional council and central government.

[497] Most of the parties before us agreed that, in principle, a reticulated system had significant advantages. It does appear to us that the significant advantage of a reticulated system is being able to impose controls over the outlet and treatment of the wastewater, rather than having to deal on an ad hoc basis with multiple systems that may be of different ages and stages. Non compliance of septic tanks may have significant impacts on individual landowners. To that end, we were initially concerned about the grinder systems on each property, but we were told by the Council that those would be owned and maintained by the Council, and only in exceptional circumstances (such as deliberate interference) would they be looking to the landowner to meet costs. It was acknowledged that the landowners would need to pay the cost of power in respect of each in addition to the wastewater rates assessment.



[498] Overall we were unable to find in this argument anything that convinced us that there was any disabling effect of a reticulation scheme. We note that it is not opposed by the majority, and it seems to us that it will have advantages to the population generally. While we remain unconvinced that this will allow any major extension of Matatā it nevertheless does ensure that any additional properties built or subdivided will be part of a reticulated and controlled scheme.

Enabling the community

[499] Section 5 seeks to enable people and communities. It is sometimes helpful to analyse the Part 2 criteria in terms of the various parties that are enabled or not enabled through the proposal. It might be argued that a designation is not subject to the same evaluation, yet s171 does state that it is subject to Part 2 of the Act. In those circumstances we conclude that the Court is still obliged to consider whether it is satisfied that the purpose of the Act is being met.

[500] Does this application enable the social, economic, health and safety needs of the community? There are broad arguments it does, but it is difficult to evaluate the relative significance of this enabling given the lack of evidence. Thus the broad social benefit of a reticulated waste system must be considered against the impost on beneficial landowners of Lot 6A, the failure to properly consider alternative sites and the potential effects on surface water from the LAF site. The task has proved very difficult because of the need to sift through background documents to evaluate evidence, and the significant number of issues only partially considered. The Commissioners' decision issued four days after the hearing is unhelpful.

Evaluation of the Designation

[501] Although the objective of a designation is clearly an important factor, in the end we have concluded that the purpose of the Act must also be met. In this regard, in respect of the designation itself, we conclude that with some potential amendments to the designation of the LAF, it could meet the purpose of the Act, and we could be satisfied that the designation should be confirmed.

[502] Key to this is whether the impact of N and P on the ORC (and thus the Tarawera River) can be improved.

[503] In respect of Lot 6A, the situation is somewhat more problematic. As we have discussed in some detail, the issue comes down to whether or not we can be satisfied that the beneficial owners of that lot and Lot 7A will be able to establish Papakainga in future, or whether it will constitute a restriction on the land's use in the future. If this is impeded, that has a direct impact on the relationship of Māori with their Taonga (land).

[504] In the end we are satisfied that the issues of visual effects could be met by the imposition of appropriate conditions in relation to a site planting scheme and any associated fencing of the areas to be stocked in due course.

[505] So far as the question of odour is concerned, we have discussed this in some detail and reached the conclusion that, without some adequate control of odour at its source, offensive odour is likely beyond the boundary of the designation/s. Although we accept that residential amenity is not part of the current physical environment, we see it as a cultural issue relating to the appropriateness of the activity on the site, and the clear and continuing objective of having Papakainga on both Lot 6A and Lot 7A.

[506] To date, the evidence has not satisfied us that there would be no offensive odour beyond the boundary. At the end of the case, and in light of the Applicant's submissions, we are in significant doubt as to whether or not the proposed condition of no objectionable odour at the boundary could be met at all, and conclude that Mr Iremonger's view that a 100-140m buffer would be required to achieve that level of confidence is correct.

Outcome

[507] When we look at this matter under Part 2, the principle of a reticulated system for Matatā is a positive benefit, although no specific evidence weighing those benefits has been given. However, provided N and P reaching the ORC from the LAF can be attenuated, we would consider that there would be an overall benefit.

[508] That would require some specific proposals in respect of one or more of the following:

(a) Improving attenuation in the ground at the LAF;

(b) riparian planting and/or wetlands; and

(c) retirement of paddocks from stock.

[509] Further evidence should then be able to demonstrate an attenuation of nutrient levels entering the ORC from the farm drains, which would then satisfy us that the broad objectives of the Freshwater Policy Statement and the regional documents could be met. Collaterally, this would accord with the Tarawera Catchment Plan and satisfy us that the intent of Rule 15.8.4(r) is being met.

[510] In relation to the Treatment Plant on Lot 6A, we conclude that the cultural relationship is not enabled by the proposal. To that extent we see the reticulation of the three marae and in particular for any future construction on Lot 6A as a positive benefit. Nevertheless, on the basis of the evidence currently before us, it appears to us that significant adverse effects from odour could occur, and that the risk would be unacceptable in terms of any residential activity within 150m of the plant, more particularly in respect of any relationship of the beneficial owners of Lot 6A and Lot 7A with their residual lands.

[511] The Applicant's evidence in this area was variable, with the original proposal suggesting that the operation would be fully covered and ventilated, but the Applicant in final reply indicating that covers would be installed with no mention of how those would be ventilated and the odour reduced. Questions of maintenance or problems with the system were not addressed in any detail, and in particular:

- How would the elements of the plant be covered and odour extracted?
- How would items be serviced while avoiding the emission of any odour?
- How would odour effects of Treatment Plant upsets be managed?

[512] We are not satisfied that potential effects can be avoided. The condition proposed does nothing to assist in that regard. Odour would be a significant adverse effect on any Papakainga within a radius of 100-150 metres. It may have significant adverse effect from time to time beyond that. No design solution has been given to satisfy us that the odour effects will be avoided beyond the Buffer area. When combined with the other cultural factors the Designation and resource consent/s for Lot 6A must be cancelled.

[513] Overall the Applicant's case suffered from a lack of careful thought in its preparation, and an assumption that generic conditions would sufficiently control effects. The concern from the Court's point of view is how, in fact, such effects would be avoided, as opposed to mitigated. We also have considerable issues with the wording of the conditions. We do not go into these in detail simply because the conditions would need to be settled once a proposal is accepted.

[514] Having reached the conclusion that there are significant adverse effects, which are not fully addressed by the application, s 171(1)(b) would then require the consideration of alternatives. There was a clear failure to adequately consider alternative sites for the Treatment Plant. The effect of this has been to identify this site for the development of a Treatment Plant without regard to the clear expectation of development for Papakainga on Lot 6A and 7A, or the effect that this Treatment Plant will have on the relationship of the beneficial owners of both Lot 6A and Lot 7A. This Māori land was identified by URS in its June 2013 report, but was ignored in the later analysis.

[515] The Applicant's evidence-in-chief before us did not take into account this relationship or expectation for Papakainga development in respect of this land. Even if the Applicant is not required to consider alternatives, it is quite clear that the Court is able to take into account all effects under s171. The question of alternatives is merely an element of that. In that regard, we reach the conclusion that there is potential for odour to impact upon the beneficial owners of both Lot 6A and Lot 7A, which is a significant effect. The failure to properly consider alternatives go to our conclusion that we are not satisfied the Lot 6A proposal meets the purpose of the Act.

[516] This cultural input can, in any event, be considered under s 104(1)(c) – other relevant matters. We have a broad discretion to include other matters that bear upon sustainable management. We include the potential Papakainga and community facilities as part of that analysis.

[517] Whichever methodology we adopt, we have concluded unanimously, after significant consideration as to whether the matter can be remedied by the Applicant, that Lot 6A designation for the Treatment Plant cannot be granted. It follows that the designation for the buffer area, which essentially is simply vegetation and therefore permitted, serves no purpose without the plant, as does the access road. We note in respect of the access road that it itself has an effect currently in bisecting the rear of the site, and by connecting to a road which currently appears to require a consent

before it can be constructed. There is no utility in granting these designations in the absence of the plant designation and comment that we saw little utility in having separate designation for these elements in any event. Given the current lease arrangements between the Council and the Trustees, the access and buffer zone elements could be constructed in any event without a designation, given they appear to be permitted activities.

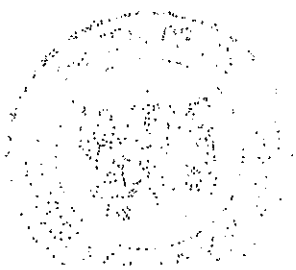
[518] We accept that an appropriately designed, operated and sited wastewater treatment system, based on grinder pump reticulation, Treatment Plant and LAF, is an appropriate system for Matatā. But Lot 6A is not an appropriate site for a Treatment Plant and the LAF has potential indirect adverse effects on the ORC that need to be addressed.

[519] Accordingly we have concluded that all three designations for the Treatment Plant site on Lot 6A must fail. Given our conclusions in respect of effects we are not satisfied with the granting of regional consent for the odour release on the properties. To the extent that there are other consents either relevant or interpolated within the broad range of consents sought, we conclude that these should be refused also. Given the lack of any clarity in both applications, and the consents granted, we say this out of caution.

Comments

[520] Given the conclusion of this Court, we again reiterate, as we have several times through this decision, that we see a reticulated system of the type suggested by the Applicant as generally desirable. We are minded to grant consent for the LAF in principle, subject to being satisfied as to the reduction of N and P to the ORC, and the redrafting and extension of other conditions.

[521] We give the Applicant an opportunity to consider, on a proper basis, alternative sites for the wastewater Treatment Plant. If a proper constraints analysis was conducted, we suspect that there are several sites around Matatā which would be appropriate.



[522] It may be that the various subsidies could be continued while a process for an alternative Treatment Plan site was entered into. Matters could be expedited even by way of a direct referral. We would expect any alternative site to factor in a separation from residential activity and/or Māori land around 150m buffer zone, with more thought given to the potential design of the site to minimise odour. We would suspect that such alternative site may even be achieved by consensus, given the position of almost all parties before us as to benefits of a reticulated system. We acknowledge that this does not address directly Mr Harris's concern about costs to the local community, but we have already noted that this aspect of his appeal is not supported by this Court.

Directions

[523] We direct that the Applicant is to advise within **twenty working days** if it wishes to finalise the Designation and consent conditions in respect of the LAF, in which case it should seek further directions from the Court for timing. We adjourn that aspect of the case.

[524] The resource consents and designations are cancelled in relation to the Treatment Plant. This appeal is allowed only to the extent set out in this decision. We particularly note that this does not endorse Mr Harris's position in respect of the question of financial matters or the necessity for a reticulated scheme.

[525] Costs are reserved for directions in due course.

SIGNED at AUCKLAND this 12th day of May 2015

For the Court

JA Smith
Environment Judge

C Fox
Alternate Environment Judge

JA Hodges
Environment Commissioner

ACE Leijnen
Environment Commissioner

Annexure List:

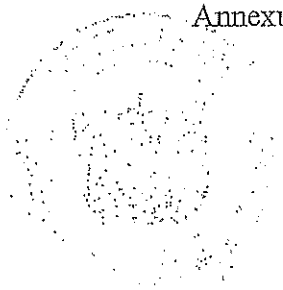
Annexure A Consent 67708;

Annexure B Figure 7 Map Book prepared for Whakatāne District Council evidence;

Annexure C Figure 3 Map Book prepared for Whakatāne District Council evidence;

Annexure D Figure 20 Map Book prepared for Whakatāne District Council evidence;

Annexure E Figure 8 Map Book prepared for Whakatāne District Council evidence.



Annexure A

Conditions of consent for the Matatā wastewater treatment system

(67708)

Purpose

1. For the purpose of discharging treated wastewater (TWW) by way of sub-surface irrigation from a wastewater treatment plant (WWTP) to the land application field.
2. For the purpose of discharging contaminants to air from the WWTP and land application field.
3. For the purpose of authorising earthworks associated with the construction of the land application field and access road.

Location

4. Wastewater Treatment Plant and Land Application Field located at Thornton Road, Matatā.

Quantity and Rate of Wastewater

5. The daily quantity of TWW discharged to the sub-surface irrigation shall be no more than 605 cubic metres per day, at an average application depth no greater than 30 millimetres per day, averaged over a period of one calendar month.

Volume of Earthworks

6. Earthworks under this consent shall not exceed a total cut and fill volume of 5,500 cubic metres.

Earthworks Location

7. Within Pt Allotment 273 Rangitaiki Parish Recreation Reserve and Allotment 109 Rangitaiki PSH BLK V Awaateatua SD, as shown on plan number C03.

Map Reference

8. Discharge of TWW at or about map reference NZTM 1935533 5798943.
9. Discharge of contaminants to air at or about map reference NZTM 1935181 5799150 and NZTM 1931281 5799263. .

Legal Description

10. WWTP site: Allotment 6A Matata Parish
11. Land application field: Pt Allotment 273 Rangitaiki Parish Recreation Reserve

Earthworks - Notifying the Regional Council

12. No less than ten working days prior to undertaking any earthworks as authorised under this consent, the consent holder shall submit a Site Management Plan to the Chief Executive of the Bay of Plenty Regional Council (Regional Council) (or delegate) for approval. This management plan will include, but not be limited to:
    a. A plan of earthworks showing cut and fill locations and volumes.
    b. How sediment, stormwater and erosion will be controlled and contained, noting that as this is a sandy soil site winter earthworks are encouraged.
    c. How the groundcover of the dunes will be protected.
    d. Site Plan.
    e. Drainage Plan.
    f. Areas to be cut and filled.
    g. Total works area expected to be disturbed.
13. No less than five working days prior to the overall start of works under this consent, the consent holder shall request (in writing) a site meeting between the principal site contractor and the Chief Executive of the Regional Council (or delegate). Notification at this time shall include details of who is to be responsible for site management and compliance with consent conditions.

14. The consent holder shall notify the Chief Executive of the Regional Council (or delegate) in writing no less than five working days before the completion of Earthworks under this consent, prior to the removal of erosion and sediment controls.

Discharge - Notifying the Regional Council

15. No less than five working days prior to the first TWW discharge from the WWTP under this consent, the consent holder shall request (in writing) a site meeting between the principal site manager and the Chief Executive of the Regional Council (or delegate). Notification at this time shall include details of who is to be responsible for site management and compliance with consent conditions.

Notification of Medical Officer of Health

16. The consent holder shall notify the Medical Officer of Health should any part of the activity set out in the document 'Matatā Wastewater Scheme: Resource Consents and Notices of Requirement Assessment of Effects on the Environment, Application Edition, November 2013' be subject to any significant change that may have an effect on public health.

Written Approvals

17. The following conditions requiring written approvals from the Chief Executive of the Regional Council (or delegate) shall be obtained before any works or discharges commence:

    a. Condition 12 relating to earthworks;

    b. Conditions 23, relating to discharges of TWW.

Wastewater Treatment Plant and Land Application Field

18. The location of the WWTP and land application field shall be as shown on plan number A02.

19. There shall be no above ground discharge or spray irrigation of wastewater, treated or untreated, from the WWTP or within the land application field.

20. Treated wastewater discharge to land shall be by way of sub-surface drip lines placed at a minimum depth of 200mm and maximum depth of 300mm below the ground surface.

21. The consent holder shall ensure that the physical works authorised under this consent are completed within a period of no longer than 15 months following their commencement.

22. The consent holder shall ensure there is no activity undertaken on top of the land application field that may cause damage to the disposal system (e.g. stock grazing, deep rooting trees or vehicle parking etc.).

Operation and Management Plan

23. The consent holder shall submit a Draft Operations and Management Plan for WWTP and land application field to the Chief Executive of the Regional Council (or delegate), no less than one month prior to the installation of the system, for approval by the Chief Executive of the Regional Council. The consent holder shall consult with the Medical Officer of Health and seek feedback on the draft Operations and Management Plan prior to submitting to the Regional Council. The draft Operations and Management Plan shall include the results of any consultation undertaken in developing the draft Operations and Management Plan. The Operations and Management Plan shall include as a minimum the following details:

    a. Location and Design of WWTP and TWW land application field:

        i. Plans detailing the key components and location of the WWTP;

        ii. Detailed design drawings; including depth and length of the land application field, layout of the land application field and reticulation within it;

        iii. Methodology for calculation and verification of the land application field's loading rate;

        iv. An explanation of the operation of the land application field, including field resting;

        v. Wastewater Treatment Plant process flow diagram;

        vi. Location and specification of groundwater monitoring wells, including depth; and

        vii. Maintenance specifications for both the WWTP and land application field.

b. Soil monitoring within the land application field:

i. Details of the monitoring methodology of the land application field soils, including:

1. Five yearly soil quality monitoring; and

2. Location, depth, frequency of sampling, dates and constituents as required in Condition 45.

c. Operation of WWTP and land application field:

i. Onsite responsibilities, including names and contact telephone numbers for operational staff and a 24 hour contact telephone number;

ii. Protocols for sampling, sample handling and analysis;

iii. Protocols for cycling land application fields;

iv. Maintenance schedules for all components of the WWTP and land application field;

v. An Environmental Risk Management Plan, including identification of potential issues, including spill and breakdown, location in the system where these may occur, issue indicators, and response plans. These should include measures to notify the Medical Officer of Health as soon as practical where a spill or breakdown occurs that may have a public health risk, including the notification of the measures being implemented to mitigate the occurrence and associated public health risk;

vi. Storage and handling procedures for any chemicals to be stored on-site as part of the WWTP process; and

vii. Timelines for any reviews associated with the operation of the WWTP and discharge field.

d. Odour Management Plan for the WWTP and land application field, including as a minimum:

i. The purpose of the odour management plan,

ii. Full process description and identification of potential sources of odour,

iii. Methods of odour mitigation and operation procedures,

iv. Biofilter (or alternative odour device that would achieve the same level of odour control) management and maintenance frequency,

v. A description of the routine inspection, monitoring and maintenance procedures to be undertaken to ensure effective WWTP operation and compliance with resource consent conditions;

vi. Key system parameters to be monitored remotely,

vii. System review and reporting procedures,

viii. Details of back up options and contingency plans and procedures, including spill, overflow and breakdown response plans; and

ix. Details of the odour complaints procedure (including the provision of odour diaries to neighbouring property owners on request), record keeping and response procedure.

e. Avian Botulism Management Plan for the surface water drainage network immediately to the south of the land application field and/or Bennett Rd Stream:

i. Surveillance actions to detect an outbreak of Avian Botulism;

ii. Actions (for example, collecting and removing dead or dying birds) that the consent holder shall undertake should there be an outbreak of Avian Botulism including proactively participating with Fish and Game New Zealand, Eastern Region; and

iii. Monitoring and mitigation measures.

24. The final Operations and Management Plan shall be submitted to the Chief Executive of the Regional Council (or delegate) for approval within three months of the completion of the initial sampling period as described in condition 32. The Operations and Management Plan shall be reviewed by the consent holder at least every three years and if revised shall be submitted to the Chief Executive of the Regional Council (or delegate).

Baseline Receiving Water Monitoring

25. At least one month before any discharge of TWW from the WWTP the consent holder shall supply the Chief Executive of the Regional Council (or delegate) no less than 12 months' worth of monthly water quality monitoring results from surface water bodies likely to receive resurfacing discharged TWW. These sampling locations shall be located generally as detailed in the Plan number C03.

26. Surface water monitoring results as required under Condition 25 shall be sampled and tested for:

    i. Dissolved Oxygen (g/m3)
    ii. Electrical conductivity
    iii. pH
    iv. Chloride (g/m^3)
    v. Total nitrogen (g/m^3)
    vi. Nitrite and nitrate nitrogen (g/m3)
    vii. Total ammoniacal nitrogen (g/m^3)
    viii. Total phosphorous (g/m^3)
    ix. Dissolved reactive phosphorous (g/m^3)
    x. E. coli (cfu/100mL)

27. At least one month before any discharge of TWW from the WWTP, the consent holder shall supply the Chief Executive of the Regional Council (or delegate) no less than 12 months' worth of quarterly groundwater quality monitoring results from the groundwater bodies likely to receive discharged TWW. These sampling locations shall be located generally as detailed in the Plan number C03.

28. Groundwater monitoring results as required under Condition 27 shall be sampled and tested for:

    i. Groundwater level (metres below ground level)
    ii. Water temperature
    iii. Dissolved Oxygen (g/m3)
    iv. Electrical conductivity
    v. pH
    vi. Chloride (g/m^3)
    vii. Total nitrogen (g/m^3)
    viii. Nitrite and nitrate nitrogen (g/m3)
    ix. Total ammoniacal nitrogen (g/m^3)
    x. Total phosphorous (g/m^3)
    xi. Dissolved reactive phosphorous (g/m^3)
    xii. E. coli (cfu/100mL)

29. The installation of monitoring bores in Condition 27 shall be undertaken in consultation with a suitably qualified and experienced hydrogeologist to ensure correct specification relative to the depth and construction of the well.

30. Results from Conditions 26 and 28 shall be submitted in writing to the Chief Executive of the Regional Council (or delegate) and the consent holder must obtain written receipt from the Chief Executive of the Regional Council (or delegate).

Initial Sampling of Treated Wastewater

31. For no less than four weeks immediately following the commencement of the TWW discharge from the WWTP, or for no less than 4 weeks if required under condition 38, results from samples taken from the WWTP (after all treatment processes and prior to discharge to the land application field) shall be taken twice weekly (measured as a grab TWW sample for E. coli and a 24 hour flow proportioned TWW sample for other parameters) for the parameters set out below:

i. Total nitrogen (g/m^3)

ii. Total ammoniacal nitrogen (g/m^3)

iii. Nitrite and nitrate nitrogen (g/m^3)

iv. Total phosphorous (g/m^3)

v. Total suspended solids (g/m^3)

vi. $cBOD_5$ (g/m^3)

vii. pH

viii. E. coli (cfu/100mL)

32. On receipt of three weeks consecutive results verifying the TWW to be within the parameters defined in Table A of Condition 35, the initial sampling period will be considered over and operational sampling of TWW shall commence. Should this condition not be achieved within six months following the commencement of the TWW discharge from the WWTP, the Regional Council may undertake a review as described in Condition 97.

Operational Sampling of Treated Wastewater

33. Following completion of the initial sampling period for the WWTP as provided in Condition 31, the consent holder shall take samples of the TWW from the WWTP (after all treatment processes prior to discharge to the land application field) once per week. Samples shall be measured using a grab TWW sample for E.coli and 24 hour flow proportioned TWW sample for other parameters, and shall be analysed by laboratory analysis for the following:

i. Total nitrogen (g/m^3)

ii. Total ammoniacal nitrogen (g/m^3)

iii. Nitrite and nitrate nitrogen (g/m3)

iv. Total phosphorous (g/m^3)

v. Total suspended solids (g/m^3)

vi. $cBOD_5$ (g/m^3)

vii. pH

viii. E. coli (cfu/100mL)

34. The total daily volume from the WWTP to the land application field shall also be recorded on a daily basis taken at approximately the same time each day.

35. Following completion of the initial sampling period for the WWTP as provided in Condition 31, the TWW discharged into the sub-surface discharge system shall not exceed the limits specified in Table A when determined as setout in condition 33 for the ten out of twelve consecutive samples, taken weekly and measured as 24 hour flow proportioned TWW samples;

Table A – TWW Limits

Process Performance Parameter	Unit	10 out of 12 Consecutive Samples Compliance Limit
$cBOD_5$	g/m^3	30
NH_4-N	g/m^3	5
NO_2-N + NO_3-N	g/m^3	10
TN	g/m^3	15
TP	g/m^3	10
Suspended Solids	g/m^3	30
pH	SU	6.5 - 7.5 (outside of range)

36. If the concentration of E.coli measured under Condition 33 exceeds 100,000 cfu/100ml the consent holder shall, within 7 days, commence weekly monitoring of the groundwater bores for E.coli levels, in order to confirm compliance with trigger levels set out under of Condition 46. If compliance with the trigger levels set in Condition 46 is demonstrated for 3 consecutive weeks the consent holder shall revert to groundwater monitoring at the frequencies set out in the Sampling Plan provided under Condition 46.

37. Laboratory analyses as required under conditions 26, 28, 31, and 33 shall be carried out as set out in the latest edition of "Standard Methods for the Examination of Water and Wastewater' - APHA - AWWA - WPCF or such other method as may be approved by the Chief Executive of the Regional Council (or delegate).

38. If under Condition 35 sample results exceed one of the specifications listed in Table A (as measured in accordance with Condition 33 and 37) the consent holder shall recommence sampling as required under Condition 31 to again satisfy Condition 32. In the event that Condition 31 cannot be satisfied following such an event, the Chief Executive of the Regional Council (or delegate) may trigger a review of the monitoring conditions in accordance with Condition 97.

39. The consent holder shall keep records verifying conditions 32, 34, 35, 36 and 37. These records shall be made available immediately upon request to the Chief Executive of the Regional Council (or delegate).

Soil Monitoring

40. At least one month before the first discharge of TWW to the land application field the consent holder shall submit to the Regional Council soil sample results for parameters as defined in Condition 45.

41. Samples taken for Condition 45 shall be taken at a depth below where the discharge drip lines will be situated and shall consist of random composite samples from no less than one sample per hectare or part thereof within the discharge field.

42. As part of the Operations and Management Plan to be submitted by the consent holder in accordance with Condition 23, the consent holder shall submit a Soil Monitoring Plan to the Chief Executive of the Regional Council (or delegate) for approval. The plan shall include how five-yearly soil analysis results for the parameters defined in Condition 45 shall be obtained and any associated methodologies.

43. Soil sampling shall be conducted once every five years in accordance with the soil monitoring as required under Condition 23.

44. Results from Condition 45 are to be submitted in writing to the Chief Executive of the Regional Council (or delegate) and the consent holder must obtain written receipt from the Chief Executive of the Regional Council (or delegate).

45. Soil sampling shall involve the following parameters:

    i. Nitrate nitrogen
    ii. Ammoniacal nitrogen
    iii. Total nitrogen
    iv. Total organic carbon
    v. Organic matter
    vi. Phosphorus
    vii. Total Sodium
    viii. Calcium
    ix. Potassium
    x. Soluble salts
    xi. Cation exchange capacity

Receiving Water Sampling

46. Following the completion of the baseline monitoring in accordance with Conditions 26 and 28, all monitoring results shall be forwarded to the Regional Council and a Sampling Plan shall be submitted to the Chief Executive of the Regional Council (or delegate) for approval. This Sampling Plan shall determine the sampling frequency and methodology used to ensure that any groundwater body and surface water body likely to receive discharged TWW is monitored for the duration of this consent, and for the provision of monitoring results to the Regional Council. The Sampling Plan shall specify the location of a minimum of four monitoring bores which are to be provided with at least one upgradient and one downgradient of the land application field, and a minimum of five surface water sampling points, as shown generally in the Plan number C03. These groundwater and surface water samples shall as a minimum be sampled quarterly. The results of this monitoring shall be reviewed in the Review Report required by condition 96 and the frequency of monitoring may be reduced by approval of the Chief Executive of the Regional Council (or delegate) on receipt of each Review Report. The Sampling Plan shall also provide trigger levels for the monitored parameters as specified in Conditions 48 and 49, to be approved by the Chief Executive of the Regional Council (or delegate).

47. In order to monitor any potential effect on groundwater seaward of the proposed land application field the consent holder shall specify in the Sampling Plan required through Condition 46 a requirement for a minimum of two monitoring bores on the seaward side of the proposed land application field, as generally shown in Plan C03 as monitoring bores BH804 and BH810. The two seaward bores shall be sampled quarterly including as a minimum one sample collected between the months of June to August. The results of this monitoring shall be reviewed in the Review Report required by condition 96 and the frequency of monitoring may be reduced by approval of the Chief Executive of the Regional Council (or delegate) on receipt of each Review Report.

48. Surface water samples required under the Sampling Plan required by Condition 46 shall be tested for:

    i. Dissolved Oxygen (g/m^3) (as measured by an appropriate method to detect the minimum diurnal dissolved oxygen concentration)
    ii. Electrical conductivity
    iii. pH
    iv. Chloride (g/m3)
    v. Total Nitrogen (g/m^3)
    vi. Nitrate and nitrite nitrogen (g/m^3)
    vii. Ammoniacal Nitrogen (g/m^3)
    viii. Total Phosphorus (g/m^3)
    ix. Dissolved reactive phosphorus (g/m^3)
    x. E.coli cfu/100ml

49. Groundwater samples required under the Sampling Plan required by Condition 46 and 47 shall be tested for:

    i. Groundwater level (metres below ground level)
    ii. Water temperature
    iii. Dissolved Oxygen (g/m3)
    iv. Electrical conductivity
    v. pH
    vi. Chloride (g/m^3)
    vii. Total Nitrogen (g/m^3)
    viii. Nitrate and nitrite nitrogen (g/m^3)
    ix. Total ammoniacal Nitrogen (g/m^3)
    x. Total Phosphorus (g/m^3)

xi. Dissolved reactive phosphorus (g/m^3)

xii. E.coli cfu/100ml

50. Groundwater samples required by Condition 46 and 47 shall be sampled for the parameters listed in Condition 49 and shall not exceed the groundwater quality trigger values established in Condition 46.

51. In the event that a single sample of the groundwater exceeds the trigger levels as established in Condition 46, the consent holder shall:

    i. Immediately notify the Chief Executive of the Regional Council (or delegate) in writing; and

    ii. Resample the groundwater immediately

52. In the event that three consecutive samples of the groundwater exceed the trigger levels as established in Condition 46, the consent holder shall formulate a Remediation Plan. The Remediation Plan shall:

    i. Address the exceedances; and

    ii. Initiate an investigation into reasons for the exceedances and include remedial actions which may include, but not be limited to, alternative or upgraded treatment methods, changes to the management and operation of the treatment plant and ultraviolet disinfection system, changes to the alarming and monitoring of key process units, and/or improvements to the designated land application field.

    The Remediation Plan shall be submitted to the Chief Executive of the Regional Council (or delegate) within 6 weeks of the first exceedance occurring.

53. In addition to the specific requirements of Condition 52, if the groundwater monitoring required under Condition 46 demonstrates any exceedance of the trigger levels for three consecutive results, the consent holder shall commence weekly monitoring of flowing surface water in the receiving streams for the parameters set out in Condition 48.

54. If any solution specified in the Remediation Plan does not result in the groundwater quality complying with the trigger levels set out in Condition 46 within 6 months after the Remediation Plan being submitted to the Regional Council, the Regional Council may then trigger a review of the consent conditions in accordance with Condition 97.

Wastewater Treatment Plant and Land Application Field Maintenance

55. The WWTP and land application field shall be operated and maintained generally in accordance with the Operations and Management Plan required under Conditions 23 and 24 at all times, to the satisfaction of the Chief Executive of the Regional Council (or delegate), provided such requirements or "satisfaction" does not affect the consent holder's ability to meet the conditions of this consent.

Reporting

56. All sampling and monitoring results and records as required by the Operations and Management Plan and consent conditions from 1 July to 30 June of each year shall be compiled into an annual report. The annual report shall discuss sampling and monitoring results and trends, exceedances and actions taken, site management, complaints and how these have been addressed, and any areas where improvement is required. The annual report shall be submitted (in writing) to the Chief Executive of the Regional Council (or delegate) before the 31 of July of each year.

    Note: For the avoidance of doubt the consent holder shall publish the annual report on their publically accessible website within two weeks of the annual report being provided to the Regional Council.

Earthworks

57. Construction and earthworks shall be carried out in accordance with the information submitted with the Site Management Plan as required under Condition 12.

58. During the construction of the land application field the consent holder shall:

    a. Ensure that no stripping of grass sward or topsoil is to occur on the land application field;

b. Protect the groundcover of the dunes as far as possible within the land application field;

c. Minimise excavation to lay pipelines within the land application field. The preference is for pipelines to be laid using mole plough pipe laying method or similar;

d. Ensure that vehicles use only the formal roadway off Thornton Road for access to the land application site.

59. The consent holder shall ensure that only cleanfill is deposited on site. For the purposes of this consent, the definition of cleanfill shall include only materials such as clay, soil, rock; or concrete, and brick.

60. No physical works associated with the construction of the Land Application Field shall occur within 5m of any kanuka vegetation

61. The consent holder shall ensure that the earthworks authorised under this consent are completed within a period of no longer than 12 weeks following their commencement.

62. The consent holder shall ensure that all exposed areas of earth resulting from works associated with this consent are effectively stabilised against erosion, by vegetative cover or other methods, as soon as practicable following the completion of works, to the satisfaction of the Chief Executive of the Regional Council (or delegate).

Temporary Signage

63. Prior to the commencement of works under this consent, the consent holder shall erect a prominent sign adjacent to the main entrance to the site, and maintain it throughout the period of the works. The sign shall clearly display, as a minimum, the following information:

a. The consent holder;

b. A 24 hour contact telephone number for the consent holder or appointed agent;

c. A clear explanation that the contact telephone number is for the purpose of receiving complaints and information from the public about dust nuisance or any other problem resulting from the exercise of this consent.

Erosion and Sediment Control

64. The consent holder shall ensure that all erosion and sediment controls detailed in the Site Management Plan as required under condition 12 and implemented on site comply with specifications set out in Bay of Plenty Regional Council Guideline No. 2010/01 - "Erosion and Sediment Control Guidelines for Land Disturbing Activities" or its successor.

65. All erosion and sediment controls shall be installed prior to the commencement of earthworks.

66. The consent holder shall ensure that all practicable measures are taken to the satisfaction of the Chief Executive of the Regional Council (or delegate) to ensure that no material is tracked off site.

67. The consent holder shall divert uncontaminated catchment runoff away from the area of earthworks.

68. The consent holder shall ensure that where runoff controls (such as diversion channels, bunds, contour drains etc.), have slopes greater than 2%, then the runoff controls shall be protected from erosion by the use of geotextile materials, rock or other suitable materials.

Dust Control

69. The consent holder shall adopt a proactive strategy for dust control, specifically by complying with the principles of dust management as set out in section 3.4 of Environment Bay of Plenty Guideline No. 2010/01 – "Erosion and Sediment Control Guidelines for Land Disturbing Activities" or its successor, so as to prevent a dust nuisance from occurring beyond the property boundary.

70. The consent holder shall ensure that an adequate supply of water for dust control and an effective means for applying that quantity of water, is available on site at all times during construction and until such time as the site is fully stabilised.

71. The consent holder shall ensure that soil moisture levels are monitored at all times when earthworks are being carried out, and at the end of every working day.

72. The consent holder shall ensure that, at all times, the soil moisture level of exposed areas is sufficient, under prevailing wind conditions, to prevent dust generated by normal earthmoving operations from remaining airborne beyond the boundary of the work site.

73. The consent holder shall ensure that, at the end of every working day until such time as the site is fully stabilised, the soil moisture level of exposed areas is sufficient to prevent a dust nuisance occurring beyond the boundary of the works site.

74. The consent holder shall ensure that, outside of normal working hours, staff are available on-call to operate the water application system for dust suppression.

75. In the event that wind conditions render dust control impracticable, the consent holder shall ensure that any machinery generating airborne dust ceases to operate until such time as effective dust control can be re-established.

76. Notwithstanding conditions 69 to 75 above, the consent holder shall undertake additional or alternative dust control measures to the satisfaction of the Chief Executive of the Regional Council (or delegate), as directed.

Erosion and Sediment Control Maintenance

77. The consent holder shall ensure that the erosion and sediment controls, spillways and associated erosion protection devices and dust controls are inspected and maintained in an effective capacity at all times during works and until the site is stabilised in accordance with condition 62 of this consent.

78. The consent holder shall ensure that, as far as practicable, any necessary maintenance of erosion and sediment controls identified by inspection under condition 77 or by Regional Council staff is completed within 24 hours.

79. Accumulated sediment shall be removed from the sediment retention devices before sediment levels reach 25% of that device's volume.

80. The consent holder shall ensure that sediment removed from the sediment retention device is placed in a stable position where it cannot re-enter the device or enter any water body.

81. The consent holder shall ensure that all-weather machinery access is maintained to any sediment retention pond.

Erosion and Sediment Control Monitoring and Reporting

82. The consent holder shall ensure that the erosion and sediment controls are inspected:

    a. at least weekly during the duration of construction works; and

    b. within 24 hours of each rainstorm event which is likely to impair the function or performance of the erosion and sediment controls.

83. The consent holder shall maintain records of:

    a. the date and time of every inspection of erosion and sediment controls on the site; and

    b. the date, time and description of any maintenance work carried out.

84. The consent holder shall forward a copy of records required by condition 82 to the Chief Executive of the Regional Council (or delegate) within 48 hours of the Chief Executive of the Regional Council (or delegate's) request.

Reinstatement and Restoration

85. The consent holder shall ensure that the ground surface within the land application field following earthworks is left in a standard of reinstatement similar to that of the adjacent undisturbed areas of the site.

86. No later than thirty (30) working days prior to the commencement of the discharge of TWW from the WWTP the consent holder shall submit a Restoration Plan to the Chief Executive of the Regional Council (or delegate) for approval. The Restoration Plan shall be prepared in general accordance with application supporting document 9, and shall include:

a. Restoration planting for the land application field and the wider designation area (as shown on plan titled 'Restoration Area for Proposed Matatā Wastewater Land Application Field', reference 01 1503);

b. The permanent retirement from grazing, and the provision of weed and pest control, for the Western Whakatāne Coastal Recreation Reserve between the Tarawera River and Walker Road (of which the land application field and wider designation area are part of); and

c. Management of the dunes between the Tarawera River and Thornton Road suitable to achieve a predominantly indigenous habitat.

The restoration plan shall be prepared by a suitably qualified person, and shall include the following details:

a. A planting plan, detailing species lists and spacing's, utilising eco sourced indigenous species where possible;

b. Weed control measures;

c. Any temporary fencing requirements;

d. Animal pest management measures; and

e. Monitoring procedures.

87. The consent holder shall ensure that the land application field, dunes and Western Whakatāne Coastal Recreation Reserve (between the Tarawera River and Walker Road) are managed in accordance with the requirements of the Restoration Plan.

Air Quality

88. The consent holder shall design, operate, manage and maintain the WWTP in a manner that shall not result in any objectionable odours at or beyond the designated boundary of the wastewater treatment plant environmental protection buffer as shown on plan titled 'Site Survey', prepared by Harrison Grierson, drawing number 135173-SS03 rev. C.

89. The consent holder shall operate, manage and maintain the land application field in a manner that shall not result in any objectionable odours at or beyond the boundary of the designated boundary of the land application field as shown on plan titled 'Site Survey Extent of Effluent Field, prepared by Harrison Grierson, drawing number 1357173–SS05, rev. B.

90. The consent holder shall maintain and keep a Complaints Register for all complaints made about the treatment and discharge operations that relate to air discharges received by the consent holder. The Register shall record:

a. The date, time and duration of the event/incident that has resulted in the complaint;

b. The name, phone number and address of the complainant, unless the complainant refuses to supply these details;

c. The location of the complainant when the event/incident was detected;

d. The possible cause of the incident;

e. The weather conditions and wind direction at the site when the incident allegedly occurred, if significant to the complaint;

f. Any corrective action undertaken by the consent holder in response to the complaint.

91. The Complaints Register shall be made available to the Chief Executive of the Regional Council (or delegate) at all reasonable times. Complaints which may indicate non-compliance with the conditions of this resource consent shall be forwarded to the Chief Executive of the Regional Council (or delegate) within 5 working days of the complaint being received.

The consent holder shall notify the Chief Executive of the Regional Council (or delegate) of any incident, including power, mechanical or process failure, leading to a significant emission of odour from the plant, within 24 hours of the incident being brought to the attention of the consent holder, or the next working day. A written report shall be forwarded to the Chief Executive of the Regional Council (or delegate) within seven working days of the event occurring describing the incident, the reasons for it occurring, its consequences (including the nature of any complaints), the measures

taken to remedy or mitigate its effects, and any measures taken to prevent a recurrence of the event, including any changes proposed to the Operation and Management Plan.

Surface Water Flow Monitoring

92. The consent holder shall liaise with the Rivers Programme Leader, Regional Council to collect data from the Robinsons pump station in order to determine the water flow being pumped from the farm drainage system (Robinsons Farm or subsequent property) into the Bennett Road Stream (Old Rangitaiki Canal). These data shall be collected according to the following parameters:

    a. Pump data will be collected on a monthly basis for 12 months prior to any discharge of TWW from the WWTP to the land application field to determine a baseline flow.

    b. Pump data will be collected on a monthly basis for a period of 2 years following commencement of the discharge of TWW from the WWTP to the land application field.

    Note: The Rivers Programme Leader, Regional Council shall provide access to the Robinsons pump station so that monitoring equipment can be installed at the consent holder's cost.

93. The consent holder shall install a temporary flow monitoring gauge in the Bennett Road Stream (Old Rangitaiki Canal) at a location to be agreed with the Regional Council (proposed location Robinsons or subsequent property owner milking shed access bridge approximately 400m to the west of the Robinsons pump station discharge) in order to determine water flows within the Bennett Road Stream (Old Rangitaiki Canal). These data shall be collected according to the following parameters:

    a. Flow data will be collected on a monthly basis for 12 months prior to any discharge of TWW from the WWTP to the land application field to determine a baseline flow.

    b. Flow data will be collected on a monthly basis for a period of 2 years following commencement of the discharge of TWW from the WWTP to the land application field.

94. All data collected will be provided to the Regional Council and Fish and Game New Zealand, Eastern Region, by 31 July of each year that data is collected.

Permanent Signage

95. For the duration of this consent, the consent holder shall install and maintain appropriate signage on the formal access point to the wastewater treatment plant site and at appropriate locations around the perimeter of the land application field warning that treated wastewater is discharged to the land. The consent holder shall seek comment and agreement on the proposed wording, size and placement of signs from the Medical Officer of Health for both sites and from Fish and Game New Zealand, Eastern Region, in terms of the land application field. Written confirmation of the signage wording, size and placement shall be provided to the Chief Executive of the Regional Council (or delegate) no less than one month prior to commencement of the TWW discharge.

Whakatāne District Council Review Report

96. The consent holder shall submit to the Chief Executive of the Regional Council (or delegate) a Review Report no later than 31 July 2020, and thereafter at six yearly intervals, for the duration of the consents. As a minimum, the Report shall:

    a. Address ongoing compliance with the conditions of the consent and, in particular, any reported non-compliance with consent conditions;

    b. Include an assessment of compliance/consistency with any relevant national or regional water quality policies, standards or guidelines in effect at the time;

    c. A summary of the monitoring undertaken as required through conditions 46 and 47 including an assessment of whether the sampling frequency can be reduced or not;

    d. A summary of any residual actual or potential adverse environmental effects of the discharge of TWW, irrespective of whether those environmental effects are in accordance with the conditions of this consent; and

    e. The appropriateness of monitoring indicators and monitoring methods including reference to any appropriate new monitoring indicators and/or guidelines.

Review of Conditions

97. The Regional Council may:

    a. on the anniversary of the commencement of the consent; or

    b. within six months of receipt of any report submitted to the Regional Council under any condition of this consent or any report required as a result of compliance monitoring by Council; or

    c. within 6 months of completion of any compliance monitoring carried out by the Regional Council, which shows that the Matata wastewater treatment scheme is a substantiated source of odour complaints; or

    d. where condition 32 cannot be satisfied as set out in condition 35; or

    e. in the circumstances contemplated by condition 54.

    serve notice on the consent holder of its intention to review the conditions of this consent, under s128 of the Resource Management Act 1991.

98. The purposes of this review may include:

    a. To modify any required monitoring/reporting and/or specify additional monitoring/reporting and/or change the monitoring/reporting frequency required to address any identified adverse effects;

    b. To assess, and if necessary to address, any identified adverse effects of any of the discharged treated wastewater on ground or surface waters;

    c. To assess and if necessary to review current discharge limits and controls;

    d. To require the consent holder to adopt the best practicable option in accordance with section 128(1)(a)(ii) of the Resource Management Act 1991;

    e. To ensure that management practices at the site are consistent with any provisions or restrictions that are required to be implemented by the Regional Council for any National Environmental Standards (NES);

    f. assess the need for treatment of air discharges from any part of the Matata wastewater treatment scheme;

    g. impose monitoring and discharge control conditions relating to odour discharges; and

    h. To require further works to be carried out on the WWTP or land application field, or to require further treatment components within the WWTP or land application field. The requirement would be after six months of a Remediation Plan being triggered under condition 51 or no solution has been reached which enables the operation of the WWTP and land application field in full compliance with consent conditions.

Accidental Discovery Protocol

99. A Taonga Tuturu Monitor shall be employed by Whakatāne District Council to monitor, act in accord with the Accidental Discovery Protocol (attachment A to this consent) and report any discoveries during earthworks.

100. The following procedures will be adopted in the event that kōiwi or taonga are unearthed or are reasonably suspected to have been unearthed during the course of construction.

    a. Immediately when it becomes apparent or is suspected by workers at the site that kōiwi or taonga have been uncovered, all activity in the immediate area will cease.

    b. The construction plant operator will act with caution by shutting down all machinery or activity in the immediate area to ensure that kōiwi or taonga remain untouched as far as possible in the circumstances and shall notify the Site Construction Manager or the on-site supervisor.

    c. The Site Construction Manager or on-site Supervisor shall take immediate steps to secure the area in a way that ensures that kōiwi or taonga remain untouched as far as possible in the circumstances and shall notify the Taonga Tuturu Monitor.

101. The Taonga Tuturu Monitor will:

a. Seek advice from kaumātua from Te Mana o Ngāti Rangitihi Trust (TMoNRT), Ngāti Rangitihi Raupatu Trust (NRRT), Ngāti Tuwharetoa BOP Settlement Trust (NTST) and Te Rūnanga o Ngāti Awa (TRONA) to guide and advise Site Managers and any other parties as to the appropriate course of action to be taken and the identity of persons to involve as appropriate to the circumstances.

b. Upon the advice of iwi contacts from kaumātua from TMoNRT, NRRT, NTST and TRONA and an archaeologist from Heritage New Zealand providing a description of the find and seeking their advice as to whether they consider it necessary to immediately request kaumātua, Pukenga, an archaeologist and/or the NZ Police attendance at the scene.

c. Ensure the find area is secure and available for inspection by Kaumātua, Pukenga, an archaeologist and/or the NZ Police and for photographic recording by the archaeologist should a decision be reached to request attendance at the scene.

d. In the event it is considered by the Taonga Tuturu Monitor and archaeologist unnecessary for kaumātua, Pukenga and the NZ Police to attend the scene, the Taonga tuturu Monitor and archaeologist will:

i. Record, photograph and report the potential findspot including reasons why attendance was not required.

ii. Take photographs of the find site to share with iwi and others and ensure the archaeologist and site manager have recorded GPS co-ordinates for the site should it be confirmed by the archaeologist the site is a newly discovered site.

iii. Take photographic records of any taonga tuturu and the find spot.

iv. Collect and retain custody of any koiwi in a suitable receptacle to be located at until the completion of the works upon which time iwi will hui to deliberate on the appropriate place for re-interment of koiwi.

e. Upon the discovery of taonga tuturu the Taonga Tuturu Monitor and archaeologist shall:

i. Photograph the taonga and findspot and record the circumstances of the find.

ii. In compliance with the Protected Objects Act 2007, register the taonga tuturu with the Senior Advisor Heritage Operations at the Ministry for Culture and Heritage, and with each iwi. The Archaeologist will seek from the Ministry for Culture and Heritage approval to place the taonga tuturu into the interim custody of the Whakatāne Museum in order to enable subsequent claims for custodianship and ownership to be lodged by iwi with the Ministry of Culture & Heritage (in compliance with Taonga Tuturu Protocols between settled iwi and the Ministry) while also providing for the enablement of processes under the Protected Objects Act 2007 that require decisions from the Maori Land Court as to custody and ownership in perpetuity.

102. In the event of a significant find and consequential attendance at the scene the Site Construction Manager shall ensure that kaumātua, Pukenga, the archaeologist and Taonga Tuturu Monitor are given the opportunity to undertake karakia (prayer) and any such other cultural ceremonies and activities at the site and affected workers, in accordance with tikanga Māori.

103. Activity in the immediate area will remain halted until kaumātua, the Police and Historic Places Trust (as the case may be) have given approval for operation in that area to recommence. In the event that rua (caves), pits or other archaeological features are discovered, a comprehensive report, inclusive of photographs are to be taken and labelled by an archaeologist with copies sent to TMoNRT, NRRT, NTST and TRONA and Heritage New Zealand, NZ Archaeological Association File-keeper and the Heritage Co-ordinator at the Bay of Plenty Regional Council.

104. At the conclusion of the proposed works a Hui-A- Iwi will be convened by the Taonga Tuturu Monitor at the expense of the Whakatāne District Council at which reports on any discovery of koiwi and or taonga tuturu will be provided including the location of protected objects and koiwi held in the interim custody of the Whakatāne Museum. The purpose of the hui will be to:

a. Provide for the Taonga tuturu monitor to request iwi deliberation, decision-making and implementation for the re-interment of koiwi.

b. Be informed of the process required by the Protected Objects Act 2007 administered by the Ministry for Culture and Heritage and determined by the Maori Land Court to enable iwi to make claims for ownership and custodianship in perpetuity for taonga tuturu.

105. The Whakatāne District Council will cover all expenses relating to the implementation of the Accidental Discovery Protocol including those incurred by kaumātua, Pukenga, the archaeologist and iwi attendees..

Term of Consent

106. This consent shall expire 35 years from the date that this consent was granted.

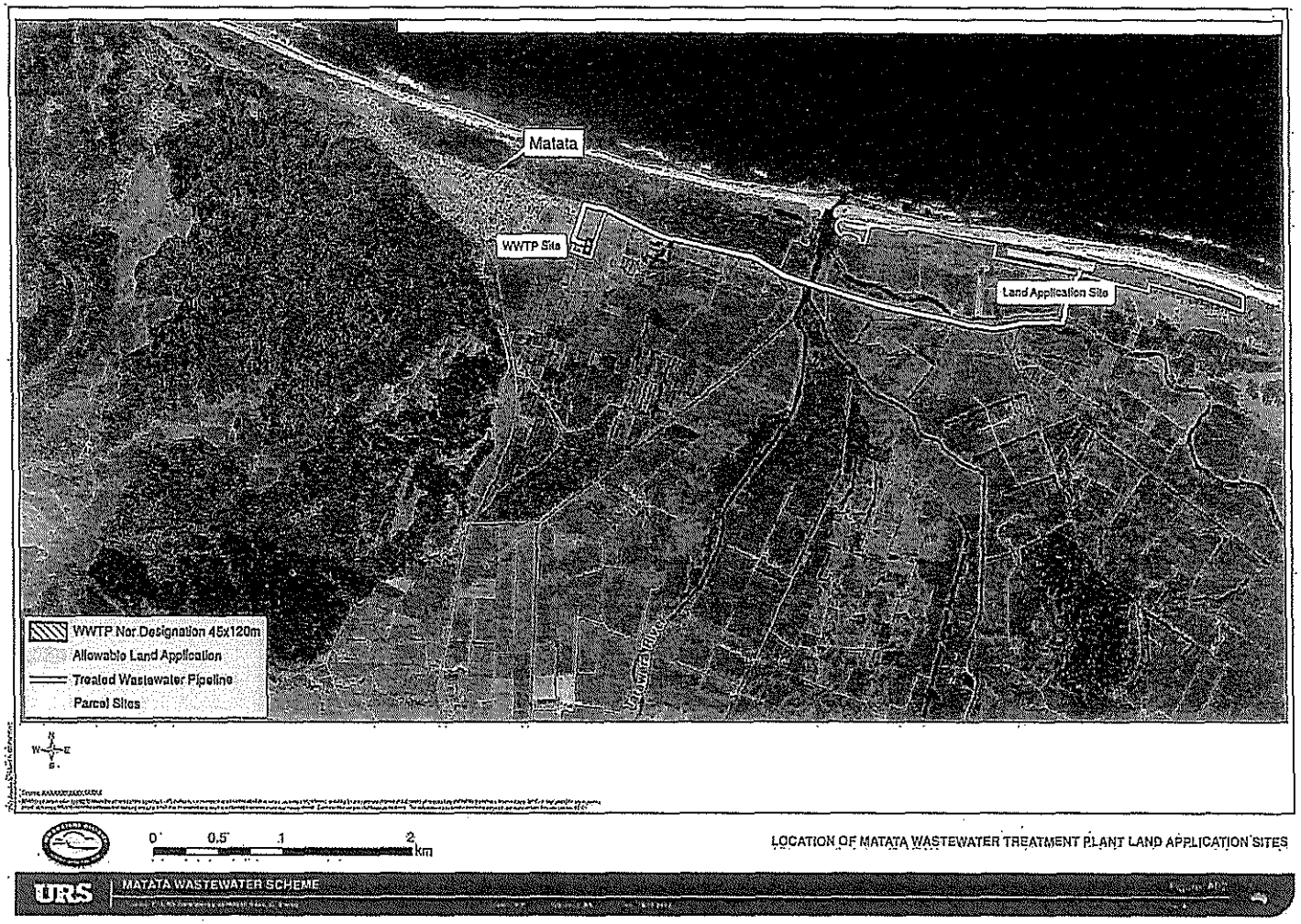
Resource Management Charges

107. The consent holder shall pay the Bay of Plenty Regional Council such administrative charges as are fixed from time to times by the Regional Council in accordance with section 36 of the Resource Management Act 1991.

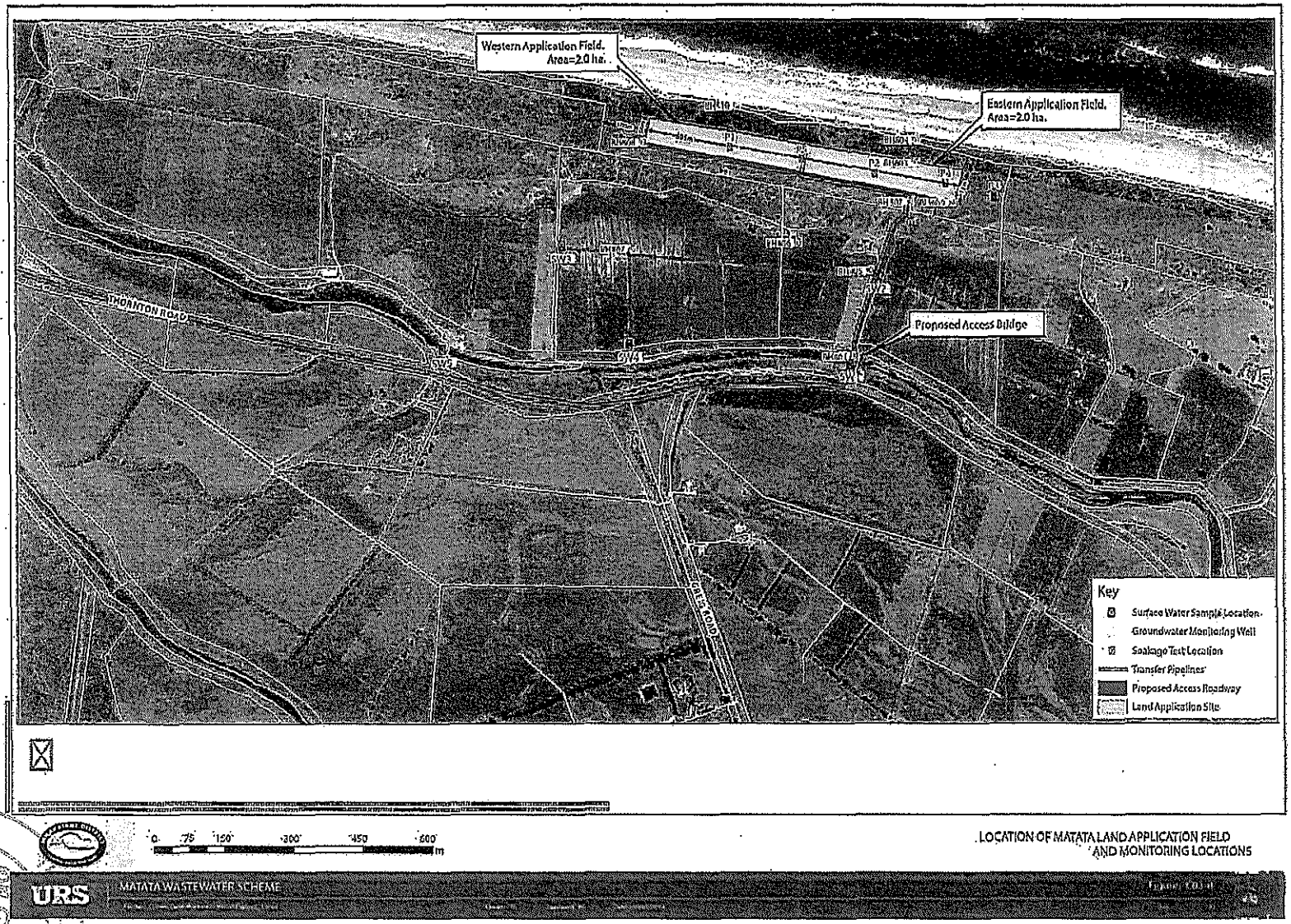
Advice Notes

1. *The Regional Council is able to provide contact details for the relevant iwi authority.*
2. *Unless otherwise stated all notification and reporting required by this consent shall be directed (in writing) to the Pollution Prevention Manager, the Bay of Plenty Regional Council, PO Box 364, Whakatāne or fax 0800 368 329 or email notify@envbop.govt.nz, this notification shall include the consent number 65977.*
3. *The consent holder is responsible for ensuring that all contractors carrying out works under this consent are made aware of the relevant consent conditions, plans and associated documents.*
4. *For clarity, the pre-operational documents and meetings and their due timeframes as detailed in these conditions are set out below. Note this list is not exhaustive and there may be a requirement for ongoing periodical submission of documents arising from the approved Operations and Management Plan, sampling plans, or other plans or documents.*

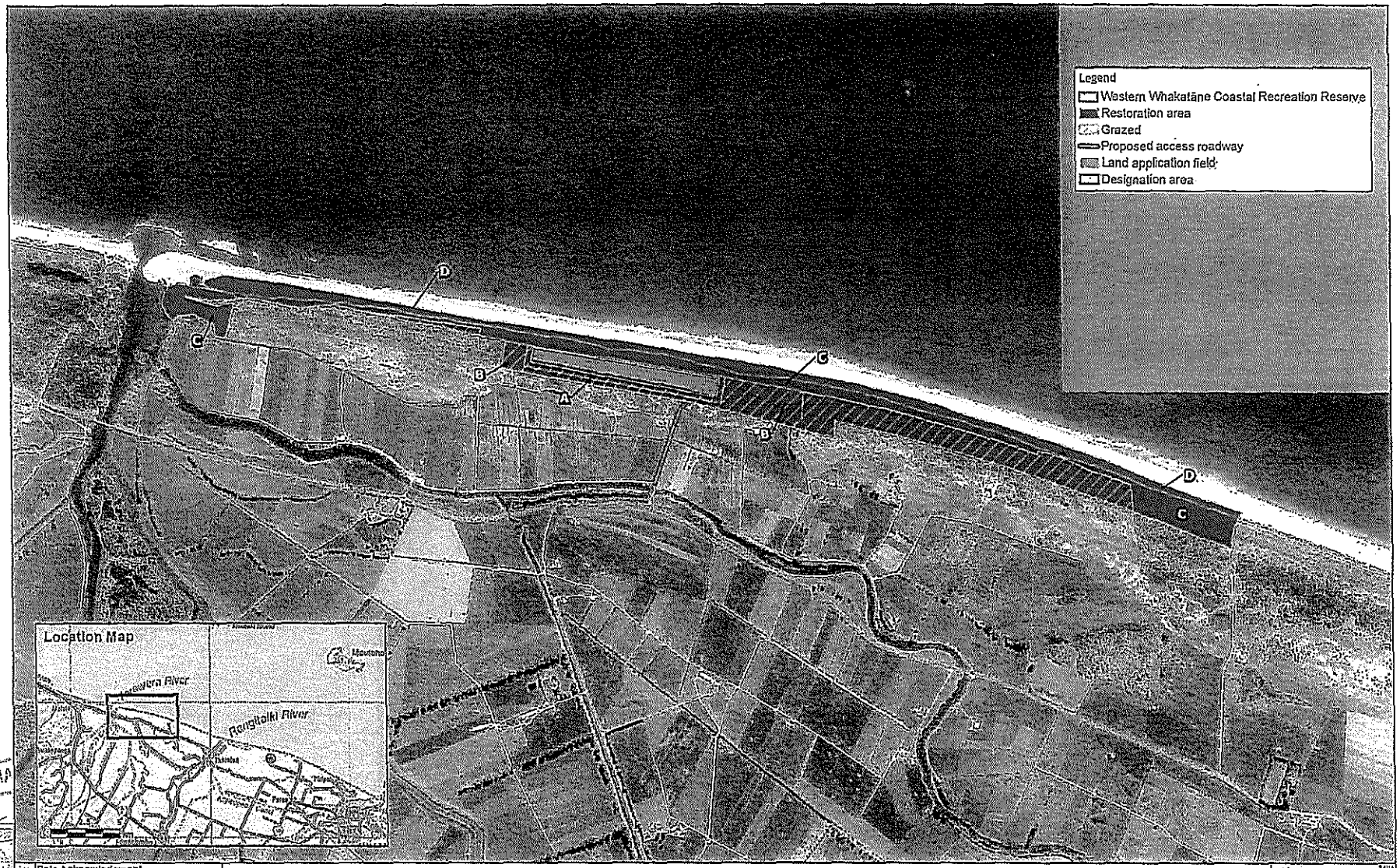
Condition	Description	Due
25	Receiving water monitoring results and analysis	1 month prior to first TWW discharge, to be commenced **at least 12 months** prior to due date.
46	Receiving water sampling plan	1 month prior to first TWW discharge, to be provided with water monitoring results
12	Earthworks site management plan	10 days prior to earthworks commencement
13	Earthworks site meeting	5 days prior to earthworks commencement
15	Discharge site meeting	5 days prior to first discharge
23	Draft Operations and Management Plan	1 month prior to system installation
24	Final Operations and Management Plan	3 months following completion of initial sampling period
85	Restoration plan	6 weeks (30 working days) prior to first discharge



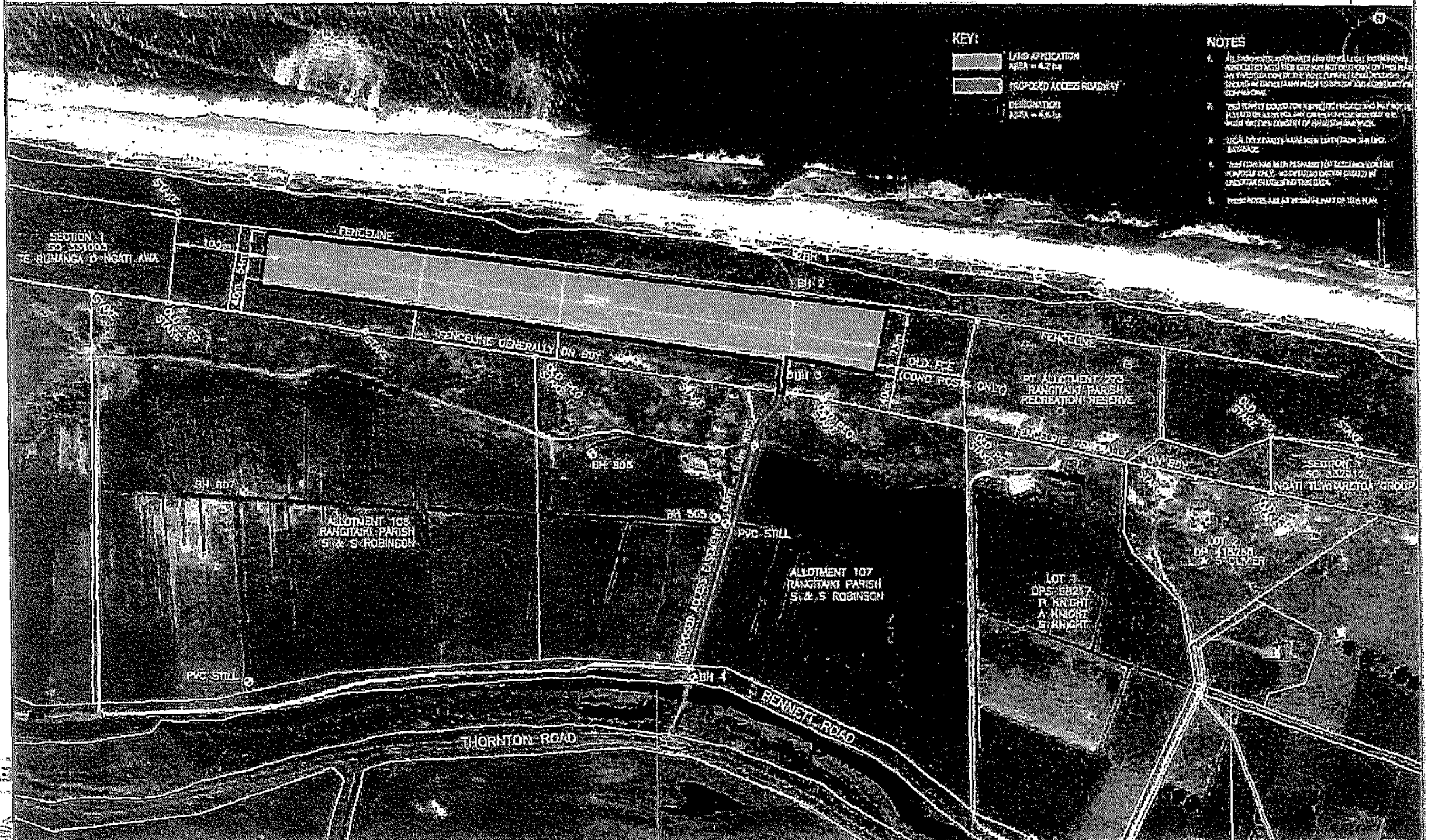
Plan A02 – Location of Matatā Wastewater Treatment Plant Land Application Sites



Plan C03 – Location of Matatā Land Application Field


Legend
Western Whakatāne Coastal Recreation Reserve
Restoration area
Grazed
Proposed access roadway
Land application field
Designation area
A
B
C
D
Location Map
Matata
Awaiti River
Rangitaiki River
Data Acknowledgment
NZ TOPO250 Crown Copy Reserved
2013 Imagery sourced from EOPLASS Limited
Report: 3228c
Client: Whakatāne District Council
Refs: 01:1503
Path: E:\GIS\Matamata\TP\mxd\
File: Figure Restoration Area.mxd
N
Restoration area for proposed
Matatā Waste Water land application field
0 200 400 m
Wildlands
Scale: 1:12,500
Date: 23/05/2014
Cartographer: FM
Format: A3R


THORNTON ROAD
LOT 2
DP 15738
H & G BURT
NOTES
KEY:
WASTEWATER TREATMENT PLANT
WASTEWATER TREATMENT PLANT ENVIRONMENTAL PROTECTION BUFFER
WASTEWATER TREATMENT PLANT ACCESS
WHAKATANE DISTRICT COUNCIL
MATATA WASTEWATER PLANT
SITE SURVEY
CLIENT ISSUE
A3
135173-SS03
C



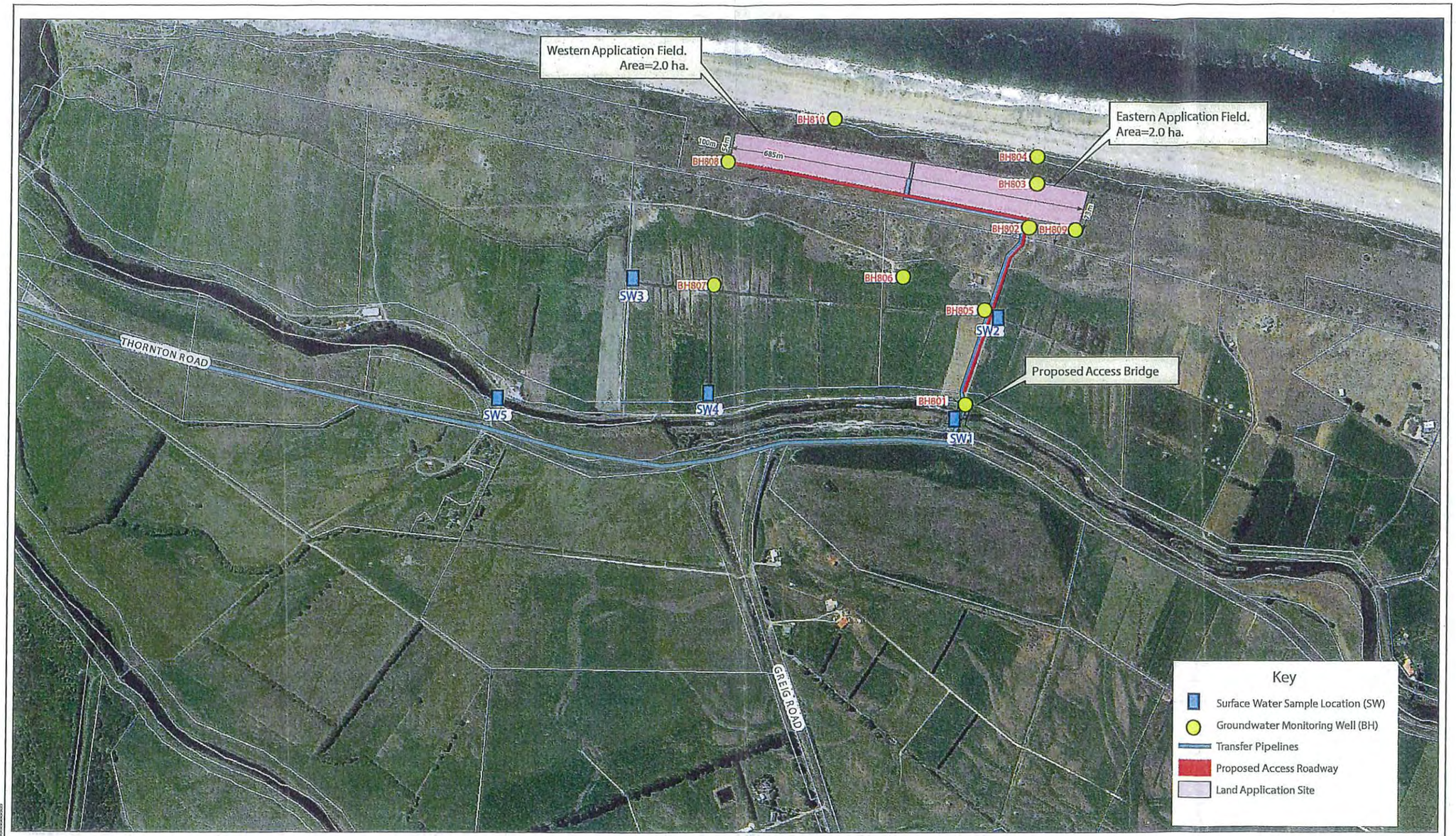
WHAKATANE DISTRICT COUNCIL
MATATA WASTEWATER PLANT
EFFLUENT FIELD

SITE SURVEY
EXTENT OF EFFLUENT FIELD

CLIENT ISSUE
135173-SS05 B

Annexure E

Figure 8: Plan C03 - Location of Proposed Groundwater and Surface Water Sampling Sites



0 75 150 300 450 600 m

LOCATION OF MATATA LAND APPLICATION FIELD
AND MONITORING LOCATIONS

URS | MATATA WASTEWATER SCHEME | Figure: C03-B

File No. C:\URS-Data\Works\42790250\Figure3_1.mxd Drawn: SS Approved: BS Date: 20/05/2014 Rev A3

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

WHAKATĀNE District Council

URS

MWH

Annexure D

Figure 20: Wastewater Treatment Plant Buffer Distances

WHAKATANE District Council www.whakatane.govt.nz	Buffers in 100m Increments from the Matata Treatment Plant	N
	Path: C:\Users\caseyb\Desktop\AddressEditCasey.mxd	Scale: 1:4,192.81
	Date of issue: 27/08/2014	Author: CB

Aerial Photography flown between 2011 and 2013, depending on the area. Parcel boundaries are to be taken as approximate only, not to be substituted for site specific survey. May contain LINZ data: Crown Copyright Reserved Note: Placenames may not conform to LINZ guidelines 2008. DISCLAIMER: While Whakatane District Council (WDC), has exercised all reasonable skill and care in controlling the contents of this information, WDC accepts no liability in contract, tort or otherwise howsoever, for any loss, damage, injury or expense (whether direct, indirect or consequential) arising out of the provision of this information or its use. Position of all assets & historical sites are approximate, actual positions are to be verified on site.

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

Annexure C

Figure 3: Layout of the Proposed Designation for the Wastewater Treatment Plant Site and Access Road

ASSOCIATION OF CONSULTING ENGINEERS NEW ZEALAND | ISO 9001 QUALITY ASSURED

NOTES

1. ALL EASEMENTS, COVENANTS AND OTHER LEGAL INSTRUMENTS ASSOCIATED WITH THIS SITE MAY NOT BE SHOWN ON THIS PLAN. AN INVESTIGATION OF THE MOST CURRENT LEGAL RECORDS SHOULD BE UNDERTAKEN PRIOR TO DESIGN AND CONSTRUCTION COMMENCING.
2. THIS PLAN MAY NOT PROVIDE ENOUGH INFORMATION FOR HEIGHT TO BOUNDARY CALCULATIONS. WHERE ANY PROPOSED BUILDING OR PART THEREOF IS REQUIRED TO MEET COUNCIL'S HEIGHT IN RELATION TO BOUNDARY CONTROLS, HARRISON GRIERSON SHOULD BE CONSULTED.
3. THIS PLAN IS ISSUED FOR A SPECIFIC PROJECT AND MAY NOT BE ALTERED OR USED FOR ANY OTHER PURPOSE WITHOUT THE PRIOR WRITTEN CONSENT OF HARRISON GRIERSON.
4. LEGAL BOUNDARIES HAVE BEEN TAKEN FROM THE LINZ DATABASE.
5. THIS PLAN HAS BEEN PREPARED FOR VALUATION & LEASE PURPOSES ONLY. NO DETAILED DESIGN SHOULD BE UNDERTAKEN UTILISING THIS DATA.
6. COORDINATES SHOWN ARE IN TERMS OF BOP GEODETIC 2000 DATUM.
7. THESE NOTES ARE AN INTEGRAL PART OF THIS PLAN.

KEY:

- WASTEWATER TREATMENT PLANT
- WASTEWATER TREATMENT PLANT ENVIRONMENTAL PROTECTION BUFFER
- WASTEWATER TREATMENT PLANT ACCESS

HARRISON GRIERSON

Whakatane Office
Ground Floor Shelby House
22 Louvain Street Whakatane 3120
P +64 7 308 5478
www.harrisongrierson.com

REF	REVISIONS	BY	DATE
D	BUFFER ZONE TO 5TH INCREASED / COORDS FOR DESIGN.	BWP	10.02.2014
C	INCREASE BUFFER ZONE FROM 15M TO 20M	SRW	06.11.2013
B	DESIGNATION AREA SHIFTED TO SE CNR.	BWP	24.10.2013

PROJECT:
WHAKATANE DISTRICT COUNCIL
MATATA WASTEWATER PLANT

TITLE:
SITE SURVEY

ORIGINATOR:	DATE:	SIGNED:	PLOT BY: BWP
DRAWN: BWP	DATE: 2.09.2013	SIGNED:	PLOT DATE: 10.02.14
CHECKED: SRW	DATE: 6.09.2013	SIGNED:	SURVEY BY: BWP
APPROVED:	DATE:	SIGNED:	SURVEY DATE: 28.08.2013

ISSUE STATUS: CLIENT ISSUE

PROJECT No: 1730 135173.01	SCALES: 1:2000	A3
DRAWING No: 135173-SS03		REV D

File: WHAKATANE N:\1730\135173_A\CAD\135173-SS01.DWG

THE SEAL OF THE ENVIRONMENTAL COMMISSIONER OF NEW ZEALAND

WHAKATĀNE District Council

URS

MWH. BUILDING A BETTER WORLD

Annexure B

Figure 7: Parcels Identified for GIS Constraints Analysis

Whakatane District Council www.whakatane.govt.nz	Sites Under Consideration 20/08/2013	N
	Path: G:\DATA\GIS\ArcGIS\Maps\Policy\IdentifiedSites.mxd	Scale: 1:27,248.06
	Date of issue: 20/08/2013	Author: CB

Aerial Photography flown between 2001 and 2007, depending on the area. Parcel boundaries are to be taken as approximate only, not to be substituted for site specific survey. May contain LINZ data: Crown Copyright Reserved Note: Placenames may not conform to LINZ guidelines 2008. DISCLAIMER: While Whakatane District Council (WDC), has exercised all reasonable skill and care in controlling the contents of this information, WDC accepts no liability in contract, tort or otherwise howsoever, for any loss, damage, injury or expense (whether direct, indirect or consequential) arising out of the provision of this information or its use by you. *Position of all assets & historical sites are approximate, actual positions are to be verified on site.

WHAKATĀNE District Council

URS

MWH.

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

Decision No. [2020] NZEnvC 043

IN THE MATTER	of the Resource Management Act 1991
AND	of an appeal under s 120 of the Act
BETWEEN	TAURANGA ENVIRONMENTAL PROTECTION SOCIETY INCORPORATED
	(ENV-2018-AKL-000256)
	Appellant
AND	TAURANGA CITY COUNCIL
	BAY OF PLENTY REGIONAL COUNCIL
	Respondents
AND	TRANSPOWER NEW ZEALAND LIMITED
	Applicant
AND	NGĀI TUKAIRANGI TRUST
	LUKE FRANCIS MEYS
	MAUNGATAPU MARAE TRUST
	TE RUNANGA O NGĀI TE RANGI IWI TRUST
	Section 274 Parties

Court:	Environment Judge D A Kirkpatrick Environment Commissioner D J Bunting Environment Commissioner R M Bartlett
Hearing:	15-19, 23 and 24 July 2019
Appearances:	J Gardner-Hopkins for Tauranga Environmental Protection Society and Maungatapu Marae Trust
	M Hill and R Boyte for Bay of Plenty Regional Council and Tauranga District Council
	A Beatson and L Lincoln for Transpower New Zealand Limited
	L Burkhardt for Ngāi Tukairangi Trust
	J Gear for Te Runanga o Ngāi Te Rangi Iwi Trust

L Meys in person

Date of Decision: 14 April 2020
Date of Issue: 14 April 2020

DECISION OF THE ENVIRONMENT COURT

A: The appeal is refused.

B: The conditions of resource consent are amended as set out in Appendix C to this decision.

C: Costs are reserved. Applications are not encouraged. Any party wishing to apply must do so within 15 working days of the date of issue of this decision. Any party against whom costs are sought may respond within 10 working days of receipt of the application made against them.

Table of Contents

REASONS

Introduction

[1] This is an appeal under s 120 of the Resource Management Act 1991 (**RMA**) by Tauranga Environmental Protection Society Incorporated (**TEPS**) against a joint decision by independent hearing commissioners on behalf of the Tauranga City Council and the Bay of Plenty Regional Council (**the Councils**). The decision was to grant Transpower New Zealand Limited (**Transpower**) land use consents under the Resource Management (National Environmental Standard for Electricity Transmission Activities) Regulations 2009 (**NESETA**) and land use consents and coastal permits under the Bay of Plenty Regional Coastal Environment Plan (**RCEP**).

[2] The proposed works to which the resource consents relate are to realign an existing 110 kV electricity transmission line identified as Hairini - Mt Maunganui A (**the A-Line**) that traverses the Maungatapu peninsula, Tauranga Harbour at Rangataua Bay and the Matapihi peninsula.

[3] The portion of the A-Line on the Maungatapu peninsula and in Tauranga Harbour requires replacement within the next 10 years to maintain the electricity supply from the National Grid to Mount Maunganui and Papamoa. The need for this work has created an opportunity for Transpower to move the line off private land, including land owned by Ngāti Hē and some 40 residential properties at the northern end of the Maungatapu peninsula, as well as land owned by Ngāi Tukairangi on the Matapihi peninsula and to remove a tower in the harbour. The proposed realignment replaces that portion of the line on a new alignment along or near State Highway 29A, including on large poles above the Maungatapu Bridge which connects the two peninsulas.

[4] Although not a party to this appeal, the New Zealand Transport Agency (**NZTA**), as the owner and operator of State Highway 29A and the Maungatapu Bridge, has played a role in this proceeding and the background to it.

The appeal

[5] Resource consents were granted by hearing commissioners on behalf of the Councils in August 2018. Their decision was appealed by TEPS, an association of 14 persons who made submissions opposing the application. With one exception these original submitters were residents of that part of Maungatapu where views from the

submitters' properties after the realignment would include the new powerlines and/or new poles. Their submissions against the proposed works were based on grounds that included the location and effects of the replacement poles, including the effects on Te Awanui Tauranga Harbour, Waimapu Estuary and Welcome Bay as an outstanding natural feature or landscape (**ONFL**) identified in the RCEP as ONFL-3.

[6] TEPS appealed against the entirety of the Decision, raising all matters included in the submissions made by the original submitters on the notified application. These matters focused broadly on the effects of the proposed realignment on their views and on the residential character of Maungatapu. They said Transpower had dismissed alternative methods to meet its needs on the basis of cost but that did not justify the visual effects that would result. They referred to Transpower's own policy to put new high-voltage lines underground. They raised alternative means of carrying the cable across Rangataua Bay including in the seabed, on the existing bridge and on a purpose-built cycle bridge. Impacts on property values and consultation issues were also raised.

[7] Further reasons for the appeal included:

(i) The proposal does not avoid adverse effects on Tauranga Harbour as an ONFL as required under Policy 15 of the New Zealand Costal Policy Statement (**NZCPS**).

(ii) The proposal does not avoid effects on the *high aesthetic and natural character values* of the ONFL as required by Policy NH 4 of the RCEP. Further in relation to ONFL 3 the proposal has not assessed adequately the extent and consequences of the adverse effects on the values and attributes of ONFL 3 as required by points (a) to (d) of Policy NH 4.

(iii) The Decision adopted an erroneous 'holistic or 'offsetting' approach which traded off the effects of the proposed new poles and lines against the removal of Pole 116, Pole 117 and Tower 118. It distinguished 'effects on views of' the ONFL from 'effects on' the ONFL thereby failing to take into account the effects within the ONFL of the new poles and the presence of new lines across the ONFL.

(iv) The proposal is inconsistent with or contrary to Policies 4, 6 and 7 of the National Policy Statement on Electricity Transmission (**NPSET**).

[8] The primary relief sought was that the applications be declined:

> to enable Transpower the opportunity to work with NZTA, the councils and the community to undertake a proper assessment of alternatives and avoid adverse effects on the ONFL as required by the NZCPS, and NPSET.[1]

Section 274 parties

[9] The appeal was joined by the Trustees of Maungatapu Marae, Ngāi Tukairangi Hapū Trust, Te Runanga o Ngāi Te Rangi Iwi Trust and Mr Luke Meys as parties under s 274 RMA.

Trustees of Maungatapu Marae

[10] Maungatapu Marae (also called Opopoti) is on Wikitoria Street at the northern tip of the Maungatapu peninsula. The wharenui, Wairakewa, where the Court sat for part of the hearing, and the whare kai, Te Ao Takawhaki, look to the northeast towards the Matapihi peninsula and the bridge. A kohanga reo is established on the eastern side of the marae, between it and SH 29A. There is also a health facility between the kohanga reo and the highway. To the west the land rises steeply to a large flat area that was Te Pā o Te Ariki and is now Te Ariki Park where the Rangataua Sports & Cultural Club is situated, with clubrooms, a rugby field and tennis/netball courts.

[11] The Trustees of Maungatapu Marae opposed the decision allowing the new electricity transmission poles on either side of Tauranga Harbour. These would be directly in front of the Maungatapu Marae, which is the marae of the Ngāti Hē people, the original occupants of the Maungatapu Peninsula. They said:

> …the proximity of these super-poles and 110,000 volt conductors slung across the harbour as proposed by Transpower would result in significant adverse effects on the use of our Marae, and a negative impact on cultural and historical values which are important to us…[2]

[12] The Trustees supported the removal of the A-Line and poles from their land at Te Ariki Park, which would bring an end to the long-standing grievance that arose with what they consider to be the illegal installation of the line 60 years ago and the adverse effects of it since then. The Trustees emphasized the danger that the A-Line in its current position poses to users of the Rangataua Rugby and Sports Club, as the poles are leaning, have

1 TEPS Notice of Appeal at [23].

2 Trustees of Maungatapu Marae section 274 Notice at [3].

been splinted to prevent further failure and are at risk of failure due to further erosion at the slips on the banks above the Rangataua Bay. Failure of the line could have a potentially fatal outcome to users of the park and residents of the properties along the line.

[13] The Trustees opposed the decision to grant consent for replacement of the line as the site is recognized as having Outstanding Natural Features, is in an area of High Natural Character and an Area of Significant Cultural Value. The application breaches the principles of the Treaty of Waitangi, the NZCPS, the RCEP and the conditions of the NPSET.

[14] Referring to the Tauranga Moana Iwi Management Plan, which sets out a long-term development approach to building the capacity of Tauranga Moana designed to enhance Tauranga Moana iwi participation and provide guidance to the councils, the Trustees cited Policy 15.2 of the plan:

> 15.2: Pylons are to be removed from Te Ariki Park and Opoopoti (Maungatapu) and rerouted along the main Maungatapu Road and bridge. [Lead Agency: Transpower].

They considered it incorrect of Transpower to claim that its proposal is consistent with Policy 15.2 as the application is not to reroute the cables along the bridge as the policy requires.

[15] The Trustees opposed the erection of the new poles and placement of the new lines in the airspace above the bridge and the waters of Rangataua Bay and cited the greater heights of poles 33B (22.4 m), 33C (34.7 m), 33D (46.8 m) and 33E (24 m) than the existing poles nearest to them. We were told that the new pole heights range from 31% to 180% higher than the existing poles, although we were unable to verify how these had been calculated as the adjoining poles appeared to be about 28m high on the Maungatapu side and about 17m high on the Matapihi side. The Trustees considered that these are all new poles and the new A-Line will be erected at a distance from the existing line, such that this is not maintenance of the A-Line as claimed by Transpower, but an upgrade.

Ngāi Tukairangi Trust

[16] Ngāi Tukairangi Trust conditionally opposed the appeal by TEPS because if it were

upheld the removal of transmission lines from Ngāi Tukairangi's Matapihi lands could not proceed without a separate application. A successful appeal could unreasonably delay or put at risk the removal of the transmission infrastructure on the Matapihi land and stymie the positive cultural and other effects that removal of the lines and poles would have. This would disadvantage Ngāi Tukairangi.

[17] Notwithstanding the above, if the concerns of the Appellants relating to the new A-Line crossing of the harbour were able to be met through changes to the proposal that are in scope of the existing application, Ngāi Tukairangi Trust wished to be involved so it could fully understand any implications of such changes.

Te Runanga o Ngāi Te Rangi Iwi Trust

[18] Te Runanga o Ngāi Te Rangi Iwi Trust (**Ngāi Te Rangi**) supported the removal of the A-Line from private land and its relocation in the SH 29A corridor. It opposed the method by which the realigned A-Line would cross Rangataua Bay for the following reasons:

- Breach of the relevant plan provisions, including the NZCPS, NPSET, RCEP and the Tauranga Moana Iwi Management Plan in relation to Te Awanui (the part of Rangataua Bay the realigned A-Line would cross). Te Awanui is culturally significant to the Ngāi Te Rangi, its status as an ONFL is consistent with the high regard in which it is held as a taonga by Ngāi Te Rangi, and its protection from inappropriate development is consistent with Ngāi Te Rangi's duties as kaitiaki.

- Lack of a robust consideration of alternatives for the harbour crossing has not be carried out.

- Failure to provide for the cultural needs of Ngāi Te Rangi and Maungatapu Marae.

L F Meys

[19] Mr Meys lives on Maungatapu Road. His property is under the existing A-Line. His submission on the notified application supported Transpower's proposal and he included the information in that submission as part of his section 274 notice. He submitted that the transmission line needs to be taken from residential backyards and relocated to a more

appropriate and safer route; and that this would also make access to the infrastructure safer.

[20] Mr Meys s 274 notice opposed the appeal. He wrote:

> …there seems to be overall agreement that the current A-Line that passes over our property and over the nearby Rugby Grounds needs to be removed. There is however urgency, not reflected in this appeal, for this action to proceed due to concerns as to the bank stability and the associated safety concerns should this pylon fail.

[21] Should there be an opportunity for Tauranga District Council, Transpower and NZTA to reach an agreement that includes the building of a new bridge, separate from the existing road bridge, Mr Meys wanted this to be kept separate from the current appeal. If no such outcome could be reached, and it was his understanding that that was the case, he wanted the appeal disallowed, the consents issued and the project to proceed with urgency.

Background

The area and surrounding environment

[22] The area affected by the proposal is approximately 3 km east of the Tauranga central business district on the Maungatapu and Matapihi peninsulas which are linked across Rangataua Bay by the Maungatapu Bridge. Rangataua Bay forms part of the large eastern area of Tauranga harbour along with Welcome Bay and Waimapu Estuary. Te Tāhuna o Rangataua is listed in the New Zealand Heritage List/Rārangi Kōrero[3] as a wāhi tapu.

[23] The peninsulas are relatively flat but are elevated around parts of the coastline with cliffs or steep banks dropping to the harbour. The western sides of the peninsulas have views north to Mauao / Mt Maunganui which is some 10 km north of the site. At Maungatapu the land use is residential with predominantly one- and two-storey homes on individual lots and some open space throughout. The Matapihi side is less built up around the coastal margins and horticulture and farmland are the predominant uses.

[24] The SH 29A corridor bisects the Maungatapu peninsula through a cutting that leads down from the plateau to sea level. After crossing the harbour to the Matapihi peninsula

[3] List no. 9787.

it follows the eastern shoreline around to the north. The part of the A-Line over the central part of the Matapihi peninsula will be realigned to its eastern margin before joining the B-Line at Pole 37 on SH 29A.

[25] At Maungatapu there are three large parks, being Te Waiti Park and Rotary Park on the eastern side of the peninsula and Te Ariki Park to the west. The existing A-Line crosses Te Ariki Park. Some 3.2 ha in size, the park contains the Rangataua Sports & Cultural Club, a full-size rugby field and hard-surfaced tennis/netball courts. The park, which is at the tip of the peninsula, is bordered by steep cliffs around its seaward margins, with residential land to the south. Maungatapu Marae is directly adjacent to Te Ariki Park to the east, close to sea level, with views out to Rangataua Bay. Access to the marae is off Wikitoria Street, which terminates adjacent to the SH 29A corridor near the southern end of the SH 29A bridge. Te Kohanga Reo o Opopoti is on the eastern side of the marae.

[26] In the Tauranga District Plan, the Maungatapu peninsula is generally zoned Suburban Residential. Te Ariki Park is zoned Active Open Space and Maungatapu Marae is zoned Urban Marae Community. The headland is identified in the district plan as a significant Māori area of Ngāti Hē (Area No. M41 – Te Ariki Pā / Maungatapu). It is listed in Group 2 as a modified area with parts still intact. Its values are recorded in Appendix 7b to the district plan as:

> Mauri: The mauri and mana of the place or resource holds special significance to Maori;
>
> Wāahi Tapu: The place or resource is a Wāahi tapu of special, cultural, historic and or spiritual importance to the hapū;
>
> Korero Tuturu / Historical: The area has special historical and cultural significance to the hapū;
>
> Whakaaronui o te Wa / Contemporary Esteem: The condition of the area is such that it continues to provide a visible reference point to the hapū that enables an understanding of its cultural, architectural, amenity or educational significance.

[27] The marae on the lower area is not so identified.

[28] On the Matapihi side of Rangataua Bay, most of the relevant land is zoned Rural under the Tauranga District Plan. Its use appears to be predominantly horticultural. Waikari Marae to the east and Hungahungatoroa Marae to the north are zoned Rural Marae Community. The Matapihi Headland on the southwestern coastal margin of this land is identified as an Important Amenity Landscape. This is generally the land of Ngāi Tukairangi hapū.

[29] Te Ngāio Pā is located near the southern tip of the peninsula, just to the west of SH 29A and the B Line and directly underneath the existing A-Line. The proposed re-aligned A-Line will still pass over this Pa, but closer to its eastern side and to a lesser extent. This Pa is identified as Significant Maori Area M 44 with associations to Ngāi Tukairangi, Ngāti Hē, Ngāti Tapu and Waitaha. It is also listed in Group 2 as a modified area with parts still intact. Its values are recorded in Appendix 7b to the district plan as:

> Mauri: The mauri and mana of the place or resource holds special significance to Maori;
>
> Wāahi Tapu: The place or resource is a Wāahi tapu of special, cultural, historic and or spiritual importance to the hapū;
>
> Korero Tuturu / Historical: The area has special historical and cultural significance to the hapū.

[30] The existing lines are located in the High-Voltage Electricity Transmission Plan Area or, perhaps more accurately, that Area is located over the existing lines. The Area is an overlay zone to identify where the transmission network exists and to provide for it, including by rules to restrict other activities which might have adverse effects on that network. The proposal would relocate the A-Line generally in the Area that presently applies to the B-Line, and in so doing would remove the A-Line from passing over residential, rural and reserve zoned land and relocate it in the road zone.

[31] The whole of Te Awanui Tauranga Harbour, Waimapu Estuary and Welcome Bay, which includes the harbour surrounding Maungatapu and Matapihi, is identified in the RCEP as an Outstanding Feature and Landscape (**ONFL 3**) with the attributes and values generally identified for that whole area in Schedule 3 to the RCEP.

[32] Te Awanui (Tauranga Moana or Tauranga Harbour) is also identified as an Area of Significant Cultural Value (**ASCV-4**) as described in Schedule 6 to RCEP. The text identifies Te Awanui and surrounding lands as the traditional rohe of Ngāi Te Rangi, Ngāti Ranginui and Ngāti Pukenga, and Waitaha is acknowledged as having strong ancestral connections to the area ties to the area

[33] On the eastern side of SH 29A at Matapihi the District Plan identifies Significant Maori Areas M51 – Wharekaia Pa, in Group 2 having been modified by the construction of the highway, and M37 – Oruamatua Pa, which is in Group 1 as largely intact.

[34] Also on that side of the road corridor at Matapihi is Rangataua Bay Special

Ecological Area (**SEA 25**), described in the Tauranga District Plan as a large diverse wetland containing a range of estuarine vegetation and a small area of palustrine vegetation. This contains banded rail and fernbird. Some vegetation clearance will take place adjacent to SEA 25 to create an access track and works area for the replacement of Pole 128 with Pole 128A and some trees will be removed from SEA 25 for electrical safety and security of the transmission line. To the south, SEA 26 – Oruamatua is applied to the scarps, toe-slopes and associated steep slopes between the harbour and the highway.

[35] The coastal margins and bay area in this vicinity are within Indigenous Biodiversity Area (**IDBA**) A. Part of this area, IBDA B23 (Rangataua Bay A) is described in Schedule 2 of the RCEP as including estuarine wetlands of sea rush, oioi, saltmarsh ribbonwood, mangrove, noded rush, *Samolus repens* and glasswort. A temporary wiring site will be constructed and willows removed as part of the proposal within SEA 25 and partially within IBDA B23.

The proposal

[36] Transpower is the state-owned enterprise that owns and operates New Zealand's national grid. It plans, builds and operates the high-voltage system that delivers electricity throughout the country. Its land use activities are regulated by the National Environmental Standards for Electricity Transmission Activities (**NESETA**) administered by regional and district councils, which requires resource consents when its standards are not met, and where the proposed activities are outside the jurisdiction of the NESETA.

[37] Currently Transpower supplies electricity to Mt Maunganui and Papamoa via two lines:

(i) The Hairini - Mt Maunganui A 110 kV transmission line (**the A-Line**), an aerial line traversing private land on the Maungatapu Peninsula, the Coastal Marine Area (**CMA**) in Rangataua Bay and on private land at Matapihi;

(ii) The Hairini - Mt Maunganui B 110 kV transmission line (**the B-Line**), which runs along the State Highway 29A (**SH 29A**) corridor and is attached to the bridge across Rangataua Bay.

[38] Both lines are required for resilience of supply, so that if one fails for any reason there is still a line to transmit electricity to Mt Maunganui and Papamoa.

[39] Mr Douglas McNeill, Transpower's investigations project manager, described the project in his evidence as follows:

> The A-Line was built in 1958. The line starts at Kaitimako Substation at Kaitimako Road and terminates at Mount Maunganui Substation at Matapihi Road.
> …
>
> Transpower constructed the B-Line in 1995. It runs from a junction at Poike from the A-Line and generally follows State Highway 29A to near the Te Maunga roundabout before making a westward turn to the Mount Maunganui Substation.
> …
>
> The project affects only a section of the A-Line and B-Line, specifically the section between Poles 28 and 51 on the B-Line and Poles 113A and 128 on the A-Line.
> …
>
> In general terms, the Project will consist of the following main components:
>
> (a) The A-Line will be realigned from the point where the two transmission lines currently converge in the SH 29A road reserve adjacent to the Taipari St overbridge in Maungatapu at B-Line Pole 28, to A-Line Pole 128 adjacent to the railway line n Matapihi. From there, the line will continue on existing poles to the Mount Maunganui Substation.
>
> (b) To achieve the A-Line realignment, a number of poles on the B-Line will need to be replaced and some additional poles installed. These works are required to manage structural loads and line swing and to reduce the need to trim or remove vegetation along the SH 29A boundary. The new and replacement poles will be located in the general location of the existing B-Line.
>
> (c) Two steel monopoles will be installed either side of Rangataua Bay to avoid a structure in the estuary.
>
> (d) Sections of the A-Line will be removed, including five existing structures between Pole 28 and the estuary on the Maungatapu side. Of these five structures, two will be removed from Te Ariki park and three will be removed from residential areas. Nine structures will be removed from pastoral/horticultural land on the Matapihi side.
>
> In total, 27 existing poles and one tower in the CMA will be removed (28 structures in total), and 28 new poles (including 13 replacement poles) will be installed. One temporary pole is needed during construction. Twelve poles will not need any work done on them.

[40] The A-Line over the northern part of the Maungatapu peninsula is mounted on two poles, referred to as Poles 116 and 117. These are not as tall as pylons or towers, so the line sags and swings relatively close to the ground. Coming from the south it passes above some 40 privately-owned houses on Maungatapu peninsula, then above the playing fields of Te Ariki Park and the cliffs at the edge of the peninsula. Transpower wishes to remove the poles for maintenance reasons. In particular, Pole 117 is sited close to the edge of the cliff above the harbour and has required temporary support recently to protect it from naturally occurring coastal erosion. The A-Line then crosses the harbour

to Tower 118, situated in the CMA in Rangataua Bay, and thence to Pole 119 on the Matapihi side of the bay. Both of these poles are also proposed to be removed.

[41] While Poles 116 and 117 could be shored up or replaced at or near their existing locations, the Ngāti Hē hapū who own Te Ariki Park do not support that approach. Transpower agreed instead to realign a longer 3.5 km section of the A-Line, which includes the section across Te Ariki Park, to the existing poles for the B-Line in the SH 29A corridor. The poles for the B-Line were designed and constructed to support another circuit with the potential realignment of the A-Line in mind, as Transpower was aware of historic grievances of the Maori communities whose land the line currently crosses.

[42] Tower 118 is due for major refurbishment in the next 10 years, which we were told will be expensive and difficult. From an engineering, maintenance and landscape perspective Transpower considers it beneficial for the tower to be removed and this would be facilitated by the proposed realignment.

[43] While the B-Line crosses Rangataua Bay through a duct under the Maungatapu bridge and underground on the approaches at each end of the bridge, the realigned A-Line would cross Rangataua Bay aerially above the bridge. New tall poles would be required within the SH 29A corridor to carry the A-Line here, with those of most concern in this case being identified as Poles 33B and 33C at the Maungatapu end of the bridge and Poles 33D and 33E at the Matapihi end of the bridge. Pole 33C at a height of 34.7m would be located close to the entrance to Maungatapu Marae and was the focus of attention during the hearing. Several other poles would be replaced or moved on the Matapihi side of the harbour. No new structures would be located within the CMA.

[44] The presence of the A-Line has been a concern to Ngāti Hē, and to Ngāi Tukairangi and their trustees who own the land at Matapihi, since it was installed in 1950 as it restricts recreational, horticultural and development activities on both sides of Rangataua Bay. Ngāti Hē cited concerns about the location of the A-Line infrastructure on and above their land under Treaty of Waitangi Claim Wai 215. Treaty of Waitangi Claims WAI 211 and WAI 688 for Ngāi Tukairangi Trust documented issues regarding the effect of the line on the use and development of horticultural land at Matapihi.

[45] Transpower set out its objectives for the project in its assessment of environmental

effects (**AEE**)[4] as being to:

a) Enable Transpower to provide for the long-term security of electricity supply into Mount Maunganui;

b) Remove an existing constraint from an important cultural and social facility for the Maungatapu community; and from horticultural activities for the Matapihi community; and

c) Honour a longstanding undertaking to iwi and the community to remove Tower 118 from the harbour.

[46] Transpower considered a range of options for taking the transmission line across Rangataua Bay including bridge or sea bed cable options as well as the aerial crossing option. The bridge and sea bed options were rejected for reasons that included costs being between 10 and 20 times more than those of an aerial crossing, programming issues, health and safety effects and access and maintenance considerations.[5]

[47] Transpower has been in discussion with Ngāti Hē, Ngāi Tukairangi and their trustees regarding the project to realign the A-Line since March 2013. From their consultation process, it was Transpower's understanding that Ngāti Hē and the Maungatapu Marae Trust were in support of the proposal. Transpower had provided details of the locations and heights of the new poles in the SH 29A corridor as early as May 2013 and understood that the mitigations proposed were satisfactory to the parties. However, when the applications were notified the submissions lodged generally indicated support for the removal of the poles and A-Line from Te Ariki Park and the CML but opposition to the location of the tall support poles for the relocated A-Line, particularly Pole 33 C at the Maungatapu end of the bridge as it would be directly adjacent to the entrance to the Maungatapu Marae, albeit not on the Ngāti Hē land.

[48] A map showing the area and the main elements of the proposed realignment project, produced by Transpower, is attached as **Appendix A**. Two oblique graphical representations of the southern part of the project over the Maungatapu Peninsula, produced by Transpower's consultants, are attached as **Appendix B**: these may assist readers in understanding some of the matters referred to in this decision.

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4 Assessment of Effects on the Environment: Realignment of if the HAI-MTM-A Transmission Line, Maungatapu to Matapihi including Rangataua Bay, Tauranga. Transpower New Zealand Limited 24 October 2017. Section 1.2 Page 8.

5 Assessment of Effects on the Environment Transpower New Zealand Limited 24 October 2017 Appendix N [4].

Application for resource consents

[49] In 2017 Transpower sought resource consents for the proposal as described above. The application to the Tauranga City Council was made under the NESETA regulations. The proposal does not involve any land use activities not covered by the NESETA regulations and so no additional consents are required under the Tauranga District Plan. Transpower also sought resource consents from the Bay of Plenty Regional Council under the Bay of Plenty Regional Natural Resources Plan (**RNRP**) and the RCEP for five activities not covered by the NESETA and for occupation of the air space in the CMA which is covered by the NESETA. The applications were assessed on a bundled basis, with the overall activity classification being as a discretionary activity.

[50] Mr Chris Horne, the expert planner engaged by Transpower, gave details of the activities requiring consent and the rules under which consent is required. We have used this evidence as the basis for Table 1 below. The references to the provisions of the RNRP are to the current rules, superseding the references to the Regional Water and Land Plan which the RNP replaced in 2017.

Table 1 *Resource consents sought by Transpower.*

Tauranga City Council		
Activity	*Rule*	*Class/Status*
Relocation of transmission line support structures that meet all the permitted activity standards. (This only applies to Pole 128A, is permitted and is included for completeness.)	Reg. 14 NESETA	Permitted
Relocation of transmission line support structures that do not meet the permitted activity standards or controlled activity conditions. These include Poles 28A/28B (replacing a twin pi-pole structure 28), 29A, 30A, 31A, 32A, 38A, 43B, 47A, 48A, 48C, 48D and 48F.	Reg. 16 NESETA	Restricted discretionary
Willow removal within SEA 25.	Reg. 31 NESETA	Controlled
Vegetation removal within SEA 25.	Reg. 32 NESETA	Restricted discretionary
Construction of additional poles that are not relocations. These include Poles 33A, 33B, 33C, 33D, 33E, 39A, 40A, 41A, 42A, 43C, 44B, 45A, 48B, 48E and 127A.	Reg. 39 NESETA	Discretionary

Bay of Plenty Regional Council		
Earthworks within 20m of the CMA (Pole 33C).	LM R4 RNRP	Discretionary
Disturbance of contaminated land (Poles 33E, 48C, 48D, 48A, 119, 120, 121, 122, 123, 124, 125, 126, 127 and 127A and related tracks).	DW R25 RNRP	Restricted discretionary
Drilling of foundations below ground water (Poles 33C and 33D).	WQ R40A RNRP	Controlled
Modification of a wetland (Pole 128 removal, Pole 128A installation and associated access track, construction of a wiring site within Span 127A to 128A and associated access track, willow removal which may require use of machinery within the wetland.)	WL R9 RNRP	Discretionary
Disturbance of the seabed associated with removal of Tower 118	DD R14 RCEP	Discretionary
Occupation of the CMA (conductors in air space)	Reg. 39 NESETA	Discretionary

[51] The applications were heard together by independent hearing commissioners, one appointed by both councils and one by Bay of Plenty Regional Council only, on 18-19 July 2018. Their decision on 23 August 2018 was to grant the consents subject to conditions.

Legal framework

[52] In reaching our decision on this appeal against the grant of consent the Court must have regard to the same considerations as does a consent authority when making a decision under s 104 RMA.[6] Section 104 relevantly provides:

> (1) When considering a requirement and any submissions received, the consent authority must, subject to Part 2, have regard to
>
> (a) any actual or potential effects on the environment of allowing the activity; and
>
> (ab) any measure proposed or agreed to by the applicant for the purpose of ensuring positive effects on the environment to offset or compensate for any adverse effect on the environment that will or may result from allowing the activity;
>
> (b) any relevant provisions of–
> (i) a national environmental standard:

6 Section 290 RMA.

(ii) other regulations
(iii) a national policy statement
(iv) a New Zealand coastal policy statement:
(v) a regional policy statement or proposed regional policy statement:
(vi) a plan or proposed plan; and

(c) any other matter the consent authority considers relevant and reasonably necessary to determine the application.

(2) When forming an opinion for the purposes of subsection (1) (a), a consent authority may disregard an adverse effect of the activity on the environment if an environmental standard or the plan permits an activity with that effect.

…

[53] As a discretionary activity, under s 104B RMA the consent authority had, and on appeal this Court has, an overall discretion to grant or refuse the application and, if the application is granted, to impose conditions under s 108 RMA.

[54] The Resource Management (NESETA) Regulations 2009 came into effect on 10 January 2010. A National Environmental Standard takes precedence over the relevant rules in a district plan unless the standard states expressly that a rule or consent may be more lenient that the standard[7] or more stringent than the standard.[8] Neither of those cases apply to the current applications under the NESETA.

[55] The NESETA permits a range of activities enabling the establishment, maintenance and upgrading of transmission infrastructure. Certain activities proposed by Transpower do not meet the permitted activity conditions under the NESETA and are either controlled, restricted discretionary or discretionary activities as identified in Table 1 above. These require resource consents under the NESETA. The NESETA do not include any objectives or policies to guide decision-makers in relation to the exercise of their discretion in granting or refusing resource consents or imposing conditions on the grant of consent.

[56] In considering any application for resource consent, regard must be had to any relevant provisions of a national policy statement.[9] The NZCPS sets out objectives and policies for managing activities in the CMA. The National Policy Statement on Electricity Transmission (**NPSET**) sets out the objectives and policies for managing the electricity

7 Section 43B(3) RMA.
8 Section 43B(1) RMA.
9 Section 104(1)(b)(iii) RMA.

transmission network under the RMA. There is no direct connection between the provisions of the NPSET and the NESETA: while the NPSET contemplates the making of national environmental standards, the NESETA make no reference to the NPSET or to any other policy. As we discuss further below, there is also no clear relationship between the texts of the NZCPS and the NPSET.

The relevant planning instruments

[57] The following statutory instruments are relevant to the proposal under section 104(1)(b) RMA:

(a) Resource Management (National Environmental Standard for Electricity Transmission Activities) Regulations 2009 (**NESETA**);

(b) Resource Management (National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health) Regulations 2011;

(c) National Policy Statement on Electricity Transmission (**NPSET**);

(d) New Zealand Coastal Policy Statement 2010 (**NZCPS**);

(e) Bay of Plenty Regional Policy Statement for (**RPS**);

(f) Bay of Plenty Regional Natural Resources Plan (**RNRP**);

(g) Bay of Plenty Regional Coastal Environment Plan (**RCEP**); and

(h) Tauranga District Plan.

[58] Other matters relevant to the application under section 104(1)(c) are:

(i) Tauranga Moana Iwi Management Plan;

(j) Ngāi Tukairangi and Ngāti Tapu Hapū Management Plan;

(k) Ngāi Te Rangi Resource Management Plan.

Part 2 RMA

[59] Our consideration of the matters listed in section 104 RMA is subject to Part 2 RMA,

being ss 5 – 8 and headed *Purpose and Principles*. The Environment Court[10] has previously summarized the importance of Part 2 to the consideration of applications for resource consent with reference to the decision of the Court of Appeal in *RJ Davidson Family Trust* v *Marlborough District Council*.[11]

> The position of the words "subject to Part 2" near the outset and preceding the list of matters to which a consent authority must have regard to [in s 104], clearly show that it is necessary to have regard to Part 2, when it is appropriate to do so;[12]
>
> If it is clear that a plan has been prepared having regard to Part 2, and with a coherent set of policies designed to achieve clear environmental outcomes, reference to Part 2 is unlikely to add anything;[13]
>
> If a plan has been competently prepared under the Act, in many cases a consent authority will feel assured in taking the view that there is no need to refer to Part 2 because it will not add anything to the evaluative exercise. Absent such assurance, or if in doubt, it will be appropriate and necessary to do so.[14]

[60] In this case counsel for TEPS submitted that Transpower does not appear to rely on Part 2 to support the grant of consent, but rather on a consent pathway under the policies of the RCEP. The Appellant's view was that if there was any difficulty in resolving the meaning of regional policy requirements then recourse should be had to the higher order instruments and Part 2, as contemplated by the High Court in *Royal Forest & Bird v Bay of Plenty Regional Council*[15] where the High Court suggested that provisions of the NZCPS need to be checked to address the risk they can be diluted or even lost in the retelling in the lower order instruments.

[61] The Appellant's view was that it was enough that there is some doubt about whether consideration of Part 2 or the NZCPS would add anything to the evaluative process: if there is doubt then it is appropriate and necessary to do so.

[62] Counsel for Transpower submitted in reply that all Part 2 matters were litigated through the RCEP's development, including through the Environment Court and an appeal to the High Court which directed the matter back to the Environment Court. In response to the Appellant's focus on the relationship between the NPSET and the NZCPS and whether the RCEP appropriately gives effect to those higher order

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10 *Director General of Conservation & ors v New Zealand Transport Agency* [2019] NZEnvC 203 at [28].

11 *RJ Davidson Family Trust v Marlborough District Council* [2018] NZCA 316.

12 *RJ Davidson Family Trust*, fn 11 at [47].

13 *RJ Davidson Family Trust*, fn 11 at [74].

14 *RJ Davidson Family Trust*, fn 11 at [75].

15 *Royal Forest & Bird Protection Society of NZ Inc v Bay of Plenty Regional Counci*l [2018] NZEnvC 182 at [76].

documents, counsel for Transpower submitted that the NPSET and NZCPS have an equal status as national policy statements and that their requirements have been reconciled in the provisions of the RCEP that give effect to them, such that there is no tension between the two statements and no lack of clarity in the RCEP for the Court to resolve. Counsel for the Appellant referred to the RCEP's requirements as being clear and directive and counsel for Transpower submitted that reference to the NZCPS or NPSET does not add anything to the evaluative exercise required in this case, submitting that the RCEP had been robustly negotiated and validated through the submission and appeal process and its outcome ought to be afforded respect, particularly in the absence of a challenge that it had been poorly prepared or failed to address key matters.

[63] Counsel for the Councils submitted, in a similar vein, that there was no question of lack of coverage of the RCEP, that it comprehensively addresses all aspects of the NZCPS, NPSET and Part 2 matters, and that there is no uncertainty as to the meaning of the relevant provisions. Counsel described the Appellant's suggestion of invalidity as *remarkable* given the comprehensive appeals process on the Natural History (**NH**) policies in the RCEP. The appeal on the NH policies, which focused on the extent to which Regionally Significant Infrastructure (including the National Grid) should be provided for, was joined by more than 20 parties representing diverse interests, underwent mediation before proceeding to the Environment Court which delivered an interim decision,[16] and thence to the High Court[17] which referred it back to the Environment Court for a final decision[18] and determination.[19] None of the decisions in that process questioned the pathway for the National Grid provided for in the RCEP and this was not disputed by the Appellant in that case.

[64] The Councils' submission was that in the context of this consent application, the Court is not required to re-examine whether the NH Policies appropriately reconcile the relevant national policy directions. Further, planning processes which are meant to particularise the application of national policy directions in a regional context could be rendered futile if every subsequent consent application required a reassessment of whether the Plan provisions appropriately give effect to the higher order directions.

[65] We understand this submission to be based on the essential reasoning in

[16] *Royal Forest & Bird Protection Society of NZ Inc v Bay of Plenty Regional Council* [2017] NZEnvC 045.
[17] *Royal Forest & Bird Protection Society of NZ Inc v Bay of Plenty Regional Council* [2017] NZHC 3080.
[18] *Royal Forest & Bird Protection Society of NZ Inc v Bay of Plenty Regional Council* [2018] NZEnvC 157.
[19] *Royal Forest & Bird Protection Society of NZ Inc v Bay of Plenty Regional Council* [2018] NZEnvC 182.

Environmental Defence Society Inc v New Zealand King Salmon[20] in relation to Schedule 1 processes and the requirements of ss 6 and 7 RMA, and in *RJ Davidson Family Trust* v *Marlborough District Council*[21] in relation to application processes and the requirements of s 104(1) RMA. Briefly, unless there is a clear issue, such as invalidity, incompleteness or uncertainty in the context of a plan provision or a lack of clarity from relevant polices as to whether consent should be granted or refused, one must apply the particular provisions of the plans without seeking to circumvent them by recourse to more general, higher level provisions of policy statements and the RMA.

[66] In evidence, Mr Horne and Ms Paula Golsby, the expert planning witnesses for Transpower and the Councils respectively, did not consider it necessary or helpful to consider Part 2 separately as they were satisfied that the RCEP has given effect to the relevant statutory and national policy directives. Mr Horne's opinion was that the cascade of policies relating to natural heritage in the regional and district plans is quite complex and is designed to give effect to both the NZCPS and the NPSET. Ms Golsby's evidence for the councils was that the most relevant provisions relate to natural heritage and iwi resource management; and that these include provisions of the NZCPS, NPSET, RPS, RCEP, RNRP and the District Plan, as well as the most relevant parts of the Tauranga Moana Iwi Management Plan, the Ngāi Tukairangi and Ngāti Tapu Hapū Management Plan and the Ngāi Te Rangi Resource Management Plan.

[67] No expert planning evidence was called by the Appellant. Mr Stephen Brown, an expert landscape architect who gave evidence for the Appellant, is also a qualified planner and his evidence touched on these issues but mainly in relation to his primary focus on the landscape issues in the case. We address his evidence in detail later in our decision in that context.

[68] We agree that the RCEP is comprehensive, has been tested through hearing and appeal processes and provides a clear policy framework and consenting pathway for these applications. Accordingly, our evaluation of the statutory provisions focusses on the relevant policies in the RCEP. We also address the higher order policy documents and the District Plan.

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[20] *Environmental Defence Society Inc v New Zealand King Salmon* [2014] NZSC 38 at [90] and [150] – [153]

[21] *RJ Davidson Family Trust*, fn 11 at [66] – [75].

Relevant National Policies

[69] Before addressing the relevant provisions of the RCEP, we must consider the relevant provisions of the NPSET and the NZCPS.

[70] The NPSET commenced on 10 April 2008. Its purpose is to state objectives and policies for the electricity transmission network as a matter of national significance that are relevant to achieving the purpose of the RMA. It has as its single objective:

> To recognise the national significance of the electricity transmission network by facilitating the operation, maintenance and upgrade of the existing transmission network and the establishment of new transmission resources to meet the needs of present and future generations, while:
>
> - managing the adverse environmental effects of the network; and
> - managing the adverse effects of other activities on the network.

[71] That objective is supported by 14 policies in relation to recognition of the national benefits of transmission, managing the environmental effects of transmission, managing the adverse effects of third parties on the transmission network, maps and long-term strategic planning for transmission assets, the policies for managing the environmental effects of transmission which are most relevant to this appeal are:

> **Policy 2**
>
> In achieving the purpose of the Act, decision-makers must recognise and provide for the effective operation, maintenance, upgrading and development of the electricity transmission network.
>
> **Policy 4**
>
> When considering the environmental effects of new transmission infrastructure or major upgrades of existing transmission infrastructure, decision-makers must have regard to the extent to which any adverse effects have been avoided, remedied or mitigated by the route, site and method selection.
>
> **Policy 6**
>
> Substantial upgrades of transmission infrastructure should be used as an opportunity to reduce existing adverse effects of transmission including such effects on sensitive activities where appropriate.
>
> **Policy 7**
>
> Planning and development of the transmission system should minimise adverse effects on urban amenity and avoid adverse effects on town centres and areas of high recreational value or amenity and existing sensitive activities.
>
> **Policy 8**
>
> In rural environments, planning and development of the transmission system should seek to avoid adverse effects on outstanding natural landscapes, areas of high natural character and areas of high recreation value and amenity and existing sensitive activities.

[72] Issues arising in this appeal in relation to these policies are:

i) Whether Transpower's proposal is a major upgrade to which Policy 4 applies or a substantial upgrade to which Policy 6 applies;

ii) Whether and to what extent the affected environment is one to which Policies 7 and 8 apply in relation to the avoidance of adverse effects or seeking to avoid adverse effects.

[73] The NZCPS first came into effect in 1994 but was substantially revised in 2010. Its purpose is to state objectives and policies to achieve the purpose of the RMA in relation to the coastal environment of New Zealand. It has seven objectives and 29 policies. The most relevant provisions are:

> **Objective 2**
>
> To preserve the natural character of the coastal environment and protect natural features and landscape values through:
>
> - recognising the characteristics and qualities that contribute to natural character, natural features and landscape values and their location and distribution;
> - identifying those areas where various forms of subdivision, use, and development would be inappropriate and protecting them from such activities; and
> - encouraging restoration of the coastal environment.
>
> **Objective 3**
>
> To take account of the principles of the Treaty of Waitangi, recognise the role of tangata whenua as kaitiaki and provide for tangata whenua involvement in management of the coastal environment by:
>
> - recognising the ongoing and enduring relationship of tangata whenua over their lands, rohe and resources;
> - promoting meaningful relationships and interactions between tangata whenua and persons exercising functions and powers under the Act;
> - incorporating mātauranga Māori into sustainable management practices; and
> - recognising and protecting characteristics of the coastal environment that are of special value to tangata whenua.
>
> **Objective 6**
>
> To enable people and communities to provide for their social, economic, and cultural wellbeing and their health and safety, through subdivision, use, and development, recognising that:
>
> - the protection of the values of the coastal environment does not preclude use and development in appropriate places and forms, and within appropriate limits;
> - some uses and developments which depend upon the use of natural and physical resources in the coastal environment are important to the social, economic and cultural wellbeing of people and communities;

- functionally some uses and developments can only be located on the coast or in the coastal marine area;

…

- the proportion of the coastal marine area under any formal protection is small and therefore management under the Act is an important means by which the natural resources of the coastal marine area can be protected; and

…

Policy 2 The Treaty of Waitangi, tangata whenua and Māori heritage

In taking account of the principles of the Treaty of Waitangi (Te Tiriti o Waitangi), and kaitiakitanga, in relation to the coastal environment:

(a) recognise that tangata whenua have traditional and continuing cultural relationships with areas of the coastal environment, including places where they have lived and fished for generations;

(b) involve iwi authorities or hapū on behalf of tangata whenua in the preparation of regional policy statements, and plans, by undertaking effective consultation with tangata whenua; with such consultation to be early, meaningful, and as far as practicable in accordance with tikanga Māori;

(c) with the consent of tangata whenua and as far as practicable in accordance with tikanga Māori, incorporate mātauranga Māori1 in regional policy statements, in plans, and in the consideration of applications for resource consents, notices of requirement for designation and private plan changes;

(d) provide opportunities in appropriate circumstances for Māori involvement in decision making, for example when a consent application or notice of requirement is dealing with cultural localities or issues of cultural significance, and Māori experts, including pūkenga, may have knowledge not otherwise available;

(e) take into account any relevant iwi resource management plan and any other relevant planning document recognised by the appropriate iwi authority or hapū and lodged with the council, to the extent that its content has a bearing on resource management issues in the region or district; and

    (i) where appropriate incorporate references to, or material from, iwi resource management plans in regional policy statements and in plans;
    …

(f) provide for opportunities for tangata whenua to exercise kaitiakitanga over waters, forests, lands, and fisheries in the coastal environment through such measures as:

    (i) bringing cultural understanding to monitoring of natural resources;

    (ii) providing appropriate methods for the management, maintenance and protection of the taonga of tangata whenua;

    …

(g) in consultation and collaboration with tangata whenua, working as far as practicable in accordance with tikanga Māori, and recognising that tangata whenua have the right to choose not to identify places or values of historic, cultural or spiritual significance or special value:

    (i) recognise the importance of Māori cultural and heritage values through such methods as historic heritage, landscape and cultural impact assessments; and

    (ii) provide for the identification, assessment, protection and management of areas or sites of significance or special value to Māori, including by historic analysis and archaeological survey and the development of methods such as alert layers and predictive methodologies for

identifying areas of high potential for undiscovered Māori heritage, for example coastal pā or fishing villages.

Policy 4 Integration

Provide for the integrated management of natural and physical resources in the coastal environment, and activities that affect the coastal environment. This requires:

(a) co-ordinated management or control of activities within the coastal environment, and which could cross administrative boundaries, particularly:

(i) the local authority boundary between the coastal marine area and land;

…

(b) working collaboratively with other bodies and agencies with responsibilities and functions relevant to resource management, such as where land or waters are held or managed for conservation purposes; and

(c) particular consideration of situations where:

(i) subdivision, use, or development and its effects above or below the line of mean high water springs will require, or is likely to result in, associated use or development that crosses the line of mean high water springs; or

(ii) public use and enjoyment of public space in the coastal environment is affected, or is likely to be affected; or

…

(v) significant adverse cumulative effects are occurring, or can be anticipated.

Policy 6 Activities in the coastal environment

(1) In relation to the coastal environment:

(a) recognise that the provision of infrastructure, the supply and transport of energy including the generation and transmission of electricity, and the extraction of minerals are activities important to the social, economic and cultural well-being of people and communities;

…

(d) recognise tangata whenua needs for papakāinga, marae and associated developments and make appropriate provision for them;

(e) consider where and how built development on land should be controlled so that it does not compromise activities of national or regional importance that have a functional need to locate and operate in the coastal marine area;

…

(h) consider how adverse visual impacts of development can be avoided in areas sensitive to such effects, such as headlands and prominent ridgelines, and as far as practicable and reasonable apply controls or conditions to avoid those effects;

(i) set back development from the coastal marine area and other water bodies, where practicable and reasonable, to protect the natural character, open space, public access and amenity values of the coastal environment; and

…

(2) Additionally, in relation to the coastal marine area:

(a) recognise potential contributions to the social, economic and cultural wellbeing of people and communities from use and development of the coastal marine area, …

(b) recognise the need to maintain and enhance the public open space and

recreation qualities and values of the coastal marine area;

(c) recognise that there are activities that have a functional need to be located in the coastal marine area, and provide for those activities in appropriate places;

(d) recognise that activities that do not have a functional need for location in the coastal marine area generally should not be located there; and

(e) promote the efficient use of occupied space, including by:

(i) requiring that structures be made available for public or multiple use wherever reasonable and practicable;

(ii) requiring the removal of any abandoned or redundant structure that has no heritage, amenity or reuse value; and

(iii) considering whether consent conditions should be applied to ensure that space occupied for an activity is used for that purpose effectively and without unreasonable delay.

Policy 7 Strategic planning

(1) In preparing regional policy statements, and plans:

…

(b) identify areas of the coastal environment where particular activities and forms of subdivision, use and development:

(i) are inappropriate; and

(ii) may be inappropriate without the consideration of effects through a resource consent application, notice of requirement for designation or Schedule 1 of the Act process;

and provide protection from inappropriate subdivision, use, and development in these areas through objectives, policies and rules.

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

Policy 15 Natural features and natural landscapes

To protect the natural features and natural landscapes (including seascapes) of the coastal environment from inappropriate subdivision, use, and development:

(a) avoid adverse effects of activities on outstanding natural features and outstanding natural landscapes in the coastal environment; and

(b) avoid significant adverse effects and avoid, remedy, or mitigate other adverse effects of activities on other natural features and natural landscapes in the coastal environment;

including by:

(c) identifying and assessing the natural features and natural landscapes of the coastal environment of the region or district, at minimum by land typing, soil characterisation and landscape characterisation and having regard to:

(i) natural science factors, including geological, topographical, ecological and dynamic components;

(ii) the presence of water including in seas, lakes, rivers and streams;

(iii) legibility or expressiveness—how obviously the feature or landscape demonstrates its formative processes;

(iv) aesthetic values including memorability and naturalness;

(v) vegetation (native and exotic);

(vi) transient values, including presence of wildlife or other values at certain times of the day or year;

(vii) whether the values are shared and recognised;

(viii) cultural and spiritual values for tangata whenua, identified by working, as far as practicable, in accordance with tikanga Māori; including their expression as cultural landscapes and features;

(ix) historical and heritage associations; and

(x) wild or scenic values;

(d) ensuring that regional policy statements, and plans, map or otherwise identify areas where the protection of natural features and natural landscapes requires objectives, policies and rules; and

(e) including the objectives, policies and rules required by (d) in plans.

[74] The issues arising in this appeal relating to these objectives and policies of the NZCPS are:

i) The nature and degree of protection to be given to Te Awanui Tauranga Harbour as an outstanding natural landscape identified, mapped and having its character identified in the RCEP, in relation to Objective 2 and Policy 15;

ii) What is appropriate or inappropriate development and use of Te Awanui Tauranga Harbour in this area, in relation to Objectives 2 and 6 and Policies 6, 7 and 15;

iii) The nature of the need for Transpower's proposal, in relation to Objective 6 and Policy 6;

iv) How to recognise tangata whenua as kaitiaki in this area, as well as persons affected by the proposal, in all the ways set out in these provisions, in relation to Objective 3 and Policy 2; and

v) How to pursue integrated or co-ordinated management of resources in this case, in relation to Policy 4.

[75] There was some discussion before us about how to apply NPSET Policy 8 and NZCPS Policy 15 together. In particular, counsel for Transpower emphasised that NPSET Policy 8 is to seek to avoid adverse effects on ONFLs in rural environments while counsel for the Appellant emphasised that NZCPS Policy 15 is to avoid adverse effects on ONFLs in the coastal environment. We address this further below in relation to the

third preliminary consenting issue.

[76] The two policy statements and their relationship were considered in some detail by the High Court in *Transpower New Zealand Ltd v Auckland Council*.[22] Some differences are identified in that discussion, including the different provenance and statutory context of the two and the effect of the preamble to the NPSET which may reduce the degree of directiveness of its provisions, so that the NPSET is not as all-embracing of the purpose of the RMA as the NZCPS. Even so, the High Court noted that a decision-maker is not entitled to ignore the NPSET but must consider it and give it such weight as they think necessary. It is pertinent to note that this discussion is in the context of how effect must be given to the NPSET in the context of the matters to be considered by local authorities when preparing a plan under ss 66 or 74 RMA

[77] There is no basis on which to prefer or give priority to the provisions of one National Policy Statement over another when having regard to them under s 104(1)(b) RMA, much less to treat one as "trumping" the other. What is required by the Act is to have regard to the relevant provisions of all relevant policy statements. Where those provisions overlap and potentially pull in different directions, then the consent authority, or this Court on appeal, must carefully consider the terms of the relevant policies and how they may apply to the relevant environment, the activity and the effects of the activity in the environment.[23]

Relevant Regional Policies

[78] The Bay of Plenty RPS contains objectives and policies in relation to, among other things, the coastal environment, energy and infrastructure, integrated resource management, iwi resource management and matters of national importance. As Ms Golsby noted, the RCEP gives effect to the RPS through more specific direction. No party identified any regional policy which set out anything not otherwise to be found in the national policy statements or the regional or district plans and there was no contest before us in relation to any of the provisions of the RPS. We therefore will not further extend this decision by quoting any of the provisions of the RPS.

[22] *Transpower New Zealand Ltd v Auckland Council* [2017] NZHC 281 (Interim) and [2017] NZHC 1585 (Final); see in particular the Interim Decision at [78] – [85].
[23] *R J Davidson Family Trust*, fn 11, at [73] – [75].

Relevant RCEP Objectives and Policies

[79] In relation to the consenting pathway under the RCEP, the uncontested expert evidence of Ms Paula Golsby, a consultant planner called by the Councils, identified the relevant objectives and policies of the RCEP as being those relating to natural heritage (**NH**) and iwi resource management (**IW**) as follows:

Natural Heritage:

Objective 2

Protect the attributes and values of:

(a) Outstanding natural features and landscapes of the coastal environment; and

(b) Areas of high, very high and outstanding natural character in the coastal environment;

from inappropriate subdivision, use, and development and restore or rehabilitate the natural character of the coastal environment where appropriate.

Objective 3

Safeguard the integrity, form, functioning and resilience of the coastal environment and sustain its ecosystems by:

(a) Protecting Indigenous Biological Diversity Areas A,

(b) Maintaining Indigenous Biological Diversity Areas B;

(c) Promoting the maintenance of indigenous biodiversity in general; and

(d) Enhancing or restoring indigenous biodiversity where appropriate.

Policy NH 4

Adverse effects must be avoided on the values and attributes of the following areas:

(a) Outstanding Natural Character areas (as identified in Appendix I to the RPS);

(b) Outstanding Natural Features and Landscapes (as identified in Schedule 3);

(c) Any Indigenous Biological Diversity Area A (as identified in Schedule 2, Table 1); and

Adverse effects must be avoided on taxa that meet the criteria listed in Policy 11(a)(i) or (ii) of the NZCPS.

A summary of values and attributes for areas of Outstanding Natural Character is provided in Appendix J to the RPS. Values and attributes for Indigenous Biological Diversity Area A and Outstanding Natural Features and Landscapes are set out in Schedules 2 and 3 to this Plan respectively.

Policy NH 4A

When assessing the extent and consequence of any adverse effects on the values and attributes of the areas listed in Policy NH 4 and identified in Schedules 2 and 3 to this Plan and Appendix I to the RPS:

(a) Recognise the existing activities that were occurring at the time that an area

was assessed as having Outstanding Natural Character, being an Outstanding Natural Feature and Landscape or an Indigenous Biological Diversity Area A;

(b) Recognise that a minor or transitory effect may not be an unacceptable adverse effect;

(c) Recognise the potential for cumulative effects that are more than minor;

(d) Have regard to any restoration and enhancement of the affected attributes and values, and

(e) Have regard to the effects on the tangata whenua cultural and spiritual values of ONFLs, working, as far as practicable, in accordance with tikanga Maori.

Policy NH 5

Consider providing for subdivision, use and development proposals that will adversely affect the values and attributes associated with the areas listed in Policy NH 4 where:

(aa) After an assessment of a proposal in accordance with Policy NH 4A, transient or minor effects are found to be acceptable; or

(a) The proposal:

(i) Relates to the to the operation, maintenance, or protection of existing regionally significant infrastructure or upgrading regionally significant infrastructure provided that the scale and intensity of any long term adverse effects of the proposal are the same or similar as those arising from the existing infrastructure; or

(ia) Relates to the construction, operation, maintenance, protection or upgrading of the National Grid; …

Policy NH 6

Significant adverse effects must be avoided, and other adverse effects avoided, remedied or mitigated, on the values and attributes of:

(a) …; and

(b) Natural features and natural landscapes (including seascapes) in the coastal environment that are not listed as outstanding in Schedule 3.

Policy NH 6A

Significant adverse effects on natural character in areas that are not identified as outstanding in Appendix I to the RPS are to be avoided, and other adverse effects avoided remedied or mitigated.

Policy NH 11(1)

An application for a proposal listed in Policy NH 5(a) must demonstrate that:

(a) There are no practical alternative locations available outside the areas listed in Policy NH 4; and

(b) The avoidance of effects required by Policy NH 4 is not possible; and

(c) Route or site selection has considered the avoidance of significant natural heritage areas listed in Policy NH 4 or, where avoidance is not practicable, it has considered utilising the more modified parts of these areas;

(d) Adverse effects are avoided to the extent practicable, having regard to the activity's technical and operational requirements; and

(e) Adverse effects which cannot be avoided are remedied or mitigated to the extent practicable; ...

Iwi Resource Management

Objective 13

Take into account the principles of the Treaty of Waitangi and provide for partnerships with the active involvement of tangata whenua in management of the coastal environment when activities may affect their taonga, interests and values.

Objective 16

The restoration or rehabilitation of areas of cultural significance, including significant cultural landscape features and culturally sensitive landforms, mahinga mātaitai, and the mauri of coastal waters, where customary activities or the ability to collect healthy kaimoana are restricted or compromised.

Objective 18

Appropriate mitigation or remediation is undertaken when activities have an adverse effect on the mauri of the coastal environment, areas of cultural significance to tāngata whenua or the relationship of tāngata whenua and their customs and traditions with the coastal environment.

Policy IW 2

Avoid and where avoidance is not practicable remedy or mitigate adverse effects on resources or areas of spiritual, historical or cultural significance to tāngata whenua in the coastal environment identified using criteria consistent with those included in Appendix F set 4 to the RPS. Where adverse effects cannot be avoided, remedied or mitigated, it may be possible to provide positive effects that offset the effects of the activity.

Policy IW 8

Tāngata whenua shall be involved in establishing appropriate mitigation, remediation and offsetting options for activities that have an adverse effect on areas of significant cultural value (identified in accordance with Policy IW 1(d)).

Policy IW 9

With regard to Policy IW 8, recognise that appropriate mitigation, remediation and offsetting may include, but is not limited to, the following:

(a) Restoring and protecting areas identified by tāngata whenua as being of significant cultural or biodiversity value; habitat for taonga flora and fauna; or that are mahinga kai sites; or

(b) Contributing resources (financial or otherwise) to environmental, social or cultural enhancement and improvement programmes run by affected tāngata whenua; or

(c) Providing structures associated with customary activities or access to resources of cultural value.

[80] We note that there are other policies in the RCEP which appear to us to be relevant to this appeal. In relation to structures and occupation of space in the Coastal Marine Area, we consider the following policies to be relevant:

Policy SO 1 Recognise that the following structures are appropriate in the coastal marine area, subject to the Natural Heritage (NH) Policies, Iwi Resource Management Policy IW 2 and an assessment of adverse effects on the location:
…

(b) Structures associated with new and existing regionally significant infrastructure; …

Policy SO 2 Structures in the coastal marine area shall:

(a) Be consistent with the requirements of the NZCPS, in particular Policies 6(1)(a) and 6(2);

(b) Where relevant, be consistent with the National Policy Statement on Electricity Transmission; …

Policy SO 3 Adverse effects from the use of structures in the coastal marine area:

(a) Will be controlled to appropriate levels, having regard to the values of the site, or avoided altogether; and

(b) Will not result in significant nuisance effects (such as noise, dust, traffic, light, glare or smell) to adjoining occupiers of the coastal marine area or nearby land, and other nuisance effects will be avoided, remedied or mitigated.

Appropriate controls on nuisance effects will consider the district or city plan provisions relevant to the adjoining land.

[81] These policies address matters that are identified in s 6(a), (b) and (e) RMA as matters of national importance which we must recognise and provide for. They are matters which are also addressed in the NZCPS. We note that these policies, in their detail, present a number of ways in which to achieve the objectives of the RCEP and, in that way, the purpose of the RMA.

Relevant District Plan Objectives and Policies

[82] As noted above, while the use of land for the proposal falls to be considered under the NESETA, some elements of the proposal require resource consents which are to be assessed, on a bundled basis, as a discretionary activity. Those standards do not contain or refer to any objectives and policies, and neither they nor s 104 RMA exclude consideration of relevant District Plan provisions where the NESETA applies. In these circumstances we consider that we must still have regard to the relevant objectives and policies of the District Plan in the exercise of our discretion under s 104B RMA and any other relevant provision of the RMA.

[83] Ms Golsby identified the most relevant provisions of the district plan as including those relating to special ecological areas, important amenity landscapes, views to Mauao, significant Māori areas, network utilities and the high voltage transmission line. We note the following provisions in particular:

> **Objective 7C.4.3** Maintenance and enhancement of Group 2 Significant Māori Areas: The values associated with Group 2 Significant Maori Areas, identified in accordance with the criteria in 7C.4.1.1 Policy – Identifying Significant Maori Areas, are maintained and enhanced by ensuring that subdivision, use and development is not inappropriate.
>
> **Policy 7C.4.3.1** By ensuring that subdivision, use and development maintains and enhances the remaining values and associations of Group 2 Significant Maori Areas by having regard to the following criteria:
>
> a) The extent to which the degree of destruction, damage, loss or modification associated with the activity detracts from the recognised values and associations and the irreversibility of these effects;
>
> b) The magnitude, scale and nature of effects in relation to the values and associations of the area;
>
> c) The opportunities for remediation, mitigation or enhancement;
>
> d) Where the avoidance of any adverse effects is not practicable, the opportunity to use alternative methods or designs that lessen any adverse effects on the area, including but not limited to the consideration of the costs and technical feasibility of these.
>
> **Objective 10A.3.3** Construction, Operation and Maintenance of Network Utilities
>
> a) The construction (and minor upgrading in relation to electric lines) of network utilities avoids or mitigates any potential adverse effects on amenity, landscape character, streetscape and heritage values;
>
> b) The operation (and minor upgrading in relation to electric lines) and maintenance of network utilities mitigates any adverse effects on amenity, landscape character, streetscape and heritage values.
>
> **Policy 10A.3.3.1** Undergrounding of Infrastructure Associated with Network Utilities
>
> By ensuring infrastructure associated with network utilities (including, but not limited to pipes, lines and cables) shall be placed underground, unless:
>
> a) Alternative placement will reduce adverse effects on the amenity, landscape character, streetscape or heritage values of the surrounding area;
>
> b) The existence of a natural or physical feature or structure makes underground placement impractical;
>
> c) The operational, technical requirements or cost of the network utility infrastructure dictate that it must be placed above ground;
>
> d) It is existing infrastructure.

> **Policy 10A.3.3.2** Effects on the Environment
>
> By ensuring that network utilities are designed, sited, operated and maintained to address the potential adverse effects:
>
> a) On other network utilities;
>
> b) Of emissions of noise, light or hazardous substances;
>
> c) On the amenity of the surrounding environment, its landscape character and streetscape qualities;
>
> d) On the amenity values of sites, buildings, places or areas of heritage, cultural and archaeological value.
>
> **Objective 10B.1.1** Electricity Transmission Network
>
> The importance of the high-voltage transmission network to the City's, regions and nation's social and economic wellbeing is recognised and provided for.
>
> **Policy 10B.1.1.1** Electricity Transmission Network
>
> By providing for the sustainable, secure and efficient use and development of the high-voltage transmission network within the City, while seeking that adverse effects on the environment are avoided, remedied or mitigated to the extent practicable, recognising the technical and operational requirements and constraints of the network.

[84] These provisions give effect to or are otherwise consistent with the provisions of the NPSET and the NESETA.

Other matters

[85] As noted above, there are three iwi management plans that are relevant to this appeal under s 104(1)(c) RMA.

[86] The Tauranga Moana Iwi Management Plan expressly addresses the removal of the A-Line from Te Ariki Park and is specifically discussed below in relation to our assessment of cultural effects.

[87] The Ngāi Tukairangi and Ngāti Tapu Hapū Management Plan more generally addresses matters of concern to those iwi, with specific policies in relation to the role of kaitiaki, participation in all resource management processes, protection of cultural values and controls on certain activities including network utilities. In particular, there is a policy:

> That the power provider removes power poles from identified Māori land areas or provides forms of mitigation for use of land.

[88] The Ngāi Te Rangi Resource Management Plan makes clear the importance of

Tauranga Moana to the iwi, sets out policies to control activities on and around the harbour and to enhance its ecosystems, its value for kaimoana and its recreational amenity values, and calls for involvement of the iwi and hapū in management of sites that are of cultural significance to them.

[89] We will address other particular provisions of other relevant planning documents in the context of the issues to which they relate.

The nature of policies under the RMA

[90] After that lengthy recitation of objectives and policies, it is appropriate to remind ourselves of what these provisions are considered to be in legal terms. In *Auckland Regional Council v North Shore City Council*[24] the Court of Appeal considered the meaning of *policy* in the context of the RMA and the extent to which a regional policy statement could restrict the power of territorial authorities to permit urbanisation of their districts. On the meaning of *policy* generally, the Court of Appeal said:

> 'Policy' and 'policies' must bear their natural and ordinary meaning in the context of the Act. As an appropriate definition Mr Salmon cited what is described in the Oxford English Dictionary, second edition, as 'the chief living sense':
>
> > 5. A course of action adopted and pursued by a government, party, ruler, statesman, etc; any course of action adopted as advantageous or expedient.
>
> The definition 'a course of action' is also given by other dictionaries, such as Chambers. It may readily be accepted as appropriate in the present context. The word 'policy' is very old. One of the examples given in the Oxford Dictionary, dating from 1599, is 'Eche one ... did, in the begynnynge of the months of Januarye ... presente somme gyfte unto his frende ... a pollicye gretly to be regarded'. A familiar modern usage in this country is 'New Zealand's anti-nuclear policy'. Often, as in the Resource Management Act, the word has governmental or administrative connotations. The name of our 'police' comes from the same source.
>
> It is obvious that in ordinary present-day speech a policy may be either flexible or inflexible, either broad or narrow. Honesty is said to be the best policy. Most people would prefer to take some discretion in implementing it, but if applied remorselessly it would not cease to be a policy. Counsel for the defendants are on unsound ground in suggesting that, in everyday New Zealand speech or in parliamentary drafting or in etymology, policy cannot include something highly specific. We can find nothing in the Resource Management Act adequate to remove the challenged provisions from the permissible scope of 'policies'. In our opinion they all fall within that term and are *intra vires* the Regional Council.
>
> A well-meant sophistry was advanced to bolster the argument. It was said that the Act in s.2(1) defines 'Rule' as a district rule or a regional rule, and that the scheme of the Act is that 'rules' may be included in regional plans (s.68) or district plans (s.76) but not in regional policy statements. That is true. But it cannot limit the scope of a regional policy statement. The scheme of the Act does not include direct

[24] *Auckland Regional Council v North Shore City Council* [1995] NZRMA 424.

> enforcement of regional policy statements against members of the public. As far as now relevant, the authorised contravention procedures relate to breaches of rules in district plans or proposed district plans (s.9 and Part XII generally). Regional policy statements may contain rules in the ordinary sense of that term, but they are not rules within the special statutory definition and directly binding on individual citizens. Mainly they derive their impact from the stipulation of Parliament that district plans may not be inconsistent with them.

[91] It is important to note, in relation to the last point in that passage, that the RMA has been amended to reinforce this by now requiring regional and district plans to give effect to both national policy statements and regional policy statements.[25]

[92] This passage must also now be read in light of the discussion in the Supreme Court's decision in *Environmental Defence Society Inc v New Zealand King Salmon Ltd*[26] of how provisions of National Policy Statements are to be given effect according to their particular terms rather than on the basis of a broad overall judgment.

Preliminary consenting issues

[93] All parties generally agreed on the benefits to be gained from the removal of the A-Line from above residential areas and Te Ariki Park and the realignment of the A-Line along the SH 29A corridor on both sides of Rangataua Bay, with a section of the northern part of the A-Line relocated to the eastern margin of Ngāi Tukairangi's land. But the placement of the two main support Poles 33C and 33D near the marae and the aerial location of the transmission lines across Rangataua Bay were opposed by Te Runanga o Ngāi Te Rangi and the Maungatapu Marae Trust, under the Appellant's notice of appeal. They considered that alternative locations or methods should have been explored further.

[94] The common view of Transpower and the Councils is that alternative relief is not available through these applications and that the Court must make its decision on the current application.

[95] The preliminary consenting issues for determination arising from the parties' cases were as follows:

1. **Bundling:** Is the proposal a single activity the effects of which should be assessed in the round or should the effects of the removal of the existing

[25] Sections 67(3) and 75(3) RMA.

[26] *Environmental Defence Society Inc v New Zealand King Salmon Ltd*, fn 20.

line be considered separately from the effects of the construction and use of the new line?

2. **Alternatives:** Was it necessary for Transpower to consider alternative methods for the realignment of the A-Line and if so was its assessment and evaluation adequate?

3. **Maintenance or upgrade:** Does the relocation of the A-Line constitute *maintenance* or an *upgrade* or a *major upgrade* in the language of policies 4 and 6 in the NPSET or is this *new transmission infrastructure*?

Issue 1 – Bundling

[96] It is generally accepted that where a proposal requires more than one consent and there is some overlap of the effects of the activity or activities for which consent is required, then the consideration of the consents should be bundled together so that the proposal is assessed in the round rather than split up, possibly artificially, into pieces.[27] Where, however, the effects to be considered in relation to each activity are quite distinct and there is no overlap, then a holistic approach may not be needed.[28]

[97] While the authorities for those propositions were dealing with applications for judicial review of notification decisions, the principles are also applicable to consideration of whether to grant resource consent. This is the basis on which Transpower's proposal is accepted by all parties and treated by us as being for a discretionary activity, that being the most restrictive activity class of all the matters for which resource consent is required.

[98] Soon after lodging its appeal, and in response to a direction of the Court requiring it to identify any preliminary question of law to be resolved prior to the substantive hearing, the Appellant applied for a declaration or preliminary determination that, in the particular context of this proposal and the effects on ONFL 3, in determining whether the proposed works have adverse effects on the environment, it is an error of law to discount or offset the positive effects of removing any existing works from the adverse effects of the proposed works.

[99] The Court considered that the question depended on a complex factual situation

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[27] *Bayley v Manukau City Council* [1999] 1 NZLR 568 at 579 – 580; *King v Auckland City Council* [2000] NZRMA 145 at [47] – [50].

[28] *Bayley v Manukau City Council,* fn 27 at 580; *Body Corporate 97010 v Auckland City Council* [2000] 3 NZLR 513; [2000] NZRMA 529 at [21] – [22].

and the assessment of particular positive and adverse effects, involving matters of degree, which would require evidence about the quality of the environment and the effects on that environment. On that basis the Court decided that the appeal and the application should be heard together.[29]

[100] At the substantive hearing, the Appellant withdrew that application for a declaration, but its counsel pursued the issue in submissions and in cross-examination of witnesses. He submitted that Transpower's proposal has two parts and that while the two parts may only proceed together, they are clearly separate parts of the proposal. A structured approach to the consideration of the effects of the proposal is to assess each component separately and then seek to identify what the overall effects are. An adverse effect could then be discounted by a positive effect to arrive at a net or overall effect, but that would not mean that there were no adverse effects, particularly where the effects arise or diminish in different locations. On this argument, counsel accepted that if the A-Line were simply replaced in more or less the same location with the same or smaller structures, then it should be evaluated as having no adverse effect, but if it were located in a different part of the Bay, then there would be adverse effects on the ONFL in that location, even if the benefits of the removal of Tower 118 from the Bay significantly outweighed those effects. He submitted would be incredible to suggest that there were no adverse effects on the values of the ONFL in that situation.

[101] As we understand the intended consequence of this argument, if it were accepted, the proposal would have to be considered on that basis to have adverse effects on ONFL 3 and therefore be contrary to Policy 15(a) NZCPS so that it should be declined.

[102] Both Transpower and the Councils submitted that this approach should be rejected, observing that there was no evidential foundation in this case for the argument as all the witnesses, including the expert landscape architect called by the Appellant, had assessed the effects on an overall or net basis.

[103] In addressing this argument, we start from first principles relating to how effects are to be assessed, both individually and in relation to a proposal which has a range of effects. We then consider whether the *structured approach* advanced by counsel for the Appellant is an appropriate one to take in this case.

[29] *Tauranga Environmental Protection Society Inc v Tauranga City Council* [2019] NZEnvC 1.

[104] The term *effect* is defined broadly and inclusively in s 3 RMA. The definition is subject to requirements of context. It includes any positive or adverse effect and any cumulative effect, and applies to any effect regardless of the character, scale, intensity, duration or frequency of the effect. As with other broad definitions in s 2 RMA, such as those of *contaminant* and *environment*, and from the scheme of the RMA with its hierarchy of planning documents, one may understand the statutory intention to be that greater detail about how to manage particular effects on particular parts of the environment would be provided as the focus of the planning documents narrowed through the hierarchy.

[105] As *effect* is a word in ordinary use, and because the inclusive statutory definition of it consists of phrases which use the word but does not specify the boundaries of its meaning, the Court may have regard to the ordinary meaning of it. In the context of the RMA and drawing on its purpose, we think the principal ordinary meaning of *effect* is what is caused by or otherwise results from the activities of people in using, developing or protecting natural and physical resources. In that sense it is a neutral term, but we recognize that it can be and is often used to refer to adverse effects.

[106] Case law has generally interpreted and applied the statutory definition of *effect* in a realistic and holistic way. In *Elderslie Park Ltd v Timaru District Council*[30] Williamson J addressed the assessment of adverse effects in the context of whether an application for resource consent should be notified and said:

> The wording of s 94(2)(a) requires special consideration. In particular, the phrase "the adverse effect on the environment of the activity for which consent is sought will be minor" suggests that it is the overall position which the Council must weigh. During the course of argument there was debate as to whether in the context of adverse effect the Council was entitled to have regard to any possible benefits of the proposed activity. In my view the Council was entitled to do so because it is required to be satisfied about an "effect" which involves the end result of a number of factors, changes and influences. To ignore real benefits that an activity for which consent is sought would bring necessarily produces an artificial and unbalanced picture of the real effect of the activity. In determining whether an effect is minor it is appropriate to evaluate all matters which relate to the effect. These matters would include counterbalancing benefits and possible conditions.

[107] In *Marlborough District Council v New Zealand Rail Ltd*[31] Judge Treadwell considered an application for enforcement orders and a declaration relating to the effects of operating fast ferries in Queen Charlotte Sound. Addressing the effects both of the activity and of any order restricting it, his Honour observed:

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30 *Elderslie Park Ltd v Timaru District Council* [1995] NZRMA 433 (HC).

31 *Marlborough District Council v New Zealand Rail Ltd* [1995] NZRMA 357 (EnvC).

> The expression 'adverse effects' is not defined in the RMA and indeed should not be defined. In my opinion, it must be a perceptible effect - not the type of effect that one might normally experience in the day to day activities of a society. …
>
> If such a beneficial activity carries with it as a necessary adjunct an effect which has adverse impact upon the environment the activity should not be required to cease because of that consequential effect if the adverse effect does not offend the concept of sustainable management as set forth in s.5.
>
> This leads me to the full circle, where the activity as a whole must be contemplated and, if lawful, it is a question of weighing whether it should be permitted to continue having regard to mitigation measures available to it.
>
> As I will later consider, there are some effects on the Tory Channel environment which are adverse in the eyes of some parties to these proceedings – namely disturbance of foreshore; disturbance of sub-tidal and inter-tidal marine life; and the other matters I have previously recorded. The main debate still revolves around whether these effects are in fact adverse or do in fact affect the sustainability of the environment for future generations. …

[108] In *Auckland City Council v Minister for the Environment*[32] a full bench of the Environment Court (Environment Judges Bollard and Whiting) considered an application for a declaration in relation to the meaning and effect of s 330 RMA in relation to emergency powers and in particular whether a foreseen or predictable adverse effect could give rise to an emergency. Their Honours noted:

> Obviously an effect (as defined) may be positive (in the sense of being beneficial or worthwhile) or adverse (in the sense of being detrimental or negative in some way – e.g. undermining or diminishing). The definition of "effect" in section 3 is plainly very wide, embracing it as it does (inter alia) future effects, as well as potential effects whether of high or low probability.
>
> …
>
> With the qualification "adverse" attached, the types of effects that may conceivably arise are extremely diverse, given the definition of effect itself and the wide connotation of the word "adverse" when related to the environment - environment, being very wide in concept as indicated by the … definition in s.2: …
>
> …
>
> Section 330 and cognate provisions are, of course, part of the Act's total scheme and framework. As such, they should be viewed as being in keeping with or relevant to the Act's purpose of promoting sustainable management of natural and physical resources …
>
> …
>
> Integral to the concept of sustainable management is the need under [s 5(c)] to avoid, remedy or mitigate adverse effects of activities on the environment Because of this basic concern, the individual place and purpose of ss.330, 330A and 331 becomes more apparent Assistance is also derived from a knowledge of other sections …

[109] After reviewing other relevant statutory provisions and analysing s 330 RMA, their Honours continued:

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[32] *Auckland City Council v Minister for the Environment* [1999] NZRMA 49 (EnvC).

> We have earlier discussed the term "adverse effect". In many resource consent application cases, reference has been made to adverse effects in the context of s.104(1)(a), under which a consent authority (or this Court on appeal), in considering an application for a resource consent, must have regard to any actual and potential effects on the environment of allowing the activity. Various types of actual and potential effects may fall for consideration in the particular case, whether perceived as positive, adverse or perhaps even neutral. In the final analysis the decision-maker forms a considered judgment, having had regard to all relevant matters under s.104(1) - with due primacy afforded to Part II of the Act.
> …

[110] These passages indicate that the correct approach to the assessment of effects involves not merely the consideration of each effect but also the relationships of each effect with the others, whether positive or adverse. This is consistent with the inclusion of cumulative effects in the definition in s 3: while many cases have considered the overall impact of cumulative adverse effects, there is nothing in s 3 which would prevent consideration of the cumulative impact of positive and adverse effects. Where effects are directly related and quantifiable in commensurable ways, then it may even be possible to sum the overall effect, but these passages also indicate that commensurability is not a pre-requisite to such consideration.

[111] We also consider that such an approach is not limited to the level of individual effects but applies similarly to the whole activity. While one may conceive of an activity as separate elements with separate effects, that approach may not properly address the proposal as it is intended to occur or operate. Numerous provisions of the RMA, including the functions of territorial authorities and regional councils, indicate that the statutory purpose is to be pursued or given effect by methods which help to achieve the integrated management of the effects of the use, development or protection of resources. While there may be separate or ancillary activities which require separate consideration, the analysis should not be artificial. This approach is consistent with the identification of activities in terms of planning units[33] which can assist in such integration.

[112] In this case, we are satisfied that the proposal is to be assessed as a single one with its activities bundled together for the purposes of identifying the correct activity classification and considering the effects, positive and adverse, cumulatively. We note that counsel for the Appellant acknowledged that its two parts may only proceed together: without the new line, there would be no removal of the existing one. We agree and see that as determinative of this point.

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[33] *Burdle v Secretary of State for the Environment* [1972] 23 All ER 240; [1972 1 WLR 1207; *Centrepoint Community Growth Trust v Takapuna City Council* [1984] NZCA 107; [1985] 1 NZLR 702; (1984) 10 NZTPA 340.

Issue 2 - Alternatives

[113] Was it necessary for the Transpower to consider alternative methods for the realignment of the A-Line and, if so, was its assessment and evaluation adequate?

[114] Clause 6(1)(b) of Schedule 4 RMA states that an AEE must include a description of any possible alternative locations or methods for undertaking the activity when it is likely that the activity will result in any significant adverse effect on the environment.

[115] An assessment of alternatives may be relevant under section 104(1)(a) RMA generally if the adverse effects are significant;[34] or in this case if, under an assessment via the cascade of policies in the RCEP, there are adverse effects of an activity on the values and attributes of ONFL 3. Under Policy NH4 of the RCEP adverse effects on the values and attributes of ONFL 3 are to be avoided. If they cannot be avoided, Policy NH5 and Policy 11.1 provide a pathway for the consideration of a range of other matters that may allow the activity to proceed and some of these require that alternatives be assessed.

[116] Schedule 3 of the RCEP summarises the key attributes of ONFL 3 as relating to: *the high natural science values associated with the margins and habitats; the high transient values associated with the tidal influences; and the high aesthetic and natural character values associated with the vegetation and harbour patterns*. The evaluation is presented under seven headings: natural science values; aesthetic values; expressiveness (legibility); transient values; shared and recognized values; Māori values; and historical associations. It is pertinent to note that the identification and assessment of these attributes expressly recognises that current uses in ONFL 3 include among a number of things *bridges* and *national grid infrastructure*. It appears to follow that such uses do not prevent the area from being identified as an ONFL. It may also follow, in the absence of any policy for the removal of such uses, that they might be considered to be generally appropriate within it[35] on the basis that they do not undermine or threaten the things that are to be protected.

[117] The Applicant assessed alternatives in its AEE and the witnesses it called did so in their evidence before us, as we describe below. As to the sufficiency of that assessment

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[34] *TV3 Network Services Ltd v Waikato District Council* [1998] NZLR 360; [1997] NZRMA 539.

[35] *Western Bay of Plenty District Council v Bay of Plenty Regional Council* [2017] NZEnvC 147 at [124] – [128].

and evidence, an applicant is not required to undertake a full assessment or comparison of alternatives, or clear off all possible alternatives, or demonstrate its proposal is best in net benefit terms.[36] All that is required is a description of the alternatives considered and why they are not being pursued.

[118] The landscape within which the realignment of the A-Line would take place and its features, natural character and visual amenity were described by Mr Brad Coombs, an expert landscape architect, in his evidence for Transpower. Ms Rebecca Ryder, an expert landscape architect who reviewed Mr Coombs' evidence on behalf of the Councils, considered that he had provided a *solid understanding of the landscape's elements, features and characteristics*, supported by his graphic supplement. Mr Stephen Brown, an expert landscape architect called on behalf of the Appellant, in his evidence considered that Mr Coombs' evidence provided a broad-brush analysis of the main physical characteristics of the landscape, with which he agreed, but that it needed additional descriptions of some features of the environment, noting that *virtually the entire coastline has been extensively modified and, for the most part, developed*.

[119] The opinions of both Mr Coombs and Ms Ryder were that the proposal does not have any adverse effects on those values and attributes based on their assessments under the RCEP natural heritage policies. Mr Brown's evidence was that landscape effects of the proposal would give rise to moderate adverse effects, while in relation to the Maori values component of ONFL3 the effects of the proposal would be *significant*. His assessment was that the project does not comply with Policies 6 and 8 of NPSET and Policy 15(a) of the NZCPS.

[120] We return to the details of the evidence of the above three witnesses in our section on their landscape and visual assessments, where we evaluate the effects on the values and attributes of the project on ONFL 3 and determine whether there are adverse effects and if so, whether they are significantly adverse.

Alternatives considered

[121] During the development of its applications for the project Transpower prepared an Options Report which considered the alternatives to taking the transmission line across Rangataua Bay. It developed a *long list* of options that described the infrastructure expected to be required for each (tabulated below) and provided additional comments on

[36] *Meridian Energy Ltd v Central Otago DC* [2011] NZLR 482 (HC) at [120] and [128].

relative costs and other issues including access for maintenance and repair, health and safety, resilience of supply and environmental issues.

Table 2. *Principal options considered by Transpower*[37]

Option	Option Description	Comments
1	Do nothing	Poles A116 and A117 will still require replacement. Ongoing maintenance and access issues will remain. Does not resolve historic grievances with iwi.
2	Underground cable between Poles A116 and A117 on Ngāti Hē land (sports field)	Would require two new cable termination structures to replace Poles A116 and A117. Ongoing maintenance and access issues will remain. Does not resolve historic grievances with iwi.
All remaining options below involve relocation of the circuit onto or adjacent to the HAI-MTM-B support poles between poles B28 and B48, and removal of redundant HAI-MTM-A line poles from Te Ariki Park, residential and horticultural land.		
3(a)	Aerial crossing of Rangataua Bay in a single span.	Requires two monopoles of approximately 34.7 m on the Maungatapu side and 46.8 m high on the Matapihi side, and removal of the existing Tower A118 from the CMA.
3(b)	Aerial crossing of Rangataua Bay utilising a strengthened or replacement Tower A118 in the CMA.	Requires one monopole of up to 40 m high on the Maungatapu side of the harbour and a 12m to 17m high concrete pi-pole on the Matapihi side. Existing Tower A118 in the CMA is retained.
4(a)	Integrate a cable into a potential future replacement road bridge.	New cable termination structures required on either side in the order of 15m to 20m high. New bridge would need to be designed to accommodate an additional transmission cable.
4(b)	Cable across estuary on a new stand-alone footbridge or cable bridge	New cable termination structures required on either side in the order of 15m to 20m high. New bridge structure required.
4(c)	Cable across existing bridge - east side	New cable termination structures required on either side in the order of 15m to 20m high. Terminate on west side adjacent to Marae, but then cross to east side (opposite side to existing cable) as soon as practicable. Thrust bore under road required.

[122] The result of Transpower's analysis of the long-list options, below, led to confirmation of the current proposal (Option 3a) as the preferred option.

> Undergrounding of the line across the Ngāti Hē land (Te Ariki Park) was rejected on the basis that it did not resolve long term grievances of iwi, has issues of cultural acceptability due to the burial history on the Ngāti Hē land, and also does not provide any wider benefits such as removal of the lines from other land that is crossed by the transmission line.
> …
>
> Options involving attaching the cable to the existing State Highway 29A bridge, use

[37] AEE Appendix N page 4.

> of a new cable/foot bridge or a cable thrust beneath the seabed are considered by Transpower to have operational and security of supply risk (network resilience), and unacceptable costs due to hardware and engineering considerations, and would not eliminate the need for substantial termination structures on either side of the waterway, while there is no road bridge replacement project forecast in the foreseeable future that a new cable crossing could be integrated into. Accordingly, two aerial crossing options were shortlisted for further consideration, with the preferred option involving a single span aerial crossing of Rangataua Bay adjacent to the State Highway 29A bridge.

[123] The primary focus of TEPS' appeal was for the proposal to be declined so that in their words a *proper assessment of alternatives* could be carried out adverse effects on the ONFL avoided. In evidence Transpower's witnesses Mr Richard Joyce and Mr Colin Thomson provided further detail on the consideration given to the under-seabed cable option and the bridge-attachment cable option. TEPS, the Trustees of Maungatapu Marae, and Ngāi Te Rangi Iwi Trust made particular mention of these potential alternatives in their submissions and evidence so we provide this further detail below.

Attachment of a cable to the SH 29A bridge

[124] The bridge across Rangataua Bay was built in the late 1950's. It is around 317m long and comprises 33 spans each about 10m long with a traffic lane in each direction and a footpath on its western side. It carries a water main, Transpower's B-Line and a local electricity distribution cable.

[125] When Transpower consulted with NZTA in May - June 2010 about the suitability of the bridge for carrying the A-Line as well as the B-Line, NZTA and its advisers noted in e-mail correspondence that:

(i) the eastern side of the bridge would be the preferred location for the A-Line as a watermain is located on the opposite side;

(ii) a new longitudinal *cable tray* support structure about 1.5m wide could be attached to the outside of the bridge at each pier in the same way as the water main is attached;

(iii) the loading per pier from the A-Line and its support structure would be about two tonnes;

(iv) the existing protection along the outside of the bridge is of a low standard and the A-Line, if located as suggested, could be at risk of damage if vehicles were to veer off the bridge carriageway.

(v) there could also be a problem keeping people from accessing the cable tray for fishing or for jumping off the bridge into the harbour.

[126] Later, in June 2016 it was noted in e-mail correspondence that:

(i) NZTA was concerned about historic pile settlement which was clearly visible from the deformation of the bridge handrail with the risk that this settlement could be compounded if the A-Line was to be carried on the bridge;

(ii) if the Line-A was added, there was likely to be a requirement for new piles at each pier to meet Transpower's design requirement for an ultimate limit state of a 2,500-year-return-period seismic event.

(iii) irrespective of Transpower's needs, additional piles might be required to strengthen the bridge to meet NZTA's current seismic resilience standards.

(iv) the cable weight of 400kg/m would add about four tonnes to the loading at each pier (compared with the two-tonne load stated in the 2010 correspondence).

[127] To confirm whether strengthening was feasible to accommodate the A-Line, NZTA advised it would need to undertake detailed investigations estimated to cost in the order of $75,000 - $120,000. Transpower declined to commission NZTA to undertake these investigations.

[128] The bridge was not in NZTA's 30-year replacement programme and an assessment of its condition originally scheduled for 2018/2019 had not yet started. At the time of this decision we are unaware whether this condition assessment has been undertaken.

Costing Information

[129] In July 2016 NZTA estimated $7.5 million as the rough order of cost to strengthen the bridge for the additional A-Line loading and to provide for stronger safety barriers. This excluded the costs of strengthening the bridge for a 2,500-year-return-period seismic event. Later, in December 2017, it was noted that the extra weight of the A-Line would adversely affect the bridge's capacity for carrying permitted overweight loads with confirmation that the rough order of cost for strengthening the bridge would be in the range previously advised ($5M to $7M). Unlike the information provided with the July

2016 estimate, the December 2017 estimate did not identify what was covered by the estimate.

[130] In addition to NZTA's costs for strengthening the bridge, Transpower's costs were estimated to be in the order of $7M to $13M for supplying and installing its componentry (the A-Line cables and cable joints and replacing the existing CTS structures with new double circuit CTS structures). When combined, the overall cost for the A-Line bridge crossing option was estimated to be in the order of $13M to $20M. Given that this cost estimate was more than 10 times that of the estimate for the aerial crossing option ($0.7M to $1.4M) Transpower decided against investigating the bridge crossing option any further.

A crossing beneath the sea bed

[131] Mr Joyce told us that Transpower does not generally place functioning overhead transmission lines underground. When it does consider an underground method, it is most often because it needs to construct a new transmission line in an urban area. The only other reason is when the project is externally funded, for example by a developer or roading authority to enable growth. It generally costs $3M - $5M per kilometre to underground an existing 110kV overhead transmission line, and more for a seabed or marine crossing. Costs are highly sensitive to the environment being considered.

[132] As an infrastructure provider operating as a statutory monopoly, Transpower's major capital expenditure projects must pass an investment test set by the Commerce Commission under Part 4 of the Commerce Act 1986 requiring a determination whether a net benefit is accrued by the project nationally. We were told that the Commission would be unlikely to approve such expenditure in the absence of such a net national benefit.

[133] While underground cables are less prone to weather related outages, repair and restoration are more costly and there is a risk to accidental damage (such as being dug up) and earthquake damage. Cables, whether buried or carried on a structure such as a bridge, are specially designed for both thermal and electrical insulation and to withstand corrosion and other environmental impact, so have a water barrier, metallic sheath and an outer jacket, all adding to the weight and cost of the cable. Because underground cables dissipate heat through the surrounding ground, detailed investigations of ground conditions are necessary to determine how quickly heat would dissipate, but a trench some 1.5 m wide and 2.0 m deep would likely be required. Cable transition structures

would be needed at each end of a 110 KV underground cable and these are themselves large structures.

[134] Investigations of seabed cabling routes were made in June 2016 - June 2017 by way of a high-level desk-top analysis to inform Transpower's assessment of alternatives, and again in August to November 2018 to review the desk-top investigations in more detail and to assess other potential cable routes in the light of concerns raised by the Appellants.

[135] A southern option was considered which would route the A-Line underground from the vicinity of A-Line tower A0113, near the intersection of Taipari and Te Hono streets, and follow public roads to Rotary Park on the eastern edge of Maungatapu peninsula. The cable would then cross beneath Rangataua Bay, emerging near the current B-Line Tower B0040, which is on SH 29A about 600m from the northern end of the bridge. These were the towers shown as the start and finish locations for the route identified as Option 2 in Appendix B to Mr Joyce's evidence.[38] Mr Joyce's estimate of the cost of Option 2 underground was approximately $15M, with a margin of accuracy of -20% to +50%, giving a range of $12.1M to $22.7M. The estimated costs were checked against those for a recent undergrounding project by Transpower in Hamilton (which had a higher cost for the cable, attributed to a rise in the price of copper) and against indicative costs for two projects in the Tauranga area, contracted by Transpower to Northpower Limited. The latter projects indicated a lower cost of one component of the Rangataua Bay crossing, the horizontal directional drilling beneath the seabed, but considering the costs were qualified as being *conservative, high level estimates for supply and install of cable ducts pending geotechnical conditions and route profiles, etc.*, these did not alter the overall costs Transpower estimated for this Option 2 underground route.

[136] Towards the end of 2018, three different underground alignments, together with the necessary aboveground infrastructure, were investigated to establish *desk-top* orders of costs for each. These included an updated cost estimate for the Option 2 alignment investigated earlier in June 2016 – June 2017. As well as a seabed section, each of these underground alignments included land-based sections of varying lengths on the peninsulas. As part of this assessment, updated information was obtained from a range of external parties on cabling and drilling costs. In addition, provision was made for the

[38] We have relied on the locations shown in Appendix B to Mr Joyce's statement, as the references in his text to Towers A0133 and B0049 appear to be typographical errors as they are to towers which, according to Transpower's online assets map, are some distance from those indicated in Appendix B.

possibility that existing underground infrastructure might be encountered on the land-based sections of each route and that these would need to be diverted and therefore add to the costs. For each alignment, the undergrounding costs were compared with the cost of constructing an aerial transmission line on the same alignment. This established that the cost of undergrounding was at least an order of magnitude more than the cost of an aerial route along the same alignment.

[137] The above evidence of the issues and costs associated with Option 2 was not contested.

Discussion and findings on consideration of alternatives

[138] A relocated A-Line crossing of the harbour on a strengthened existing bridge would appear to be technically feasible. This would likely involve the installation of additional piles at each pier, a cable support structure attached to the outside of the bridge and strengthened safety barriers. Whether the new piles and their connections to the existing piers could be designed to enhance the seismic resilience of the bridge for both Transpower's and NZTA's modern design standards was left unanswered.

[139] With a bridge crossing option estimated to cost more than 10 times that of an aerial crossing (or in the range of about $11M to $18M more), putting to one side other considerations, we consider that Transpower has a clear reason for discounting a bridge option.

[140] In terms of our consideration of these matters, the Environment Court has no authority to direct the use of public funds. If expenditure is required to address adverse effects, an issue may arise as to the extent to which an increase in costs is reasonable. While consent authorities (and the Environment Court on appeal) often add conditions that may increase the costs of a project, these must, among other things, not be so unreasonable that no reasonable planning authority could have imposed them.[39] In that sense one element of the reasonableness of a condition is that ordinarily it must be proportionate to the scale of the proposal or to the other terms of the consent to which it is to be attached. To impose a condition which had the effect of requiring the cost of a proposal to increase by an order of magnitude could well be unreasonable[40] and would also be likely to go beyond the Court's proper role in adjudicating disputes under the

[39] *Newbury District Council v Secretary of State for the Environment* [1980] 1 All ER 731; *Housing New Zealand Ltd v Waitakere City Council* [2000] NZCA 392 at [18].

[40] *Waitakere City Council v Estate Homes Ltd* [2006] NZSC 112; [2007] 2 NZLR 149; [2007] NZRMA 137.

RMA. If we were to conclude that such a level of increased expenditure was necessary to avoid, remedy or mitigate the adverse effects of a proposal, then the more appropriate course could be to refuse consent to the proposal.

[141] For completeness, we note that we did not receive any evidence about Transpower's earlier decision to locate the B-Line on the bridge, how it was attached, whether any strengthening was required for this or what the financial arrangements might be between NZTA and Transpower including whether NZTA charges a rental for accommodating services on the bridge. However, we do not need this information on the B-Line for us to make a finding on whether Transpower undertook an adequate consideration of alternatives for the realignment of the A-Line.

[142] In relation to the alternative of an underground or sub-seabed crossing, we consider that the level of assessment undertaken by Transpower for this, based on itemised costings from similar projects and updated to present day values and including reasonable margins for contingencies, was an appropriate approach to making cost comparisons with the preferred aerial transmission option. As with the bridge option, for cost reasons alone, we accept Transpower's dismissal of the under-sea options for crossing Rangataua Bay.

[143] In relation to the effects on the ONFL of the current project and any alternatives, Table 2 above briefly describes the alternatives considered, all of which appear to require physical structures of a similar scale that would likely be placed in similar locations on either side of Rangataua Bay to those proposed for the aerial transmission line. Structures would be required to support either an aerial transmission line or enable the transmission line to descend to a level at which it could either be attached to the bridge or routed through an underground conduit beneath Rangataua Bay. All methods would place tall structures in the ONFL, whether above or below it or on its margins.

[144] We consider the alternatives to have been appropriately assessed and the reasons for the selection of the project on which Transpower wishes to proceed to be sound. We have in front of us a single application on which to make a determination and this goes to the further issues and effects of the proposal which we now evaluate.

Issue 3 - Maintenance or upgrade

[145] There was some discussion before us, as there had been at first instance, as to

whether the proposal is a maintenance project or an upgrade, and whether it includes new infrastructure. These distinctions affect the identification of the relevant policy under the NPSET: new transmission infrastructure or a major upgrade would require assessment under Policy 4 while a substantial upgrade comes under Policy 6. These policies are:

> **Policy 4**
>
> When considering the environmental effects of new transmission infrastructure or major upgrades of existing transmission infrastructure, decision makers must have regard to the extent to which any adverse effects have been avoided remedied or mitigated by the route, site and method selection.
>
> **Policy 6**
>
> Substantial upgrades of transmission infrastructure should be used as an opportunity to reduce existing effects of transmission including such effects on sensitive activities where appropriate.

[146] No definitions are set out in the NPSET for *major* or *substantial* in relation to upgrades of transmission infrastructure. In the context of Policies 4 and 6, it can be seen that *major* upgrades are referred to alongside new infrastructure and should involve consideration of avoiding, remedying or mitigating any adverse effects, while *substantial* upgrades are referred to with existing effects and opportunities to reduce those. The policies therefore contemplate that a major upgrade involves more upgrading than a substantial upgrade and is more likely to have additional adverse effects.

[147] We have already concluded that the policies of the NPSET have been appropriately reflected by the Natural Heritage policies of the RCEP so that we do not need to evaluate this matter in detail here. We will describe that consenting pathway later in our decision. However, the parties have raised this as a specific issue and we briefly consider the arguments below.

[148] Ms Moss summarised Transpower's view that the proposal's genesis was the need to replace the deteriorating poles and that this is not an upgrade because it is will not result in an increase in capacity to transmit electricity. The company is shifting the A-Line onto existing infrastructure, with some new assets required to span the waterway. She therefore did not consider this to be *new infrastructure* in terms of the wording of NPSET Policy 4.

[149] Mr Horne provided his opinion about what he considered an *upgrade* to be versus a *major upgrade*. Because one of the benefits of moving the A-Line would be to improve

access for maintenance, he would consider that to be an *upgrade* in terms of the NPSET but he noted that Transpower would consider it to be *maintenance*. He did not consider it would be a *major upgrade* as it simply required moving a line and some poles. The addition of a circuit, a change from a single to a duplex circuit, or the shifting of all lines from poles to towers were things which he would consider to be types of major upgrade. Further, he considered that the relocation of the line did not amount to *new transmission infrastructure*.

[150] We think Mr Horne's approach as an expert planner to the application of the NPSET policies relating to an *upgrade*, and his comparison of that with Transpower's routine operational use of the word *maintenance* for the same activity, are helpful. They are also consistent with our analysis of the language of the policies. We agree with him that the proposal constitutes a substantial rather than a major upgrade and that it is not new infrastructure. Our findings align with those of the Commissioners. On that basis we consider Policy 6 of the NPSET to be more relevant to this appeal than Policy 4.

[151] The issue of whether and how to apply Policies 7 and 8 of the NPSET was also argued before us. The fuel for the argument appeared to be the presence of the phrase *seek to avoid* in Policy 8, which might appear to offer a route around the perceived difficulty that *avoid* in Policy 15 of the NZCPS means *"not allow" or "prevent the occurrence of"*.[41]

[152] We are guided by Policy 7 to minimise adverse effects on urban amenity and avoid adverse effects on existing sensitive areas and by Policy 8 to seek to avoid adverse effects in rural environments on outstanding natural landscapes and existing sensitive activities. Both policies, however, are expressed to be dealing with planning and development of the transmission system. This indicates that these policies relate to future and new works rather than to upgrades of the existing system. We conclude that these policies are not determinative in the present case.

Cultural effects

Consultation

[153] The appeal by TEPS and the section 274 notices of the other parties did not raise a lack or insufficiency of consultation by Transpower. We heard evidence that there was

[41] *Environmental Defence Society Inc v New Zealand King Salmon Ltd,* fn 20 at [96].

at least verbal support for the project in early meetings about the proposal with Ngāti Hē in 2013, and written agreement for an interim anchor block structure at Te Ariki Park in 2014, and that in late 2018 Transpower found that the support it had relied on for the proposal from Ngāti Hē had been withdrawn and that the hapū no longer supported the project. This was on the basis, as set out in the s 274 notices to this appeal, that the positioning of the new poles, particularly Pole 33C was unacceptable for cultural reasons. We address cultural issues in some detail below in relation to the consultation carried out, the cultural impact reports (**CIA**s) prepared by iwi and hapū, and the cultural evidence provided by witnesses.

[154] Transpower's witnesses Mr McNeill and Ms Selina Corboy (its stakeholder engagement manager) provided comprehensive descriptions of the consultation meetings held. The key issue raised in submissions made by Ngāti Hē hapū members on the consent application and subsequently brought to this appeal by the Trustees of Maungatapu Marae was the location and height of Pole 33C on land directly adjacent to Maungatapu Marae. The requirement for this pole was part of the proposal discussed in early engagement by Transpower with Ngāti Hē and Ngāi Tukairangi at separate hui on 15 May 2013. The proposal was *roundly supported* according to Mr McNeill. A follow-up hui on 14 March 2014 led to the provision by Ngāti Hē Hapū Trust, on 14 March 2014, of affected party approval for an anchor block structure to support pole 117 at Te Ariki Park. The support and approval received at the two hui *gave Transpower the confidence to initiate a formal investigation into delivering the project*. The only major change to the proposal since that date was the proposal to remove Tower 118 from Rangataua Bay, necessitating the addition of a new tall pole on the Matapihi side of the bay.

[155] Prior to October 2014 when Transpower made the decision to commence its investigations of the A-Line route for which consent applications were subsequently made, Transpower had identified hapū of Ngāi Te Rangi as being those whose interests were affected by the proposal. To confirm the correct hapū with whom consultation should be carried out, on 26 November 2016 they consulted with the Tauranga Moana Whenua Collective, an autonomous body made up of representatives of 17 hapū and iwi in the Tauranga City Council area. The Collective agreed that Transpower should continue to engage with Ngāti Hē and Ngāi Tukairangi and should also extend an invitation to Ngāti Tapu, and that these are the three hapū with mana whenua in the proposal area. Consultation was carried out with those hapū and several trusts which represented certain parts of the interests of those hapū:

- Ngāti Hē hapū, including Ngāti Hē Hapū Trust and Maungatapu Marae Trust. Ngāti Hē hapū produced a cultural impact report (**CIA**) in response to the project.

- Ngāi Tukairangi hapū, including Ngāi Tukairangi Trust (for the orchard) and the Matapihi-Ohuki Trust. Ngāi Tukairangi hapū and Matapihi-Ohuki Trust each produced a CIA in response to the project development.

[156] Ngāti Tapu hapū considered that the CIA reports from the above entities would cover the interests of Ngāti Tapu.

[157] In all during the investigation phase of the proposal, some 42 hui were held, each with one or a combination of the above entities or their representatives, with meetings also held with Tauranga Moana Tangata Whenua Collective and Maungatapu residents. We were told no concern was raised about the cultural impact of Pole 33C in the hui, other than in the recommendations of the Ngāti Hē CIA (described below) for the placement of a waharoa in the foreground of the marae entrance *to draw the eye away from the pole*.

Iwi Management Plan

[158] The Tauranga Moana Iwi Management Plan 2016 – 2026 is a joint planning document prepared by and on behalf of Ngāti Ranginui, Ngāi Te Rangi and Ngāti Pūkenga to articulate the collective vision and aspirations of those iwi in relation to Tauranga Moana. Among its policies, Policy 15 provides:

> Manage the effects of coastal structures (including moorings and jetties) and infrastructure in Tauranga Moana.

[159] There are five action points under the policy, with lead agencies identified in relation to each one:

Action		Lead Agency
15.1	Oppose further placement of power pylons on the bed of Te Awanui (Tauranga Harbour).	Tauranga Moana Iwi
15.2	Pylons are to be removed from Te Ariki Park and Opoopoti (Maungatapu) and rerouted along the main Maungatapu road and bridge.	Transpower
15.3	Any widening of the Maungatapu Bridge should not occur on the marae	NZTA

	side of the bridge.	
15.4	In relation to the placement, alteration or extension of structures, within Tauranga Moana: a) Ensure that: i) tangata whenua values are recognised and provided for. ii) early and meaningful engagement occurs with Tauranga Moana Iwi and hapū. iii) Emergency Response Protocols (e.g. for oil or diesel spills), as outlined in Section 12.8 of this Plan, are adhered to. b) Avoid adverse effects on sites and areas of cultural significance, wetlands or mahinga kai areas. c) Promote the efficient use of existing structures, facilities and network corridors. d) Ensure measures are in place to: i) avoid or mitigate coastal erosion. ii) prevent sediment and contaminants, especially chemicals, entering coastal water.	Tauranga Moana Iwi
15.5	Continue working with local authorities, Transpower NZ and NZ Transport Agency with regards to: a) The removal and rerouting of pylons from Te Ariki Park and Opoopoti (Maungatapu). b) Proposals to widen the Maungatapu Bridge. c) Engagement protocols and cultural mitigation for infrastructural projects/ programmes	Tauranga Moana Iwi

[160] Action point 15.2 expressly identifies the removal of the existing pylons and states that the line is to be rerouted *along the main Maungatapu Road and bridge*. There was some difference of opinion as to what *along* was intended to mean in this context and whether locating the line above the bridge was within or otherwise in accordance with that intention.

The Cultural Impact Assessments

[161] The three CIAs were generally supportive of the project. They made several recommendations, some of which have been reflected in consent conditions, and some of which are private agreements outside the jurisdiction of this process.

[162] The CIA for Ngāti Hē (dated September 2017) describes the history of the

Maungatapu Block and the broader surrounding area within the hapū's rohe. It describes the representation within the hapū of the many families that settled on those lands and their connection to Mataatua Waka, Te Arawa Waka and Takitimu Waka. It describes Te Pa o Te Ariki, the site of Te Ariki Park, and the Maungatapu Marae at Opopoti, directly below the pa.

[163] The CIA identified as effects and issues the following:

- removal of existing lines and support structures from significant areas of private residential and Maori land, resulting in substantial amenity benefits;
- security of supply risk due to coastal erosion issues affecting Pole A117 and need for a long-term replacement or upgrade of Pole 0116;
- having regard to kaitiakitanga and taking into account hapū rangatiratanga over the marae;
- recognising Ngāti Hē's ancestral relationship to lands and wāhi tapu and active protection of taonga and heritage (in relation to the potential for disturbance of archaeology);
- removing the harbour tower structure from the Tahuna o Rangataua for safety reasons, to recognize Ngāti Hē's ancestral relationships to water;
- having regard to Ngāti Hē's kaitiakitanga in the coastal marine area by monitoring pāpaka (mud crab) and ensuring they have adequate habitat to relocate to at the time of removing Tower 118, and if they do not, to translocate them.

[164] It made the following recommendations:[42]

> The following recommendations have been identified with regards to the offsetting of the effects outlined above.
>
> (1) Earthwork Monitoring Protocol implemented see appendix 6
>
> (2) Slope Stability Options Report commissioned by independent suitably qualified engineer
>
> (3) Marine monitoring and translocation protocol for papaka present during tower structure removal with an amended monitoring protocol developed prior to commencement of work there

[42] Ngāti Hē CIA September 2017 AEE Appendix I.

(4) waharoa Marae Entrance designed and established to counter the visual impact of the new mono pole structure

(5) Funding assistance for Maungatapu Marae and Rangataua Sports and Cultural Club from Transpower's community fund. A process of assistance to apply for the grants on the contestable funds provisions

(6) Plan developed for site reinstatement for removal of poles 116 and 117 on the Maungatapu Reservation. To ascertain if the poles shall remain in whole or part and any immediate planting and information panels are required.

(7) Memorandum of Understanding developed

(8) No other buildings or access infrastructure to be erected at Te Ngāio end power pole structure. The existing passive and tranquil nature of the foreshore of Te Ngāio opposite the Marae must be maintained

[165] Ngāi Tukairangi's CIA[43] sets out the history of the hapū in the area and the many conflicts between the Crown and Maori landowners over many years, which included the installation of transmission lines across the Matapihi land blocks. This stymied agricultural, horticultural and housing development there. In the CIA summary they indicated they were inclined to support the initiative, as this brings a sense of justice and relief to hapū representatives who have been trying for several years to remove the lines. Their support is tempered with the understanding that there are mitigation opportunities which they list as follows:

(1) It is recommended that Ngāi Tukairangi members are included in as many remedial considerations as possible.

(2) It is recommended that trees are planted in empty spaces that transmission poles used to occupy or to provide an opportunity for Ngāi Tukairangi to engage in a planting exercise, where appropriate, and with support by landowners.

(3) It is recommended that karakia is practiced. Karakia is a cultural practice that acknowledges ancestors and as this project is a small segment of what Maori ancestors tried to prevent. This will only make it more relevant to have a karakia before or after the process has completed.

(4) It is recommended that cultural monitoring should be incorporated in the Project to ensure cultural values are not overlooked and that environmental havoc that might occur, through land being unearthed with human remains, or more recently, significant archaeological value can be preserved.

(5) It is recommended that legally, for damages to Maori land, compensation must be paid. If negotiations around compensation are still viable these should still continue.

(6) It is recommended that Transpower support the removal of the

[43] CIA undated but occurred after 17 August 2017, that being the date of a meeting referred to in the CIA.

transmission lines from all of the blocks if possible.

(7) It is recommended that young people are included in this Project. Therefore, it is a good idea to keep the younger generation amongst significant projects to ensure they learn and have the potential to do it better with their peers in the future. Providing internship opportunities will benefit future growth of our hapū members.

(8) It is recommended that Transpower and local hapū representatives collaborate on projects that could benefit both sides their whanau members.

[166] Matapihi Ohuki Trust's CIA (undated) also detailed the history of the Ngāi Tukairangi in the Matapihi area and the erection of power lines over the period 1956-1959 and into the 1960s. Its cultural assessment summarised the effects and recommendations together, the recommendations including the following:

- placement of the new transmission structure (Pole 33D) on Te Ngāio block (northern side of Rangataua Bay) to include ecological enhancement and cultural recognition; removing pest plants and replanting with natives, provision of a pou and korero to outline the cultural significance of the area;

- upgrading of the access track / road to Te Ngāio block in relation to earthworks methods, use of fill on site, tree removal and replacement, fencing and provision of a shelter; provision of a power supply and cultural monitoring of earthworks;

- replacement of pole 128 to location 128A in a significant ecological area requiring landscaping;

- associated track upgrades and earthworks will ameliorate any damage, replace gates where appropriate;

- In heritage area carry out cultural monitoring, have accidental discovery protocols in lace and have correct protocols in relation to any taonga found during the works.

[167] Each CIA included reference to the works to be carried out, including the provision of the new monopoles to be installed on either side of the Rangataua Bay and the removal of Tower 118 from Rangataua Bay.[44]

[44] Ngāti Hē CIA page 15 in Appendix I to AEE; Ngāi Tukairangi CIA Figure 3 in Appendix I to AEE; Matapihi Ohuki Trust CIA Figure 1 and Figure 2 in Appendix I to AEE.

[168] Mr McNeill said that it was not until after a hui with Ngāti Hē on 17 January 2018 that was attended as well by other Maungatapu residents (some of whom are TEPS members) that Maungatapu Marae Trust's strong objection to the location of Pole 33C became apparent to Transpower. Had that been known earlier, he thought it unlikely the resource consent application would have been lodged by Transpower. Transpower had been trying to get affected party approval from Maungatapu Marae Trust for some time to enable the installation of anchor blocks for pole 117 but had been unable to achieve that as the company's proposals did not initially include relocation of Poles 116 and 117. Once a definite commitment from Transpower to remove poles 116 and 117 was given to Ngāti Hē, affected party approval was forthcoming. That occurred in May 2013.

[169] Evidence was presented by representatives of Te Runanga O Ngāi Te Rangi Iwi Trust, Trustees of Maungatapu Marae and Pa Te Ariki Trust. Some evidence was pre-circulated, with other speakers providing verbal submissions as agreed at the hearing. We summarise the information provided below.

Maungatapu Marae Trust

[170] **Mr T Taikato,** Chair of Maungatapu Marae Trust, supported the removal of the A-Line from Te Ariki Park but not its replacement as an aerial line, as the cable would be directly in front of the marae. He said the proposal would *move the lines from our backs and put them back in front of our faces*. He was concerned with the noise from the power lines adding to the noise of the traffic, saying they could be heard to crackle in rainy or foggy weather; this was adding to the noise they already experience from road traffic. He was particularly concerned with the poles on the Maungatapu side (Poles 33B and 33C). Later in questioning he said he did not accept that taking the poles off Te Ariki Park and off the land at Matapihi and putting them in the road corridor was an improvement, especially with no compensation, and said the only improvement he could see is to take the lines somewhere else after the long period of time they've been there. His view was that Ngāti Hē can wait another year or two to get the right result. He agreed that after initially agreeing to the proposal presented in 2013 the Maungatapu Marae Trustees changed their opinion about the project and went against it, mostly as a result of discussion with other hapū, such as Ngāti Kuku.

[171] While saying that the power lines are of no interest to Maungatapu Marae, which he considered was simply serving as a stepping-stone to the Mount and Papamoa, Mr Taikato agreed that he would want his mokopuna to enjoy the benefits that come with

electricity and recognized the wider consideration all around Tauranga Moana and the Bay of Plenty for electricity supply. Asked about Transpower's ability and intention to replace poles 116 and 117 on Te Ariki Park should consent be refused, Mr Taikato's response was that this would require going back to the start with negotiations all over again.

[172] **Dr Kihi Ngatai** provided evidence on behalf of Ngāti Hē, focusing on the significance of Te Pa o Te Ariki. He is a member of Te Pa o Te Ariki Trust. This was the pa site of Ngāti Hē, which was their stronghold and the place where they resided. Below was the mara kai, where the whare tupuna is at Maungatapu Marae, and this is where food was grown. Ever since he became a marae trustee for Pa Te Ariki in approximately 1971, the trust has been trying to have the powerlines removed. His main purpose is to get the line shifted away from the significant site of Pa Te Ariki. It is wāhi tapu and should be left as it was when it became wāhi tapu, without powerlines. The proposed Poles 33C and 33D were not his concern.

[173] **Ms H Walker and Ms P Gardiner** appeared together. Ms Walker is a Trustee of Maungatapu Marae and of the kohanga reo which is situated adjacent to the whare tupuna at the marae. She presented written evidence opposing the proposed realignment with tall poles in front of Maungatapu Marae and on the Matapihi foreshore. She considered that the visual aesthetics and constant humming of the realignment does not represent a holistic or empowered experience for the marae or for the Opopoti kohanga reo. Historic photographs of the natural environment, Te Ariki Park, and the Anglican church and houses up at Te Ariki and down at Maungatapu were presented by Ms Walker. She opposed the project through the lens of history and the children who now attend the kohanga reo, who will be the leaders and oracles of the marae for future generations. Ms Gardiner supported Ms Walker's presentation, saying she lived in the Kaumatua Flats on Te Ariki. They have been trying to have the lines removed but she would not want that if it meant an impact on the marae, the kohanga reo or other people. She confirmed in cross-examination that she had made a submission in favour of the proposal to have the lines removed from Te Ariki Park but said she was worried about the effect on the kohanga reo.

[174] Ms Walker responded to questions about why she had adopted Mr Stanley's positions in terms of putting a cable across the bridge. She was very concerned about the kohanga reo and the marae and the effects on the mokopuna who will be beside the lines every day. She supported Ms McDonald's evidence about the changes that have

occurred over time at Maungatapu, in terms of road and bridge construction and the power lines affecting their marae. Ms Walker and Ms Gardiner were asked if they supported the removal of Tower 118 from the middle of Te Awanui, responding that that depended *on the removal of the lines from here* and agreeing that they looked at the whole package together.

[175] **Ms M McDonald** is Ngāti Hē, raised in Maungatapu. She is a councillor on the Bay of Plenty Regional Council for the Mauao constituency. She presented evidence on the changes that have occurred to the cultural landscape of Ngāti Hē over her lifetime. This has included its development from a close-knit rural environment to *just another example of bustling suburbia*. She catalogued the history of development that affected their land, including large-scale earthworks for road and bridge construction removing their orchards and changing the landscape. She illustrated the history of change using slides. She said that urban sprawl resulted in the hapū being marginalized on their own land. They saw and continue to see blatant and arrogant behaviour towards the hapū as tangata whenua of their rohe. Ngāti Hē have lost much in providing for the needs of the city and have made a more than generous contribution to its growth – but, she said, at a huge cost. The Transpower project adds insult to injury. Ngāti Hē do not want two new monstrous poles in close proximity to their sacred marae, which is their tūrangawaewae, their sacred place. In this, she included Te Awanui and Te Tahuna as having similar significance to Ngāti Hē. Ms McDonald wanted to see alternative options considered and discussed to find a better solution to the current proposal.

[176] Ms McDonald clarified the status of the Maungatapu Marae Trust and Ngāti Hē Hapū Trust. They are separate entities but exercise their own mana in decision making but while they can operate autonomously they still answer to Ngāti Hē hapū.

[177] She commented that she pushed back strongly against the consultative engagement with tangata whenua that has been described by Transpower, that she was surprised that there was no written record of the meetings, no agreed minutes as she would have expected, and so no confirmation as to what was said, as opposed to what Transpower reported they heard. She did not consider the evidence of Mr McNeill and Ms Corboy to be misleading but opined that their perception as to what had occurred differed from actuality. She had attended one meeting at Rangataua clubrooms but was not sure what the date of that was. She accepted that Transpower had put a lot of effort into trying to find a workable solution to the problem of the A-Line across Te Ariki. She asked why Pole 33C could not go to the other side of SH 29A, and while accepting that

that could have cultural effects on other parties on that side of the road, said that those houses on the eastern side of the road would change hands over time whereas Ngāti Hē would always be present at their marae.

[178] In relation to her reference to a *paltry* contribution of money offered to Ngāti Hē for the waharoa Ms McDonald indicated she had not seen the full CIA that referred to that and was concerned that the CIA could have been taken out of context.

[179] **Ms N H Ririnui,** chairperson of Te Kohanga Reo o Opopoti, which is adjacent to Maungatapu Marae spoke on behalf of the kohanga reo, and in particular on the effect that Pole 33C may have on the tamariki that live on the marae or attend the kohanga reo. The potential effect on tamariki is seen as negative, for the reason that there is no research that proves or disproves whether there are impacts of such powerlines on health. The pole is seen as a massive dark structure that will sit outside the marae but will be across the marae swinging in the wind. She also spoke of the many other marae activities she is involved in, and that the marae is the most sought-after marae to stay at in Tauranga. People come from all over the world to stay there. Her parents and the older generations have tried to fight the changes in the surrounding environment but have never won. The power lines have become an issue, but the experts have not done any investigation, so it is not clear how consultation could take place without it, as it would be impossible to agree or disagree on that basis. She agreed that removal of the poles and wires from Te Ariki Park would be a benefit, but not the if the poles were relocated to beside the kohanga reo.

[180] **Ms Y L T Kingi,** secretary of the Maungatapu Marae committee for the past 25 years, described the marae committee as the working committee of the marae. The committee has managed thousands of visitors from different walks of life, nationalities, political organisations, Government departments and sports bodies (among others). She described the battle the hapū has had to maintain the mana on its land over many years, and that they now feel they are having to continue that battle as they are being treated in the way Maori were when new people first began to settle there. The tupuna want the hapū to continue fighting for the land and for the marae. When she was growing up, before the beach sand was taken in 40 truckloads for road building, the beach went way out into the harbour and they could play there. They want the marae to be a happy place not only for Maori but for the many visitors who come there.

[181] **Mr M Ririnui** is the chair of the Ngāti Hē Hapū Trust, the Ngāti Hē representative

on the Ngāi Te Rangi Settlement Trust and Te Runanga O Ngāi Te Rangi Iwi Trust. He provided information about previous plans for a second feeder power line to Mt Maunganui that involved a route around the eastern end of Rangataua Bay then up to Karikari Point and onto the rail corridor to Mt Maunganui. This was Ngā Pōtiki rohe, and Ngā Pōtiki vehemently opposed the route. Transpower was sympathetic to Ngā Pōtiki's concerns and looked at an alternative route, which was via SH 29A and the bridge. Concern was expressed by Ngāti Hē and there was an indication then that attachment to the bridge or an under-harbour crossing was possible. He commented that there were no minutes kept of those meetings and Ngāti Hē were disappointed later to hear that Transpower considered these options were *never part of the discussion*. This led to a *high level of suspicion* of Transpower and its representatives. Ngāti Hē has a decision-making process and no decisions about an issue like this would be made without all the various trusts and satellite groups coming together to confirm decisions as Ngāti Hē hapū. This did not happen in this case and the hapū supports the trustees and their endeavours to get a good outcome.

[182] He clarified that Ngāti Hē Hapū Trust supported the removal of the existing line from Te Ariki Park but have not given any support to the proposed structures including Pole 33C. They are considered a blight on the Ngāti Hē estate and marae. The trust had considered the option of the sea bed crossing as it was discussed in the past.

Te Runanga o Ngāti Rangi Iwi Trust

[183] **Mr P Stanley** is the Chief Executive of Te Runanga O Ngāi Te Rangi Iwi Trust. Ngāti Hē and Ngāi Tukairangi are the Ngāi Te Rangi hapū that are affected by Transpower's proposal. The predominant reason Ngāi Te Rangi conditionally supported the Transpower application was that if the consent is not granted the A-Line may be left where it is, and its realignment will never occur. He referred to Transpower's approach as *take it or leave it*. Asked if he accepted that Transpower had worked for many years to develop a proposal that was endorsed by Ngāi Tukairangi, Ngāti Hē, Ngāi Te Rangi and Maungatapu Marae Trustees, he said he had not seen the evidence, but that just because people attend meetings does not necessarily mean they agree to everything said to them.

[184] The A-Line has been in place for many decades, he said, and considering the permanence of the structures the best outcome should be sought for the sake of the marae and community. It would be much better if the lines were put across the bridge by

being attached to it or underneath the harbour. He accepted Transpower's position that the options of attaching a power cable to the bridge or burying it beneath the sea bed were not feasible was based on the interests of Transpower and money. He accepted somewhat reluctantly Transpower's view that technical reasons prevent the bridge or tunnel options being adopted. In addition, while he accepted that either a bridge or tunnel option would require substantial transition structures to take the power line from the top of the poles to a bridge or tunnel, he appeared reluctant to agree that their visibility would be well beyond that of the existing poles.

[185] In his evidence he considered that the project was *unmitigated* and when questioned about the CIAs commissioned by Transpower, the recommendations made and the fact that Transpower had accepted the recommendations he said he had not read the CIAs. He said he was not a cultural expert so could not answer questions as to the effect on Ngāi Te Rangi if the existing line is removed from Te Ariki on the Maori land, deferring such questions to kaumatua.

[186] The Court asked Mr Stanley how best to look after the interests of communities that have been here a long time and new communities moving into what all agree is an attractive area; and how such matters could be handled better in future. Mr Stanley's view was that meaningful engagement is the key. He had some aversion to what he described as Government departments explaining projects, then smiling, walking away and recording what was said in a different way, with inferences that are in the Government department's favour. Open, honest and frank conversations are required, as is sufficient time for iwi to consider matters internally and reach consensus on matters.

[187] In relation to the approximately 10-fold increase in costs for an on-bridge or beneath-sea-bed options compared to the aerial transmission line, his view that an independent estimate of costs was needed, as well as a *sharper pencil*. In his experience cost differentials can be elevated to suit a particular outcome or purpose and that as proposal design advances a more fine-grained approach may lead to a reduced cost differential.

Ngāi Tukairangi Trust

[188] **Mr P T R Cross** is a trustee and chairperson of Ngāi Tukairangi Trust. He provided

evidence on the needs of the landowners of the Ngāi Tukairangi No. 2 Orchard Trust,[45] who are the traditional owners of land on the Matapihi peninsula. The Trust has managed the orchard land since 1992, and the operations have expanded to approximately 50 canopy hectares. As well as its interests in horticulture the Trust has future aspirations for other business opportunities on its land and for papakāinga housing development. There are 1500 owners of the land at the present time.

[189] The Trust supported the proposal as it relates to the proposal to shift the power lines off the Trust's land. This followed some 50 years of struggle against the annexation of their land and installation of the lines and proposal to remove them came as a *welcome surprise*. Removal of the lines opens up the land to more flexibility in farming practices and will allow the orchard to be reconfigured so that the land can be better utilized. In addition, the papakāinga housing initiative may benefit from the freeing up of more land. The Trust was disappointed to learn that if the appeal is successful the powerlines across the Matapihi lands will not be removed and this would be a setback for the Trust, as the current limitations on its future development options would remain.

[190] The Trust opposed the appeal as set out in its section 274 notice:

> The Trust conditionally opposes the appeal on the basis that, were the consents to be declined, the removal of transmission infrastructure from its Matapihi lands could not proceed in the absence of a successful new applications. This outcome may therefore unreasonably delay, or put at risk altogether, the project and its positive cultural and other effects.

[191] However, if the concerns of those opposing the grant of consents can be addressed through changes to the proposal that are within scope of the present application, he considered the Trust may be able to support those changes. While the Trust understands the concerns of Ngāti Hē hapū, the sports club, kohanga reo and Maungatapu Marae it does not support the appeal because of the consequential impact it would have on its landowners if successful. Mr Cross noted he did not support the appellants' endeavours to use the current process to gain support for a cycleway that would apparently pass through the Trust's land, saying the Trust was very disappointed about the lack of consultation about this option.

[192] In relation to the access Transpower would require to the Matapihi lands the Trust had yet to see any access and construction agreements in relation to the removal of poles

[45] Mr Cross shortened 'Ngāi Tukairangi No. 2 Orchard Trust' to 'Ngāi Tukairangi Trust', considering them as one and the same.

and the new infrastructure to be constructed. Mr Cross agreed with the councils' planner that such agreements or side agreement that were included in CIA recommendations to mitigate the cultural effects of the project should be included as conditions of consent should these be upheld.

[193] In relation to the consultation meetings held between Transpower and Ngāi Tukairangi Trust Mr Cross was asked if he considered the evidence of Mr McNeill was an accurate portrayal of the discussions in those meetings. He confirmed that there had been about 10 or 11 meetings that he could attest to and that *the statements on those have been correct*. He had attended a single Transpower meeting with Ngāti Hē and agreed that the evidence put forward regarding that was correct.

Evaluation of cultural effects

[194] The arguments in relation to cultural effects were broadly drawn in the submissions and in evidence and our assessment of them is not assisted by the objectives and policies of the RCEP. A purpose of plans, within the overall ambit of assisting a council to carry out any of its functions in order to achieve the purpose of the RMA, is to say what needs to be protected and from what, and the RCEP is not specific about cultural values and attributes of Rangataua Bay / Te Awanui. We understand there are proposals to rectify this. Plans ought not simply identify that there are cultural issues but what the nature of those issues are and the values and attributes they affect.[46]

[195] The key cultural issues in this case are the damage to the mana of Maungatapu Marae and concern about the environment, particularly at the kohanga reo there.

[196] Consultation began in 2013. Formal consultation was held with the iwi of Tauranga Moana to ensure that the appropriate iwi and hapū were being consulted. The evidence from Transpower was that 42 hui were held during the investigation phase with a range of hapū and iwi representatives including their various trusts. Verbal approval was given by Ngāti Hē and Ngāi Tukairangi to the project according to Transpower's evidence. This included the location and height of Pole 33C. This meeting and agreement were apparently not recorded formally.

[197] Three CIAs were prepared which made recommendations as to the mitigation

[46] *Environmental Defence Society Inc v New Zealand King Salmon*, fn 20 at [101] – [105]; *Man o'War Station Ltd v Auckland Council* [2017] NZCA 24 at [59] - [65]

required if the project was to proceed. These did not include opposition to Pole 33C. The recommendations were accepted by Transpower and reflected in conditions, apart from matters pertaining to side agreements for mitigation of cultural effects. They later agreed these could be in conditions.

[198] Submissions received on the notified consent application in 2018 indicated opposition to the proposal, specifically around Pole 33C, and the effects on the ONFL. Neither had been raised previously. The effects of Pole 33C were expressed in terms of cultural values, effects of noise and electro-magnetic radiation, visual effects of the pole and line, effects on kohanga reo children, effects on the mana of the marae, ongoing cumulative effects on the hapū of developments being imposed on their land over the last 50 or so years, which they claimed was illegal (that matter is not being pursued through this hearing), and the need for greater attention to alternatives they preferred which were bridge and sea-bed options, including a new bridge (and cycleway).

[199] TEPS submitted against the project, in terms of effects on residents whose outlook/views would be affected by the realigned A-Line. Those matters were raised as part of the current appeal but no evidence from these residents was brought to this hearing. TEPS' legal submissions focused on the effects on Ngāti Hē hapū in relation to historical wrongs, cultural impacts and a take-it or-leave-it approach in consultation; on the ONFL; and on legal matters.

[200] Evidence on behalf of Ngāti Hē was that when they agreed to the proposal in 2013/14 they had not had an opportunity to consider alternatives properly; once these were raised at the time of notification (by Ngāti Kuku hapū) they decided that while they supported that part of the project that would see the line and poles removed from Te Ariki Park, they were opposed to the aerial transmission line and wanted a bridge or sea bed harbour crossing.

[201] Te Ariki Hapū Trust supported the removal of the poles and lines and was not invested in the arguments about Pole 33C. The benefits of removing the poles and lines were in terms of mana and the status of the land as wāhi tapu, as well as safety and improvement in the ability to use the land and its sports grounds. These benefits were manifestly very important to Ngāti Hē given the 50-year struggle with the authorities they detailed and that the proposal to remove the poles was apparently valued highly when this was detailed in 2013.

[202] Ngāti Hē were not satisfied that the increased cost was a good reason not to adopt one of their preferred options over the aerial option. They did not make adverse comments about the bridge or under-sea options requiring tall structures at the point of transition to take the lines down to the bridge or harbour floor and back up at the other side of the harbour. They did not raise any adverse cultural effects of a new or restructured bridge or under-sea option in Te Awanui / Rangataua Bay. They asked why Pole 33C could not be on the other side of SH 29A.

[203] Several Ngāti Hē witnesses expressed distrust of Transpower's process, saying it was a take-it-or-leave-it approach, and that consultation was poorly recorded and not faithfully represented by Transpower. Mr Cross, called by Ngāi Tukairangi, did not share this concern about his own hapū's meetings with Transpower.

[204] Ngāti Hē did not appear to accept that Transpower would walk away from the project altogether if the consents were denied, apparently thinking a new proposal and consent applications would be elicited that could be dealt with quickly, say within 2-3 years according to Mr Cross. They did not appear to accept that works to stabilize or move Poles 116 and 117 could be carried out at Te Ariki Park either under existing use rights or pursuant to a new designation.

[205] The evidence for Ngāti Hē did not make any mention of the adverse effects on Ngāti Tukairangi of not allowing the realignment. It did not address in detail the cultural matters affected by the existing line crossing the harbour, or the effects on the harbour and sea bed of the removal of Tower 118. The effects on cultural values relating to the moana generally did not appear to be front of mind. The evidence did not mention any cultural effects of the alternatives that Ngāti Hē preferred in terms of effects on the seabed of, for example, excavations for new piles or a trench to take the line below the harbour floor. The evidence called by Ngāi Te Rangi supported the Ngāti Hē point of view.

[206] Ngāi Tukairangi supported the project as it would provide significant benefits to its people on the Matapihi side of the harbour. The effect of the appeal being upheld would be to stymie the removal of the A-Line from their land and the current limits on the future development of their business interests there would remain.

[207] We find that Transpower carried out a full and detailed consultation. The company was sure enough that Ngāti Hē was in favour of the proposal when the hapū approved the anchor blocks for Pole 117, which they had refrained from doing until the realignment

project was confirmed in 2014, that it was prepared to invest in the detailed investigation phase of the project.

[208] While we acknowledge that one's perception of the tenor of a discussion may depend on one's point of view, we had no evidence that Transpower misrepresented the facts of its consultation programme or the responses it had elicited either within the consultation process or in evidence. Ngāti Hē subsequently changed its mind and opposed the proposal, which it is entitled to do. We had no evidence that indicated this was a pre-meditated strategy of any sort, rather it was a response to advice of other hapū and from members of TEPS following notification of the project.

[209] The cultural evidence described the frustration and anger held by the hapū over many years as a result of the original construction of the A-Line across Te Ariki Pa and the earthworks for roading and bridge construction that affected their marae. We acknowledge the information and opinions provided about the history of development activities in the Ngāti Hē rohe and accept that these cultural effects have adversely affected the hapū for the last half century.

[210] Witnesses raised the cumulative nature of the effects of the realignment (specifically Pole 33C) given the past effects of the A-Line's presence on Te Pa o Te Ariki along with other works adjacent to Ngāti Hē land. In addressing this matter, we consider whether the effects of the current proposal add to or reduce the total adverse cultural effect.

[211] For Ngāti Hē, on the one hand they have been pressing for the removal of the A-Line and poles from the hapū's land at Te Ariki Park for decades. The current proposal will accomplish that and consequentially result in the removal of Tower 118 from Rangataua Bay. Although we have heard little about Tower 118 in terms of its effects on cultural values and attributes within the bay, its removal can only be positive in that regard as it is in other environmental respects as well.

[212] On the other hand, the realigned A-Line will still cross Rangataua Bay. While there will be no new structures within the CMA, the line will be within and above the existing corridor of SH 29A and the bridge. The Appellant put considerable weight on the argument that the effects of the new alignment on ONFL 3 and on cultural values will be significantly adverse. The presence of the new Pole 33C in the highway corridor brings adverse effects from their point of view and, as we have remarked above, this can only

be deeply regretted. From the engineering evidence there is no opportunity to remove Pole 33C or to alter its location so that it is not directly adjacent to the marae without adversely affecting other persons who are not currently before the Court.

[213] The alternatives promoted vigorously by Ngāti Hē, being a strengthened or new bridge or an under-sea-bed crossing would reduce the effects on the marae and the kohanga reo but may also, from our understanding of the evidence, have greater effects within the CMA and on the ONFL than those that will result from the aerial transmission line. If a new bridge were to be built in future its footprint may increase and that could have adverse effects that neither the Court nor Ngāi Hē can foresee. Although we heard nothing about this from the hapū, these alternatives may affect the values and attributes of the harbour to a greater extent than the aerial line, the effects of which have been described in the Appellant's submissions and in the evidence of Mr Brown.

[214] Alongside those considerations, Ngāi Tukairangi have worked toward the removal of the A-Line and poles from their Matapihi land for a similar period to Ngāti Hē at Te Ariki Park. Ngāi Tukairangi consider the effects of the proposal to be highly beneficial. Both hapū have felt the cultural pain for some three generations. Now Ngāti Hē says the effects of new Pole 33C are so great they outweigh the benefits to Te Ariki Park of the A-Line removal. But there is no certainty that a proposal they can support will come forward, and if it does, whether it will achieve the outcomes they desire.

[215] We heard evidence from others that NZTA has no plans in the foreseeable future to upgrade the bridge to a standard that could support the lines. We have no evidence to the contrary and unfortunately received no evidence from NZTA itself. We find nothing to demonstrate that there might be an integrated, or even a co-ordinated, approach to managing the effects of the infrastructure in this location.

[216] In assessing cumulative effects, it is important to recognise that the result of what occurs over time or in combinations may not always be an increase. In some cases, changes to activities or to the environment may result in the cumulative effect being less than before. In assessing this, it is also important to identify an appropriate starting point. It is at least doubtful that the only proper starting point is some sort of zero base which might involve attempting to identify the state of the environment prior to any development or other human activity. A more restricted view might distinguish between effects which have been regulated by the RMA or its predecessor legislation and those that have not, being either generally permitted activities or those which have some form of existing use

rights. There may be other appropriate points in between from which to assess the state of the environment. Any such assessment involves a consideration of the changes in effects over time.

[217] In this case, while the proposed line will create certain adverse effects, it will also result in the existing line and its adverse effects being removed. The assessment of cumulative effects should, given our finding at [112] above that this is a single proposal, deduct the latter effects from the former. The question then is whether Ngāti Hē will be better or worse off in terms of that assessment. They are clear in their view that they are worse off, not least because they see the proposed change as continuing to subject them to adverse effects.

[218] The effects on other people and on the environment generally must also be considered. The appellant TEPS stated in its notice of appeal that its members would be adversely affected, but no evidence from any of its members was called. It does not appear that any other group would be worse off by the proposal, and equally clear that some, particularly Ngāi Tukairangi and the residents along Maungatapu Road, will be better off. Conversely, refusing consent to the proposal, and Transpower maintaining the existing A-Line, would leave those people worse off than if consents were granted.

[219] Transpower has in effect said that it will walk away from the realignment project altogether if the appeal is granted. It would then strengthen or replace its infrastructure on Te Ariki Park which is work that does not require any further consent. We have no ability to require that they do otherwise. We do not regard this as any kind of threat or otherwise as an inappropriate position: it simply recognises that if an activity requires resource consent but cannot obtain it, then not undertaking that activity is an obvious option for the unsuccessful applicant.

[220] Ultimately, we have had to assess the realistic alternatives and the likely effects of those through the cultural lens as best we can, taking into consideration the interests of both hapū. From the above analysis we do not find the proposed realignment to have cumulative adverse cultural effects on Ngāti Hē. Existing adverse effects at Te Ariki Park will be removed and new adverse effects will occur near the marae and the kohanga reo. We are conscious that the benefits to Ngāi Tukairangi will be considerable. We conclude that the benefits of the realignment to Ngāti Hē, coupled with the benefits to Ngāi Tukairangi, are greater than the adverse effects of Pole 33C's placement near the marae and the kohanga reo. For Ngāti Hē, those benefits will be felt as soon as the structures

and line are removed from Te Ariki Park, and there is some urgency to that. Their removal will immediately facilitate change. The opportunity to change the configuration of the A-Line in relation to a bridge or sea-bed location may arise in future but Ngāti Hē cannot rely on that.

Effects on the natural and physical environment

Uncontested matters

[221] Transpower called expert evidence on matters raised in submissions or in the Commissioners' decision which was not contested before us, although the noise of the transmission lines and effects of electromagnetic radiation were raised in the statements of the cultural witnesses. The uncontested evidence was on:

(a) the potential noise effects of the transmission lines;

(b) the potential electromagnetic radiation effects of the transmission lines,

(c) the effects on marine ecology of removing Tower 118;

(d) the effects on terrestrial ecology of replacing Tower 128 and carrying out other works in the area of that tower.

[222] We set out below the conclusions from the evidence of the witnesses who dealt with those subjects below, essentially to round out the information about the proposal that was provided to us. We received no evidence that undermines the reasoning and conclusions of these witnesses. We accept their findings.

(i) Noise and vibration effects (Mr Malcolm Hunt):

> Overall the new and altered transmission assets will result in cumulative noise effects that I consider are not likely to adversely impact in any significant way on the ambient sound levels received within any residentially zoned site or within any other noise sensitive site. Overall, operational noise will result in a de minimis effect on the environment.
>
> For construction activities associated with the project, provided noise and vibration effects are managed according to a CNVMP [Construction Noise and Vibration Management Plan] construction effects of the proposed works are expected to be less than minor.

(ii) *Electromagnetic effects (Mr Matthew Walker*):

> Electric and magnetic field (EMF) effects are not unique to transmission lines but are associated with all electrical devices including those in the home and workplaces.

The ICNIRP [International Commission on Non-ionising Radiation Protection] considered the full body of scientific evidence, including epidemiological research, when revising its EMF guidelines in 2010. The guidelines are recommended by the NZ Ministry of Health who continue to monitor the health research concerning EMF and mandated for use by the NPSET. The ICNIRP continue to provide an appropriate basis for health protection in which the public can have confidence.

The Proposal has been predicted to operate within the limits in the 1998 ICNIRP guidelines, even under worst case operating conditions. The 1998 ICNIRP guidelines are included in the NESETA, under which consent is required for this Proposal. The 1998 ICNIRP guidelines are more stringent that the 2010 guidelines with regard to magnetic field exposure but have the same level for electric field exposure. Compliance with these guidelines provides appropriate protection against the known health effects of exposure to EMF.

Accordingly, the EMF associated with the Proposal will be safe and no health effects are anticipated from the Proposal.

(iii) Effects on marine ecology (Mr Caleb Sjardin)

My evidence assesses the ecological effects of the proposed removal of Tower 118 from Rangataua Bay and the associated wiring site on the coastal marine ecological values of the sites.

My assessment found that the removal of Tower 118 and the associated wiring site will have an overall low level of effect on benthic marine ecology and coastal birds. This is based on proposed works methodology that minimises disturbance to marine habitats, the expected rapid recovery rate of benthic fauna communities from short term disturbance, and no loss of foraging opportunities for any 'Threatened' or 'At Risk' coastal bird species present in Rangataua Bay.

Due to the relatively small affected area by the Project footprint compared with the wider Rangataua Bay and Tauranga Harbour, and because the disturbed area of intertidal sandflat will be re-colonised, I consider that no specific mitigation other than minimising the size of the works area and the time taken to remove the Tower, and implementing the standard construction management techniques outlined above is required. These measures will address any potential effects on marine ecology.

(iv) Effects on terrestrial ecology (Dr Hannah Mueller)

The vegetation both within and surrounding the part of SEA 25 impacted by the proposed works is weed dominated, which limits overall botanical and habitat values. Ecological values in and around SEA 25 mainly relate to the potential presence of 'At Risk' wetland birds and a small area of palustrine wetland. Transpower's proposed consent conditions, supported by BOPRC and DOC, include mitigation actions to avoid effects on breeding 'At Risk' wetland birds, development and use of low impact willow removal/control methods and 0.23 ha of riparian buffer planting as mitigation or wetland disturbance associated with tree removal. Provided these actions are implemented, the long-term ecological effect of the works on SEA 25 will be no more than minor

[223] As well as the effects described by the experts above, some of which require mitigation and management plans, the proposal will generate other effects including the following:

(a) construction effects, both terrestrial and marine;

(b) traffic effects;

(c) effects of wetland clearance on native birds;

(d) soil contamination effects;

(e) earthworks and drilling effects;

(f) erosion, sediment and dust effects.

We rely on the findings of the Commissioners as to those effects being acceptable, or where necessary, requiring the imposition of conditions. We return to the conditions as they relate to the proposal's effects later in this decision.

Landscape and visual effects

[224] We now address the effects on the one subject on which contested expert evidence was called by Transpower, the Councils and the Appellant, being the landscape and visual effects of the proposal.

Effects on ONFL 3

[225] The key issue addressed by the landscape evidence was the effect of the proposal on ONFL 3 – *Te Awanui Tauranga Harbour, Waimapu Estuary & Welcome Bay*. Mr Coombs' and Ms Ryder's evidence was that the proposal would not have any adverse effects on the values and attributes of ONFL 3. Ms Ryder said that the introduction of the new lines above the ONFL is in keeping with the modified patterns that existing infrastructure creates in the harbour. She considered the naturalness of the harbour will not be further detracted from and that the inclusion of power lines will not affect the intactness of the harbour and will not introduce additional effects. She said:

> Consequently, it is my view that the inclusion of overhead powerlines across ONFL 3 will avoid adverse effects on the factors, values and associations, both when considering the proposal as a whole and when considering the alignment on its own, avoiding the balancing of positive and adverse effects.

[226] Mr Brown's view was that the new structures would affect perceptions of ONFL 3 regardless of whether the new poles were inside or outside the ONFL. The effect on travellers on SH 29A would be to negatively colour their impressions of the approach to the harbour and its crossing to an appreciable degree. While he acknowledged the concept of focusing new development in areas of existing coastal development, he said

that under Policy 15a of the NZCPS adverse effects on outstanding features and landscapes need to be avoided, and that Ms Ryders' evidence failed to demonstrate that for ONFL 3. In response Ms Ryder agreed that *adjacent effects* from activities or structures located next to but not within an ONFL can occur, but in this case noted *it is only effects on the attributes and values of ONFL 3 that are relevant to the assessment of the proposal under the NH provisions of the RCEP (which gives effects to the NZCPS 2010)*. She disagreed with Mr Brown's interpretation of the perceptions that will be had by travellers crossing the harbour on the SH 29A bridge, saying:

> In my view this audience is focused on an already modified experience of transportation infrastructure. While crossing the bridge provides some opportunities for views and the visual appreciation of the wider harbour environment, these views are seen within the context of their origin and outlook. Recognising that whilst modified, this area forms part of the appreciation of ONFL 3, but its sensitivity is lower due to its context and focus of users on the road corridor with a 100 km/hr speed limit.

[227] Ms Ryder considered how the proposal relates to tangata whenua values and associations with Tauranga Moana, basing her opinion on the Tauranga Moana Iwi Management Plan 2016-2026. She identified specific matters raised in the plan in relation to environmental issues and noted a clear statement in Policy 15 to *[m]anage the effects of coastal structures … and infrastructure in Tauranga Moana* with the first action point being that iwi *[o]ppose further placement of power pylons on the bed of Te Awanui (Tauranga Harbour),* which signals a focus toward avoiding disturbance to the seafloor and water body. While she had prepared her evidence before reading the cultural evidence presented at the hearing, she said she had since reviewed the evidence of several witnesses and their narrative and evidence in relation to their cultural values with the harbour. She did not find anything that provided additional understanding that there were adverse effects on the Maori values related to the Tauranga harbour.

[228] Mr Brown considered that in relation to the Maori values of the ONFL the effects of the realignment would be *significant*. In questioning about the meaning of *significant*, Mr Brown explained he considers an effect to be significant if there is a marked change in effect(s) from moderate to high. He said he understood Mr Coombs' view is it would be significant only when it changed from high to very high. His view was not supported by the evidence of the cultural witnesses. The cultural effects of removing the A-Line from Te Ariki Park were described and were considered positive, but there was no description of the cultural effects, relative or otherwise, of the removal of Tower 118 or the placing of a powerline in the air space above the bridge. We agree with Ms Ryder, who said:

> I am unable to reach the same conclusion as Mr Brown that the proposal would result in "significant" effects on the identified Maori Values of ONFL 3 based only on the general statement that the Harbour is a significant area of traditional history and identity for Tauranga Moana Iwi, or on the statements from witnesses relating to the visual dominance of the structures perceived from the Marae.

[229] Ms Ryder said there will be new visual effects on the marae but when considered against the improved visual outlook toward the harbour with the removal of Tower 118 the visual effects on the marae would be moderately adverse. Further, she considered all dimensions of the landscape need to be considered when evaluating the overall effects on an ONFL as it is the combination of values and attributes that lead to its identification. Her view was that determining there is an adverse impact on one set of values such as Maori values would not necessarily lead her to conclude there was an adverse effect on the ONFL. She had considered the context of the wider ONFL area as well as the specific effects in the local Te Awanui area.

Pole 33C

[230] In relation to Transpower's consideration of alternatives for the A-Line realignment, Mr Coombs responded to a question about the visual effects on Maungatapu Marae of a cable termination structure (**CTS**) that would be needed if the powerline was routed across the bridge or under the seabed as a cable. He was asked to describe and compare the Pole 33C structure and the CTS structure. He described Pole 33C as a monopole that could be modified to a degree to make it more streamlined or *elegant*, whereas the CTS has a more fluted base with an industrial appearance sometimes referred to as being like a *Tardis*.[47] In terms of the potential to mitigate the visual effects of the CTS on the marae he said, *there's nothing to hide their ugliness*. His understanding was that there are technical engineering limits to the location of Pole 33C, such that it might be able to be shifted approximately 5 m to the south from its currently proposed position but would then have to be around 1 m taller. This would make a relatively small difference to the view of it from the marae but it could affect four private residences on Te Hono and Miriana Streets such that it could change their view to Mauao.

[231] Ms Ryder agreed that the CTS as described by Mr Joyce would be some 23 m to 26 m tall and would be a bulkier and more dominant structure than Pole 33C in that

[47] A TARDIS is a spacecraft in the *Dr Who* television series, but its exterior resembles a UK police telephone box rather than a CTS. We think Mr Coombs meant to refer to a Dalek, being the alien race of cyborgs in that TV series who are the enemies of Dr Who and whose form is closer to the lower portion of a CTS than to a police box.

location. The cable termination structure would be wider and more visually obtrusive to a viewer at the marae, though it would not be as tall. In relation to the visual impact of Pole 33D, on the southern side of the harbour and within the view from the Maungatapu Marae, she said the pole with the T-cross on the top would have no visual effect.

Mitigation

[232] Mr Coombs described the mitigation that has been incorporated into the design of the proposal, including changes to the configuration of the conductors to improve their visual appearance, balancing the height of the pole with the existing vegetation to ensure the latter can be retained, and a commitment to fund a waharoa at the entrance to the marae to mitigate the visual effects of Pole 33C on the marae entrance. He considered the effects of the proposal could be further mitigated by planting around the marae entrance to complement the waharoa, and some careful landscape design to minimize the intrusion of causeway and bridge views into the outlook from the marae. He considered these would have to be offered by Transpower on a voluntary or *Augier* basis[48] as his opinion was that the effects were moderate. This was an option that he said would be subject to the approval of Ngāti Hē, should they agree to such mitigation.

[233] Ms Ryder agreed the waharoa would not provide a screen but could provide an offset to mitigate some of the visual effects. Vegetation planting could be used to integrate the lower part of the pole, and additional planting nearby could assist in mitigating the impacts of the roading infrastructure more generally.

Visual amenity effects

[234] While the experts generally agreed that effects of the proposal on visual amenity would be low, they differed in their evaluation of the effects on the amenity values of the Maungatapu Road residents. Mr Brown considered that while the removal of the A-Line from the western side of Maungatapu peninsula would have benefits, the adverse effects on the residents on the eastern side of the peninsula would be negative and a potentially wider community of residents would be affected, because new towers would be built, and some would be taller than previously. They could *break new ground* in terms of what residents might see, with effects ranging from being *subtle to quite blatant*. However, he accepted that *such effects would ultimately be of a relatively low order overall*.

[48] *Augier v Secretary of State for the Environment* (1978) 38 P & CR 219 (QBD) as explained in *Frasers Papamoa Ltd v Tauranga City Council* [2010] 2 NZLR 202; [2010] NZRMA 29 at [22] – [34].

[235] Mr Coombs was of the opinion that the effects would be significantly positive for those residents on the western side of the peninsula with the removal of the transmission lines on or across their properties, where they are quite close to the ground and/or roofs. He noted that for the residents on the eastern side of the peninsula, those with views to the harbour had a range of other urban, suburban and rural infrastructure including other transmission lines within their line of sight, with none currently having unimpeded views of Mauao / Mt Maunganui. He noted that views of Tauranga harbour are not protected by either the RPS or RCEP. He assessed the adverse effects on the views from the marae as moderate. He considered that the removal of the existing A-Line and its replacement with new structures are a single proposal and that separating them would be artificial. He said he was not offsetting the visual effects of the relocated A-Line with the removed A-Line but considering these matters as a whole.

[236] Ms Ryder generally concurred with Mr Coombs' opinions. She addressed the effects on the Matapihi Important Amenity Landscape that extends around the margins of the Matapihi peninsula and within which is the site of Pole 33D. She considered that the pole will be viewed against the backdrop of a pine forest that extends up the escarpment to the plateau of Matapihi peninsula. The existing CTS, which is 16.8 m tall, is within this area. The new Pole 33D (46.8 m tall) will be a similar distance from the shoreline and will be seen from viewpoints around the harbour. Ms Ryder considered the potential for adverse effects of the new structure to be low, given its location on a similar alignment to the existing structure, and visually following patterns of built infrastructure across the headland. While the pole will be prominent it was her view that the broader characteristics and values of the Important Amenity Landscape will remain intact and unaffected.

Natural character

[237] In relation to natural character effects Mr Coombs considered the overall natural character effects on the harbour will be positive as the harbour floor will be returned to its original state. From a landscape perspective Tower 118 sits in the middle of the ONFL which Mr Coombs considered the most sensitive part of the application site in RMA terms. He considered the outstanding landscape values of Tauranga Moana will not be adversely affected, as once removed the tower will be replaced with structures that are connected and grounded in the adjacent landforms of the Maungatapu and Matapihi peninsula.

[238] Mr Brown considered that greater weight should be given to the experience of travellers approaching the bridge and harbour on SH 29A and watching the view unfold as they go, and that the proposed changes to the powerline corridor might erode some of the perceived naturalness of the channel and its margins. He assessed the effects of the changes as being marginally adverse and largely incremental.

Cumulative effects

[239] In relation to cumulative effects Mr Coombs saw the proposal as essentially replacing like-for-like, but in a different location with some taller structures in the same or similar locations to existing poles in the SH 29A corridor. The corridor already supports the B-Line and has been designed with generous setbacks and planting such that it can easily accommodate the relocated A-Line. This does not result in cumulative effects but in a shift of the A-Line to a location where, in his view, it is more appropriately accommodated.

[240] Ms Ryder's opinion was that there were no cumulative effects associated with the proposal, and this was based not on a net benefit approach but on a consideration of what is existing and what is proposed in the context of the existing environment. She considered whether there will be additional structures and if they will affect landscape capacity. In questioning she reiterated and confirmed that she had also considered the potential for effects of just the new infrastructure on the attributes and values of the ONFL, taking no account of the infrastructure proposed to be removed.

[241] Mr Brown agreed with Mr Coombs and Ms Ryder that when considering cumulative effects, the appropriate approach is to look at an existing baseline of actual activities and then look at new effects that are to be introduced and the implications for that.

[242] We have set out our approach to cumulative effects and our finding at [112] that the works are to be assessed as a single proposal. In our view, these opinions are consistent with our approach.

Summary

[243] The views of the witnesses tabulated below are similar in many respects, and only in relation to effects on ONFL 3 do they differ to any great degree. Table 3 below summarises our understanding of their evidence.

Table 3 *Summary of assessments on landscape and visual amenity*

Component	Coombs	Ryder	Brown
Visual amenity	Low adverse effects	Low adverse effects	Low adverse effects
Visual amenity at Te Ariki park and residents on western side of Maungatapu peninsula	Positive effects	Positive effects	Low level of effect
Visual amenity from Maungatapu Marae and private views of certain residents of eastern side of peninsula	Moderate adverse effects	Moderate adverse effects	Low level of effect
Landscape character	Low level of effects	Not adversely affected	Marginally adverse
Important amenity landscape		Unaffected by Pole 33D	
Natural character of harbour	Positive effect	Positive effects	Low level of effect
ONFL 3	Effects avoided	Effects avoided	Adverse and moderate for landscape effects; high or significant for Maori Values.
Cumulative effect	No	No	Yes

[244] We were unable to confirm Mr Brown's opinions in relation to what he considered the significant effects on Maori values in ONFL 3 on the basis of the evidence provided by the cultural witnesses.

[245] Counsel for the Appellant submitted in reply submissions that:

> While the evidence for the marae trustees was not articulated in terms of cultural values of the ONFL it provides significant support for the importance of Rangataua Bay to the Marae and Ngāti Hē Hapū (and other mana whenua). It provides real world support for and elaboration on the "cultural values" as expressed in the RCEP for ONFL 3 but with greater specificity as to location and content. The evidence was genuine and heartfelt, and should not need a "cultural expert" to have to put it into "planning speak".

[246] We have no doubt about the importance of Rangataua Bay to the marae and to Ngāti Hē hapū. But we must draw the argument back to the assessment of the effects on ONFL 3 and its values, attributes and associations. The activities that will take place there are the removal of Tower 118 and the addition of a powerline above the SH 29A bridge. We heard no evidence about the effect of the removal of Tower 118 on Maori Values in the ONFL 3, except, as Ms Ryder pointed out, that there is a strong preference of iwi for no power pylons to be present in Te Awanui – and we cannot accept that taking this structure out of the centre of Rangataua Bay, where it stands alone, will not have benefits

to Te Awanui in this area. Similarly, the removal of the powerlines to the SH 29A corridor consolidates the infrastructure into one place rather than having the line strung across the otherwise open Rangataua Bay, again surely a cultural benefit in relation to its current intrusion into the open airspace above the bay.

[247] The cultural witnesses expounded more on the effects on the marae of Pole 33C (and to a lesser extent pole 33D) with concern, as noted above, for the mana of the marae and the health of the tamariki who attend the kohanga reo directly adjacent to it than they did on the effects of the activities that will take place within ONFL 3, the latter being the subject of this evaluation.

[248] During the removal of Tower 118 the works will be visible albeit short-lived and the realignment of the powerline to a new position above and parallel with the bridge will similarly be visible and could be considered by some viewers to be fleetingly adverse. The works may be visible from the marae and vicinity. We consider those effects both short term and long term to be *de minimis*. On the other hand, there will benefits to the ONFL from the removal of Tower 118 and the powerline.

Conditions

[249] The conditions of consent require a range of management plans to be prepared and otherwise specify how the works are to be carried out. Ms Golsby, the expert planner called for the Councils, gave evidence that she had reviewed the conditions imposed by the hearing commissioners, generally supported them as being appropriate, had made relatively minor refinements to them and had included conditions of the City Council land use consent providing for vibration monitoring and specifically requiring the removal of Tower 118. The conditions include provision for pre-start notification and the opportunity for tangata whenua to provide cultural monitors and undertake karakia if they wish to do so.

[250] Notably, the land use consent includes a new condition requiring Transpower to offer a contribution of $25,000 to Ngāti Hē towards a waharoa or carved entrance to the Maungatapu Marae. That offer may be accepted or not: Transpower accepts, as do we, that Ngāti Hē cannot be required to accept it.

[251] The content and wording of the conditions were not challenged by the Appellant or any of the section 274 parties.

[252] A final set of conditions was attached to the submissions in reply of counsel for Transpower. Transpower supported the amended conditions produced by Ms Golsby as part of her evidence, with some further relatively minor amendments to address matters raised during the hearing.

[253] A change was proposed to the land use consent administered by the City Council to amend condition 16 by removing the opening words *Subject to landowner access being provided* and the concluding words *prior to the completion of the activities authorised by this consent*. It appears to be accepted that no landowner approval is required in respect of Tower 118 and that removal of the poles in the orchards can be done within 6 months of the realignment being commissioned.

[254] In relation to marine ecology, to address concerns of Ngāti Hē witnesses as to the effects of removing Tower 118 on pāpaka/paddle crabs, Transpower agreed to an additional condition to monitor the effects of demolition and removal work on the crabs and, if necessary, translocate them away from the area of that work and this has been added to condition 6.4 of coastal permit RM17-0678-CC.02 in relation to the disturbance of the CMA.

[255] Ms Golsby also stated that she understood that there were or may be side agreements between parties other than the Councils. She presented her opinion that if a measure or action is required to mitigate or off-set an adverse effect of an activity for which resource consent is required, it should be included in the consent conditions so that the requirements are clear and can be enforced by the consent authority, if required. She had not seen any side agreements and therefore had not provided any draft conditions in respect of them.

[256] The Court has commented regularly over the years about the issues that may arise where a matter relevant to the resolution of an appeal under the RMA is the subject of a side agreement, and in particular whether such an agreement is enforceable in this Court as an element of a resource consent.[49] The consensus of the *obiter dicta* (as it does not appear that any application for enforcement of such an agreement has ever been determined) is that this Court would have no power to enforce such an agreement unless

[49] See e.g. *Tai Tapu and Motukarara Branches of Federated Farmers v Canterbury Regional Council* 15 NZTPA 7; *Wolfe v Waimakariri District Council* 15 NZTPA 9; *Bonifant Investments Ltd v Canterbury Regional Council* Decision No C78/96; and *Naturally Best New Zealand Ltd v Queenstown Lakes District Council* Decision No C102/2004.

it formed part of a resource consent, as this Court has no general civil jurisdiction.[50] On that basis we are inclined to agree with Ms Golsby's view.

[257] On the other hand, where parties represented by experienced counsel do not raise the point, the Court is not asked to approve of such an arrangement and there appears to be no risk that the arrangement could prejudice the interests of third parties, then the Court should be hesitant to intervene. There are many possible circumstances where an arrangement between people is better contained in a private agreement than in a Court order.

Commissioners' Decision

[258] Section 290A of the RMA requires us to have regard to the Councils' Decision. The experienced independent hearing commissioners for the Councils delivered a comprehensive decision. We have had respectful regard to it and have referred to parts of it as appropriate throughout this decision. After our full hearing of the application covering most of the same matters as were raised at first instance, we generally concur with the commissioners' findings and with their overall approach to the consenting issues.

Conclusion

[259] We now draw together the issues arising in this appeal and evaluate how they should be considered in reaching our decision under ss 104 and 104B RMA. We do this in the context of the purpose of the RMA. While a range of competing concerns have been raised, and no possible outcome would be wholly without adverse effects, we must reach a decision as to which outcome better promotes the sustainable management of natural and physical resources, as defined in s 5 RMA.[51]

[260] Our consideration is limited to the scope of the RMA and the cases that have been presented to us by the parties. A range of alternatives have been raised in some of those cases. While the Councils both have the function of implementing methods to achieve integrated management of resources and the effects of the use of resources and the Court, on appeal, has the same power, duty and discretion as the Councils, there are boundaries to the extent of those. In particular, neither the Councils nor the Court have the power to substantially alter Transpower's proposal or to require any third party, such

[50] *Lysaght v Whakatāne District Council* Decision W 030/2007.

[51] *Judges Bay Residents Association v Auckland Regional Council and Auckland City Council* Decision A 72/98 at [441] – [457].

as the New Zealand Transport Agency, to participate in the proposal. If we consider that the proposal, essentially as applied for, is inappropriate, then we may refuse consent.

[261] We start our evaluation by finding that the removal of the existing A-Line and its associated structures from its current alignment will result in positive effects for all the people, land and water over which it presently passes. We find that the benefits of the proposal to Ngāti Hē will be significantly positive at Te Ariki Pā, as the removal of Poles 116 and 117 and the power lines will, on the evidence of Dr Ngatai, restore the mana of the land and will also eliminate safety issues, remove the requirement for Transpower to access that land for maintenance, eliminate the need for ongoing erosion control to protect the base of Pole 117 and enable greater use of the facilities at the site along with future developments there, unencumbered by the infrastructure. There will be significant benefits to Ngāi Tukairangi if the proposal proceeds, as this will be, in effect, a new dawn for the hapū on their land. Once the existing infrastructure has been removed they will be able to realise the future they have planned for but been unable to achieve and make best use of their assets. The line will also be largely removed from Te Ngāio Pā. The removal of Tower 118 from Te Awanui will return that part of the bed of the harbour to its natural state and the relocation of the transmission line will consolidate the services into the SH 29A corridor on and over the Maungatapu Bridge. The achievement of these benefits gives effect to a number of relevant objectives and policies at national, regional and district level relating to the relationship of Māori with their ancestral lands, water, sites, wāhi tapu and other taonga, the natural heritage of Te Awanui and the amenity values of the Maungatapu and Matapihi peninsulas.

[262] We have found that the proposal, involving the elements of removal of the existing line and replacement of it on a new alignment, is a single one, to be assessed on a comprehensive basis. On that basis, we are not considering the first element on its own as an option. In any event, such removal without replacement would not be consistent with other relevant objectives and policies relating to infrastructure as it would reduce the electricity transmission network in this area and therefore reduce the security of electricity supply to Mt Maunganui and Papamoa.

[263] Another consequence of treating the proposal as a single one is that the effects of its elements should be considered together. They must be identified and analysed separately as they involve different things, but having done that, the judgment of whether the effects are appropriate or not in the context of deciding whether to grant consent or not must be done in terms of all the effects. Separating the positive effects from the

adverse effects would be as unsound as separating the two elements of the proposal.

[264] The proposed relocation of the A-Line to an alignment which follows SH 29A and is located above the Maungatapu Bridge does not result in wholly positive effects. While it enables the removal of the existing line and ensures security of electricity supply, its location is not ideal. In particular, placing the line above the Maungatapu Bridge, with associated tall poles, creates an increased degree of new and adverse visual effects on that part of Te Awanui, particularly when seen from Maungatapu Marae and Te Kohanga Reo o Opopoti and for some of the residents on the eastern side of SH 29A. As most of Te Awanui, including this part, is identified as an ONFL, that increase in adverse effects means that we must have regard to Policy 15 of the NZCPS which relevantly states that, to protect an ONFL from inappropriate use and development, adverse effects on it are to be avoided.

[265] The alternatives of laying the re-located A-Line on or under the seabed or in ducts attached to the Bridge appear from the evidence to be impracticable. While technically feasible, the uncontroverted evidence is that the works involved would entail costs of an order of magnitude greater than the estimated costs of Transpower's proposal. We have already found that we do not have the power to require Transpower to amend its proposal in a manner that would result in a cost increase of that kind. To do that would go beyond the scope of the power to impose conditions on the proposal as it would effectively result in a new proposal.

[266] The character or nature of the effects at the heart of this case are essentially those that relate to restrictions on using land, visual impact and the imposition of the works on sites of significance to Māori. The positive effects of removing the existing line and the adverse effects of relocating the line are not equivalent and we find that the positive effects are significantly greater than the adverse effects in intensity and scale. The main reason for this is that the adverse effects of the existing line are significantly greater than those of the proposed relocation of the line in all three aspects of restrictions on land use, visual impact and effects on sites of significance to Māori, even while taking account of the impact of the relocated line on views from the marae and proximity to the kohanga reo.

[267] The relevant policy framework applicable to the assessment of these effects of the proposal is extensive, as set out earlier in this decision, and is not limited to Policy 15 of the NZCPS. In having regard to the statutory planning documents under s 104(1)(b)

RMA. we must undertake a fair appraisal of the objectives and policies read as a whole.[52] We do not accept the argument that Policy 15 would require consent to be declined or the proposal to be amended on the basis that it has adverse effects on the ONFL. As a policy, it does not have that kind of regulatory effect. In its terms, it requires avoidance of adverse effects of activities on the ONFL to protect the natural landscape from inappropriate use and development. The policy does not entail that any use or development in an ONFL would be inappropriate. The identification of what is inappropriate requires a consideration of what values and attributes of the environment are sought to be protected as an ONFL and what the effects of the use or development may be on the things which are to be protected.

[268] It is important to note that this is not a proposal to undertake and use a new intensive commercial development in an ONFL. The existing environment of the ONFL includes the existing bridge and national grid infrastructure.

[269] The NPSET, the RCEP and the District Plan also contain relevant objectives and policies to which we must have regard under s 104(1)(b). The regional and district plans generally treat both the protection of ONFLs and the provision of network infrastructure as desirable, but do not go further to particularise how those broad objectives or policies are to be pursued or how potential conflict between them is to be resolved. Policy 6 of the NPSET guides us to using a substantial upgrade of transmission infrastructure as an opportunity to reduce existing adverse effects of transmission, and the proposal is consistent with that. There is no guidance in either the NPSET or the NZCPS as to how potential conflict between those national policies is to be resolved.

[270] As noted above, where a decision-maker is faced with a range of competing concerns, and no possible outcome would be wholly without adverse effects, we must reach a decision as to which outcome better promotes the sustainable management of natural and physical resources, as defined in s 5 RMA. In the absence of any practicable alternative, the obvious counterfactual to the proposal is the status quo. In our judgment, the removal of the existing line and its relocation within the Road zone applying to SH 29A and above the Maungatapu Bridge is more appropriate overall and therefore better than leaving the line where it is.

[52] *Dye v Auckland Regional Council* [2002] 1 NZLR 337 at [25] (CA); *R J Davidson Family Trust v Marlborough District Council* [2018] NZCA 316 at [73].

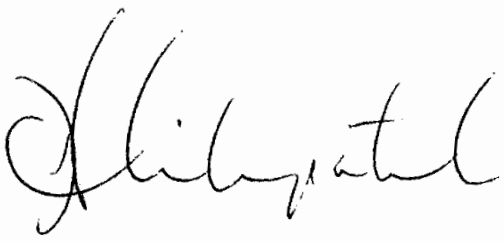
Determination

[271] For the foregoing reasons, the appeal is refused and the grant of consents is confirmed, subject to conditions.

[272] The conditions are those presented by Ms Golsby with the agreement of Mr Horne during the hearing but subject to the amendments proposed by Transpower in its submissions in reply. For the avoidance of doubt, a copy of those conditions is **attached** to this decision.

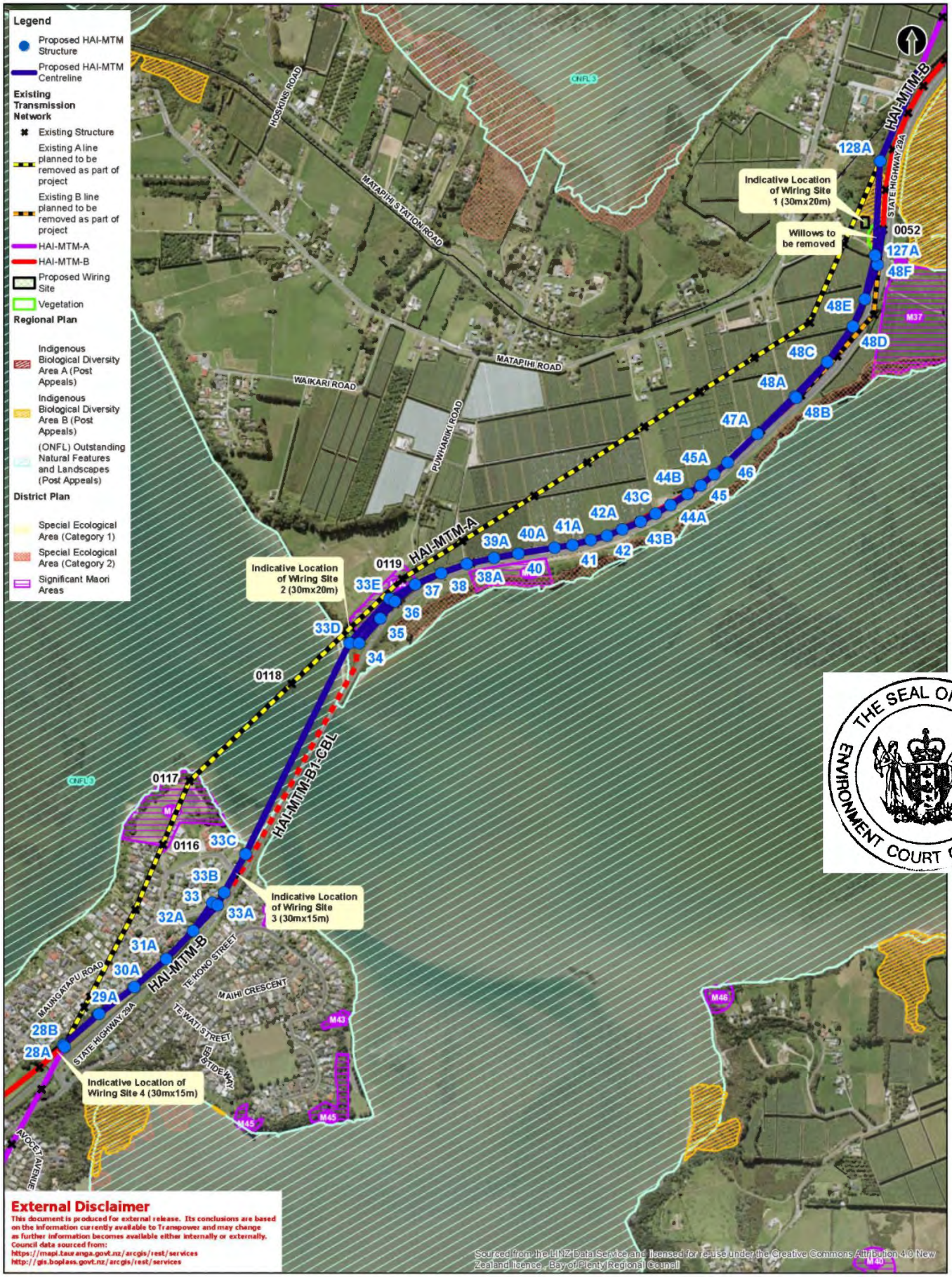
[273] Costs are reserved. We consider that the issues raised at the hearing were important and deserving of consideration on appeal before us. For that reason we do not encourage any application for costs. If any party wishes to apply for costs, then that application must be filed and served within 15 working days of the date of issue of this decision. Any response by the person against whom costs are sought may be filed and served within 10 working days of the date of receipt of the application for costs.

For the Court:



D A Kirkpatrick
Environment Judge

Appendix A



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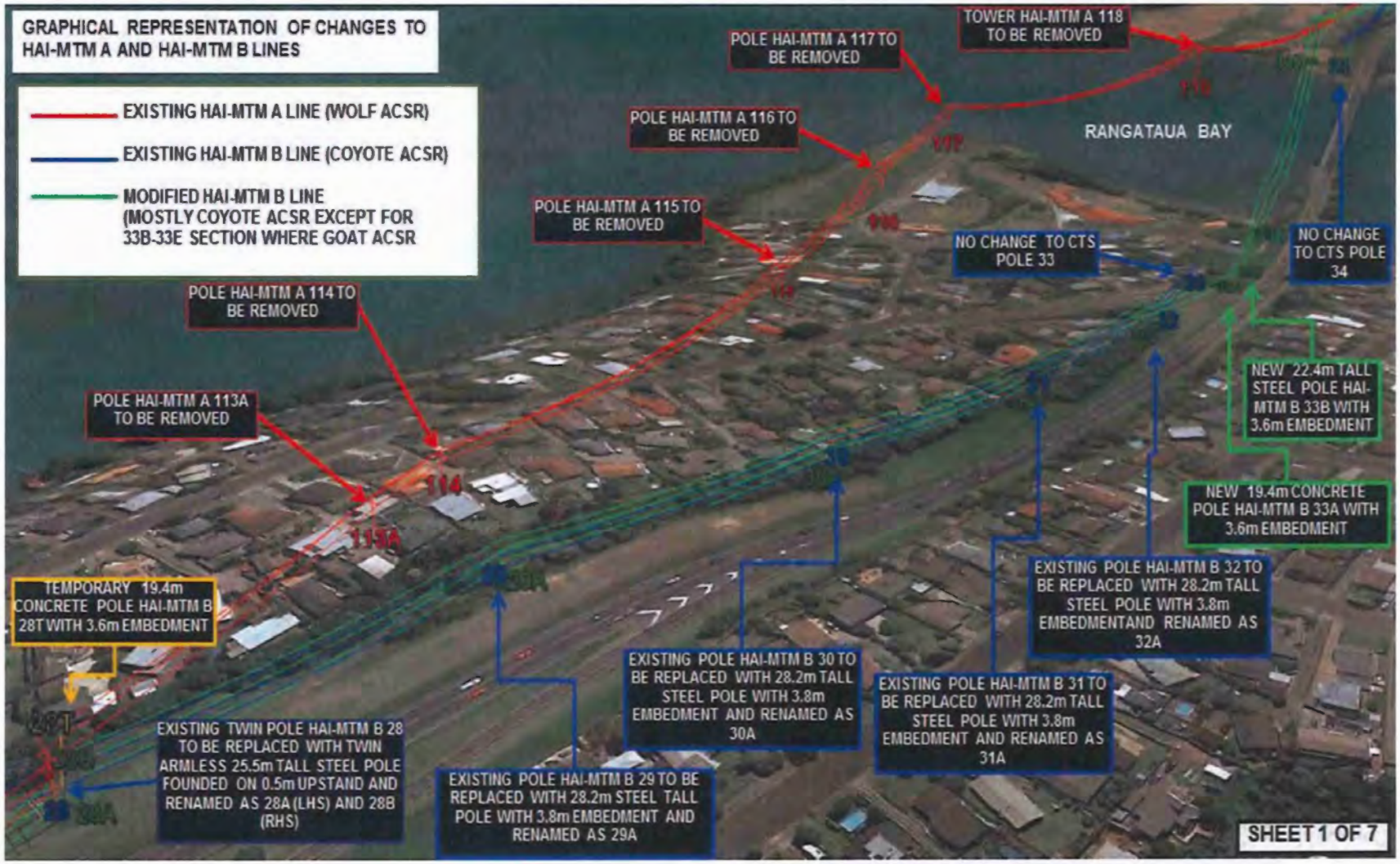
TRANSPOWER
Prepared by: Geospatial & Drawings

Projection: NZTM 2000 Scale: 1:9,500 Plan Size: A3P

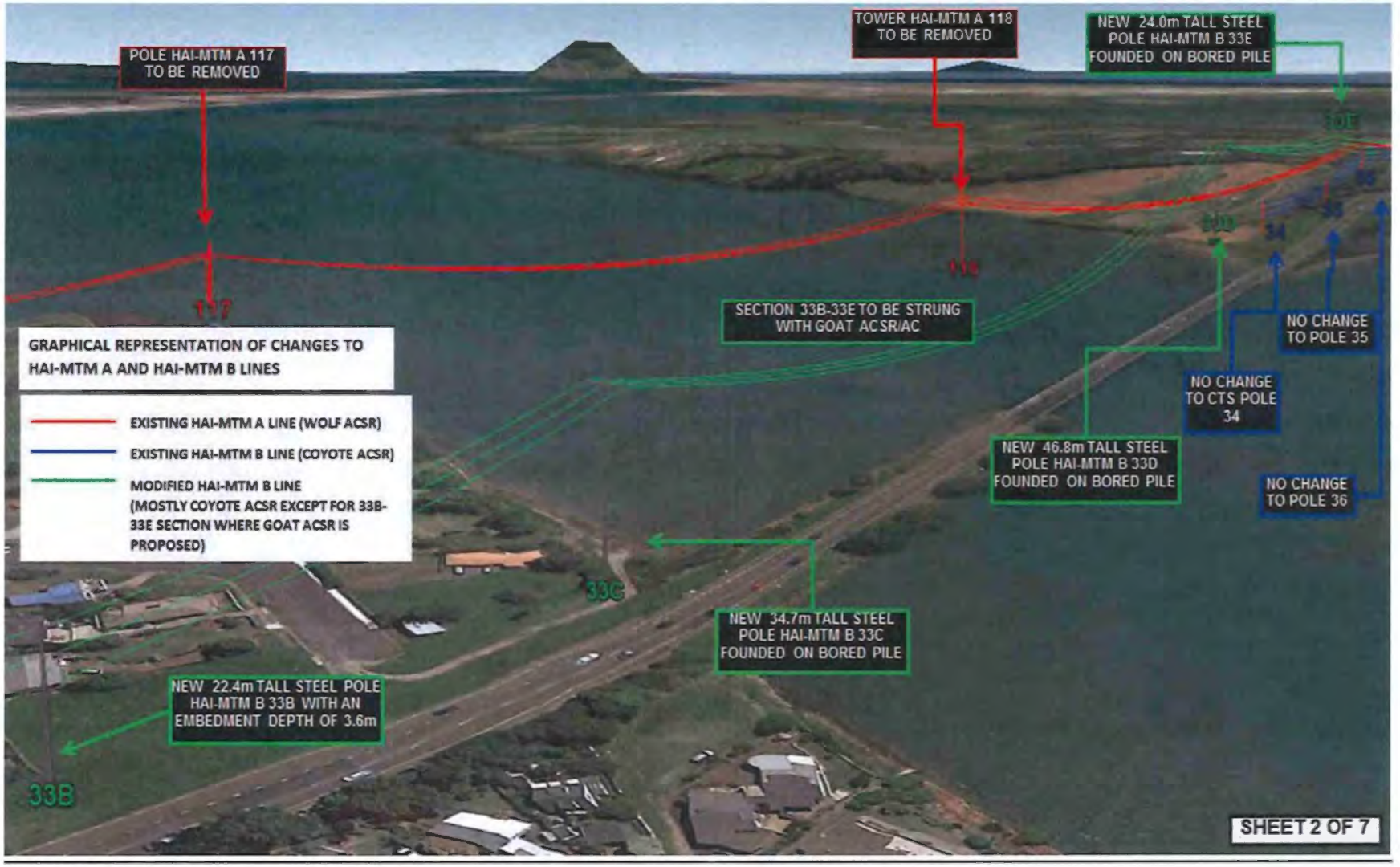
HAI-MTM A and B
Proposed Realignment Project

Date: 24/04/2019 Drawn by: aldrichh

HAI-MTM LINES MODIFICATION



HAI-MTM LINES MODIFICATION



Appendix C

Tauranga

Appendix 2 - Conditions for:

Transpower New Zealand Limited, for:

Hairini to MT Maunganui Realignment - RC26155 (TCC) RM17-0678 (BOPRC) - generally being the relocation of the existing A-Line off private land and the coastal marine area (with the removal of tower 118) and its relocation into the State Highway corridor where the B-Line is located, with new poles on either side of the harbour with power cables spanning the coastal marine area (but with no other structures in the coastal marine area).

Tauranga City Council Consent	
1.	Plans and Information Subject to the conditions below, the works shall be undertaken in general accordance with the information and supporting plans and technical appendices provided in the resource consent application **RC26155** entitled '*Assessment of Effects on the Environmental – Realignment of the HAI-MTM-A Transmission Line, Maungatapu to Matapihi including Rangataua Bay, Tauranga – Transpower New Zealand Ltd – 24 October 2017 Final*'.
2.	Pre-Start Notification a) Not less than ten working days prior to commencing site works, the consent holder shall, in writing, request a site meeting between the principal contractor and the Tauranga City Council. Notification at this time shall include details of who is responsible for on-site management and compliance with consent. b) Not less than ten working days prior to commencing any earthworks including any stage of earthworks if implemented in stages, Maungatapu Marae Trustees, Ngāti He hapū, Ngai Tukairangi hapū and Matapihi Ohuki Trust shall be notified. The consent holder shall provide these groups with the opportunity to provide cultural monitors and/or undertake site blessings/karakia if they wish to do so.
3.	The works authorised under this consent shall be undertaken in accordance with the Construction Management Plan certified under Bay of Plenty Regional Council consent RM17-0678-BC.02

Tauranga City Council Consent	
4.	Construction Traffic Management Plan – State Highway 29A The consent holder shall not commence works within or requiring access from State Highway 29A until a Construction Traffic Management Plan (CTMP) has been approved by the New Zealand Transport Agency. The consent holder shall undertake all works in accordance with the CTMP.
5.	Sites of Archaeological, Historic or Cultural Significance a) Any works carried out under this consent shall be in general accordance with the works description and location information supplied in support of the application. b) In the event that an archaeological site(s) and/or koiwi are unearthed, the consent holder is advised to immediately stop work on the part of the site that the archaeological site(s) is located and contact Heritage New Zealand Pouhere Taonga and all relevant iwi/hapū for advice. The consent holder shall so notify the Regional Council of the discovery.
6.	Archaeology The consent holder shall not commence any earthworks for which an authority is required by Heritage New Zealand Pouhere Taonga until such time that the authority has been granted. *Advice Note: the consent holder has not sought a resource consent under Regulation 35 of the NESETA to undertake any earthworks on an archaeological site on the basis that any such works will be undertaken accordance with an authority under the Heritage New Zealand Pouhere Taonga Act 2104.*
7.	Noise & Vibration a) The consent holder shall submit a Construction Vibration Noise Management Plan (CNVMP) to the Tauranga City Council **[Team Leader: Environmental Protection]** for certification at least 15 working days prior to construction work commencing. The purpose of the certification is to confirm that the conditions of this consent will be met and that the best practicable options for minimising noise have been adopted. The consent holder shall ensure the following minimum requirements are met: i. The CNVMP shall be prepared by a suitably qualified independent acoustic specialist acceptable to Council and shall provide a framework to manage construction noise/vibration for the variety of circumstances along the route by outlining the methods, procedures and standards for minimising the effects of noise and vibration during construction of the Project. ii. The CNVMP shall identify mitigation methods so that noise from construction or demolition activities do not exceed the noise limits

Tauranga City Council Consent

specified in (b) below and the vibration limits in (c) below at the relevant receiver locations.

iii. Work shall not commence until the consent holder has received the Council's written certification for the CNVMP.

iv. The consent holder shall implement the certified CNVMP throughout the entire construction period of the Project.

b) Unless works are being undertaken in accordance with a Specific Site Construction Noise Management Plan (SSCNMP) certified by Council, no construction or demolition activities shall be undertaken which exceeds the following limits when measured and assessed in accordance with NZS6803:1999 *Acoustics – Construction Noise*:

Day of week	Time period	dB LAeq(15 min)	dB LAmax
Weekdays	0630-0730	55	75
	0730-1800	70	85
	1800-2000	65	80
	2000-0630	45	75
Saturdays	0630-0730	45	75
	0730-1800	70	85
	1800-2000	45	75
	2000-0630	45	75
Sundays and	0630-0730	45	75
public holidays	0730-1800	55	85
	1800-2000	45	75
	2000-0630	45	75

c) The consent holder shall implement the vibration management and mitigation measures identified in the certified CVNMP. Construction vibration shall be made to comply with the following criteria:

Receiver	Details	Vibration Limit
Occupied dwellings	Daytime 0630h - 2000h	1 mm/s PPV
Other occupied buildings	Daytime 0630h - 2000h	2 mm/s PPV

Measurements of construction vibration shall be undertaken in accordance with German Standard DIN 4150-3:1999 "Structural Vibration Part 3: Effects of vibration on structures".

Tauranga City Council Consent	
8.	Vibration Monitoring a) Prior to the commencement of works associated with the installation of Pole 33C, the consent holder shall appoint an independent Professional Structural Engineer to assess and report on the condition of the building(s) located at 29 Wikitoria Street, Maungatapu. The engineer shall be mutually agreed between the consent holder and the consent authority. b) Prior to the commencement of works associated with the installation of Pole 33C, the consent holder the Chartered Professional Structural Engineer (referred to in (a)) shall assess the condition of the existing building(s) at 29 Wikitoria Street, Maungatapu. A written report shall be prepared on the condition assessment of the building(s) with detailed photos and records any existing building defects. c) If requested by the owner and/or occupier of 29 Wikitoria Street during, or within six months of works associated with Pole 33C, the engineer appointed under (a) shall re-assess the condition of the existing building(s) at 29 Wikitoria Street, Maungatapu. A written report shall be prepared on the condition assessment of the building(s) shall: (i) Include detailed photos; (ii) Record any defects that have occurred since the pre-construction assessment carried out in accordance with (a); (iii) Provide an assessment of the likely cause of any defects identified in accordance with (ii). d) If a condition assessment undertaken during works identifies it is likely damage is being caused as a result of works associated with the installation of Pole 33C, works shall cease immediately and, unless otherwise agreed by the owner and occupier of 29 Wikitoria Street, may only recommence when the consent holder has identified and implemented alternative methods to avoid further defects from occurring. e) If a condition assessment undertaken during or following the completion of works identifies it is likely defects to the building(s) at 29 Wikitoria Street have been caused as a result of works associated with the installation of Pole 33C, the consent holder shall take all necessary steps to ensure that such damage is remedied as soon as practicable.
9.	Vegetation Trimming and Removal The consent holder shall minimise the extent of vegetation trimming along the western boundary of State Highway 29A to the extent reasonably necessary for maintaining safe clearances for conductors. Any vegetation removed within the State Highway 29A corridor to enable temporary construction tracks shall be reinstated with equivalent plant types at the conclusion of the work.
10.	*[Condition deleted]*
11.	*[Condition deleted]*

Tauranga City Council Consent	
12.	Vehicle and Machinery Refuelling No refuelling activities or fuel storage shall be carried out within the coastal marine area, on the foreshore or within 20 metres above mean high water springs. The consent holder shall employ methods to avoid or minimise any fuel spillage, including the provision of appropriate security and containment measures, where necessary. This condition shall not apply to refuelling of the drill rig at Pole 33C (if required) provided that suitable spill containment measures are in place.
13.	Electric and Magnetic Fields The transmission line shall be designed and constructed to limit exposures from Electric and Magnetic Fields to the limits in Regulation 10(2) of the Resource Management (National Environmental Standard for Electricity Transmission Activities) Regulations 2009, being reference levels for public exposure of 5 KV/m for electric field strength and 100μT for magnetic flux density at 1m above ground level under maximum normal operating conditions (i.e. when there are no faults in the transmission systems).
14.	Network Utilities Management Plan The Consent Holder shall prepare a Network Utilities Management Plan (NUMP) so that enabling works, design, construction and ongoing operational works associated with the relocated Transpower lines adequately take account of, and include measures to address the safety, integrity, protection or, where necessary, relocation of, existing network utilities. The Consent Holder shall adhere to the relevant requirements of the NUMP at all times during enabling, construction and ongoing activities associated with the project. A copy of the NUMP shall be submitted to the Manager, Environmental Regulation for certification at least 10 working days prior to the commencement of any enabling or construction works. The purpose of the certification process is for the Council to: a) confirm that the appropriate liaison with infrastructure providers has occurred and that their concerns have been taken into account; and b) confirm that the NUMP meets the requirements below. The NUMP shall be prepared in consultation with those infrastructure providers which have existing network utilities that are directly affected by the project and shall include: c) The methods the Consent Holder will use to liaise with all infrastructure providers that have existing network utilities which are directly affected by, or located in close proximity to, the project including the process for: i) Seeking network utility provider approval of proposed works where their assets are affected; ii) The process for obtaining any supplementary authorisations (e.g. easements and/or resource consents); and

Tauranga City Council Consent	
	iii) Protocols for inspection and final approval of works by network utility providers. d) The methods the Consent Holder will use to enable infrastructure providers to access existing network utilities for maintenance at all reasonable times, and to access existing network utilities for emergency works at all times, during construction and the ongoing activities associated with the site. e) The methods the Consent Holder will use to seek to ensure that all construction personnel, including contractors, are aware of the presence and location of the various existing network utilities which traverse, or are in close proximity to, the project, and the restrictions in place in relation to those existing network utilities. This shall include plans identifying the locations of the existing network utilities and appropriate physical indicators on the ground showing specific surveyed locations. f) The methods the Consent Holder will use to ensure that provision, both physical and legal, is made for future maintenance access to utilities to a standard at least equivalent to that currently existing. g) Measures to be used to accurately identify the location of existing network utilities. h) Measures for the protection, relocation and/or reinstatement of existing network utilities. i) Measures to ensure the continued operation and supply of essential infrastructure services. j) Measures to provide for the safe operation of plant and equipment, and the safety of workers, in proximity to existing network utilities. k) Earthworks management procedures (including depth and extent of earthworks and dust management), for earthworks in close proximity to existing network utility; and l) Emergency management procedures in the event of any emergency involving existing network utilities. As built drawings showing the relationship of the relocated utility to the project shall be provided to utility owners within three months of completion of the utility relocation.
15.	All costs associated with the conditions of this consent, including any matters required under the Infrastructure Development Code, shall be met by the consent holder.
16.	The consent holder shall ensure that: a) Tower 118 is removed from the Coastal Marine Area; and b) All redundant poles are removed from the land;

Tauranga City Council Consent	
	as soon as practicable, and no later than 6 months after the new transmission line alignment is commissioned. (refer to Advice Note 4)
17.	Two months prior to construction work commencing on Pole 33C, the consent holder shall make a contribution of $25,000 towards a Waharoa or carved entrance to the Maungatapu Marae. The condition will be satisfied by an offer being made in writing to Ngāti Hē, and if the offer is accepted, by Transpower making payment of the specified amount within one month of the offer being accepted.
	Advice Notes: 1. *The Consent Holder shall meet the costs of any project-related works that are required in order to protect, relocate and/or reinstate existing network utilities. Such methods shall be consistent with the provisions of the Gas Act 1992, the Electricity Act 1992 and the Telecommunications Act 2001.* 2. *In accordance with the Council's Schedule of Fees and Charges, if not accompanying this decision, an invoice may be sent at a later date if the actual cost of processing the application the subject of this decision exceeds the application fees deposit paid on lodgement of the application. All costs associated with the conditions of this consent shall be met by the consent holder.* 3. *All archaeological sites whether recorded or unrecorded under Subpart 2 of the Heritage New Zealand Pouhere Taonga Act 2014 cannot be destroyed, damaged or modified without the consent of Heritage New Zealand. In the event that an archaeological site(s) and/or koiwi are unearthed, the consent holder is advised to immediately stop work on the part of the site that the archaeological site(s) is located, and contact Heritage New Zealand for advice. Contact Details: email - infolowernorthern@heritage.org.nz; phone - 07 577 4530* 4. *The removal of Tower 118 from the Coastal Marine Area is subject to Bay of Plenty Regional Council consent RM17-0678-CC.02.* 5. *Works within SEA 25 are subject to conditions in accordance with Bay of Plenty Regional Council consent RM17-0678-BC.02.*

Resource Consent

Appendix 1 - Conditions for:
Resource Consent RM17-0678-AP

Transpower New Zealand Limited - for

Hairini to Mt Maunganui Realignment - RC26155 (TCC) RM17-0678 (BOPRC) - generally being the relocation of the existing A-Line off private land and the coastal marine area (with the removal of tower 118) and its relocation into the State Highway corridor where the B-Line is located, with new poles on either side of the harbour with power cables spanning the coastal marine area (but with no other structures in the coastal marine area).

Consent(s) to:

RM17-0678-BC.02	Wetland Activity	Expiry	23 August 2023
RM17-0678-CC.02	Disturb Coastal Habitat or Plants	Expiry	23 August 2023
RM17-0678-CC.03	Occupy Coastal Space	Expiry	23 August 2053
RM17-0678-LC.02	Earthworks or Excavation	Expiry	23 August 2023
RM17-0678-LC.04	Earthworks or Excavation	Expiry	23 August 2023
RM17-0678-LC.05	Install a Bore	Expiry	23 August 2023

The consent(s) are subject to the conditions specified on the attached schedule(s) for each activity. Advice notes are also provided as supplementary guidance, and to specify additional information to relevant conditions.

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Consent Number: **RM17-0678-BC.02**

Bay of Plenty Regional Council

Resource Consent

A resource consent:

- **Under Section 13(1) of the Resource Management act 1991and Rule WL R9 of the Regional Natural Resources Plan to undertake a discretionary activity being to modify a wetland.**

subject to the following conditions:

1 Purpose

1.1 The purpose of this resource consent is to authorise and set conditions on the modification of the Rangataua Bay wetland by clearing vegetation, removing willows and developing construction works areas (including wiring sites and access tracks) to provide for the removal of transmission Pole 128 and the installation of transmission Pole 128A.

2 Location

2.1 As shown on the plan referenced as BOPRC Consent Plan RM17-0678/8.

3 Map Reference

3.1 At or about map reference NZTM 1921177, 5790240.

4 Legal Description

4.1 Part Ohuki 2D Block (Title ID 450875) and Part Ngai Tukairangi No 2 Block (SA53C/196), Tauranga.

5 Notification of Works

5.1 Not less than five working days prior commencing any works within the Rangataua Bay wetland, the consent holder shall write to the Bay of Plenty Regional Council and request a site meeting between the principal contractor and the Bay of Plenty Regional Council. Notification at this time shall include details of who is responsible for on-site management and compliance with consent conditions.

5.2 Not less than ten working days prior to commencing any works within the Rangataua Bay wetland, the consent holder shall write to Ngai Tukairangi hapū and Matapihi Ohuki Trust to provide an opportunity for cultural monitoring and/or site blessings/karakia. Evidence of this notification shall be kept on file and provided to the Bay of Plenty Regional Council on request.

6 Construction Works

6.1 No less than 20 workings days prior to the planned commencement of any works in the Rangataua Bay wetland, the consent holder shall submit a Construction Management Plan to the Bay of Plenty Regional Council for certification that it meets the requirements of condition 6.2.

No works shall commence within the Rangataua Bay wetland until the Construction Management Plan has been certified.

6.2 The Construction Management Plan required by Condition 6.1 shall be generally consistent with the Transpower New Zealand Ltd *'Assessment of Environmental Effects'* dated 24 October 2017, including the Tonkin& Taylor *'Marine Ecological* Assessment', and as a minimum shall:

1. Outline the proposed construction methodology;
2. Provide details of on and off site soil disposal;
3. Provide details of the erosion and sediment controls (including silt and dust) that will be implemented on site, consistent with the Bay of Plenty Regional Council's *'Erosion and Sediment Control Guidelines for Land Disturbing Activities - Guideline 2010/01'*;
4. Outline measures to manage any potentially contaminated material encountered during the land disturbing activities in accordance with the certified Contaminated Site Management Plan referred to in RM17-0678-LC.02;
5. Detail construction hours;
6. Describe methods to protect assets owned by other utility providers; and
7. Provide the contact details for the Transpower representative and site supervisor.

6.3 The certified Construction Management Plan shall be implemented and maintained throughout the entire construction period.

6.4 No refuelling activities or fuel storage shall be undertaken within the Rangataua Bay wetland area. The consent holder shall employ methods to avoid any fuel spillage, including the provision of appropriate security and containment measures, where necessary.

6.5 All machinery (particularly the underside) is to be thoroughly cleaned and inspected prior to entering the Rangataua Bay wetland site to prevent the spread of unwanted organisms.

6.6 Any indigenous vegetation removed or damaged during construction works in the Rangataua Bay wetland shall be replaced using the same methodology for species selection, restoration planting, and maintenance as set out in the certified Ecological Management Plan required by Condition 8.1.

7 Native Birds

7.1 Other than provided for by Condition7.2, no vegetation clearing and/or construction works shall occur within or adjacent to the Rangataua Bay wetlandbetween1 September and 31 March.

7.2 If vegetation clearance or construction activities are required to be undertaken in the Rangataua Bay wetland during the bird breeding season stipulated in Condition 7.1, the following management approach shall be used:

1. The area to be affected shall be checked for threatened wetland birds by a suitably qualified ecologist between September and early October and no more than 48 hours prior to vegetation clearance or construction activities;
2. Checks shall include playback calls of threatened bird species potentiallypresent at dawn and dusk over a 24-hour period, and presence will be determined through auditory and/or visual observation of wetland birds (including booming bittern and presence of footprints);
3. If threatened wetland birds are found in the works area during breeding season, no vegetation clearance or construction activities can take place for 8 weeks;
4. After 8 weeks the area to be affected will be checked again as set out in 1. and 2. above and construction activities avoided until no wetland birds are detected or until the breeding season has finished (from 1 April).

8 Ecological Management Plan

8.1 No less than 20 workings days prior to the planned commencement of any works in the Rangataua Bay wetland the consent holder shall submit an Ecological Management Plan, prepared by a suitability qualified ecologist, to the Bay of Plenty Regional Council for certification that it achieves condition 8.2. No works shall commence within the Rangataua Bay wetland until the Ecological Management Plan has been certified.

8.2 The Ecological Management Plan required by Condition 8.1 shall be consistent with the Tonkin & Taylor *'Marine Ecological Assessment'* dated September 2017 and in particular Appendix D (BOPRC Consent PlanRM17-0678/9). As a minimum, the Ecological Management Plan shall:

- Relate more generally to the entire area subject to the restoration plan development as shown on BOPRC Consent Plan RM17-0678/9, but more specifically to the 0.23 hectare restoration area shown as 'Stage 1';
- Detail the methods that will be adopted to remove or control willows in a manner which minimises disturbance of the wetland (refer Advice Note 7). Any poisoning of willows shall occur before cutting or felling;
- Provide a detailed restoration methodology for the 'Stage 1' restoration area;
- List the species and source of plants to be planted in the 'Stage 1'restoration area which must be indigenous eco-sourced plants that are suited to the habitat and will tolerate local growing conditions; and
- Provide details of a five year long plant maintenance and weed control programme to be undertaken across the 'Stage 1' restoration area.

8.3 All works undertaken within the Rangataua Bay wetland area shall be carried out in accordance with the certified Ecological Management Plan and all restoration planting (Stage 1 restoration area) shall be completed in the first autumn following completion of the works.

9 Review of Consent Conditions

9.1 The Bay of Plenty Regional Council may serve notice on the consent holder under section 128(1) of the Resource Management Act 1991 of its intention to review the conditions of the consent. The purpose of such a review is to ensure that sufficient avoidance or mitigation measures are being adopted to protect the ecological values of the Rangataua Bay wetland.

10 Resource Management Charges

10.1 The consent holder shall pay the Bay of Plenty Regional Council such administrative charges as are fixed from time to time by the Regional Council in accordance with section 36 of the Resource Management Act 1991.

11 Term of Consent

11.1 This consent shall expire on 23 August 2023.

12 The Consent

12.1 The Consent hereby authorised is granted under the Resource Management Act 1991 and does not constitute an authority under any other Act, Regulation or Bylaw.

Advice Notes

1 The consent holder is advised that this consent does not constitute a permit under the Wildlife Act 1953, and that such a permit may also be required.

2 All conditions must be fulfilled to the satisfaction of the Chief Executive of the Bay of Plenty Regional Council, or representative.

3 No archaeological sites whether recorded or unrecorded under Subpart 2 of the Heritage New Zealand Pouhere Taonga Act 2014 can be destroyed, damaged or modified without the consent of Heritage New Zealand. In the event that an archaeological site(s) and/or koiwi are unearthed, the consent holder is advised to immediately stop work on the part of the site that the archaeological site(s) is located, and contact Heritage New Zealand and all relevant iwi/hapū for advice. Heritage New Zealand contact details: email - infolowernorthern@heritage.org.nz; phone - 07 577 4530. The Bay of Plenty Regional Council is able to advise of the contact details for the relevant iwi and hapū in this area.

4 Reporting, notification and submission of plans required by conditions of this consent should be directed (in writing) to the Pollution Prevention Manager, Bay of Plenty Regional Council, PO Box 364, Whakatane or fax 0800 884 882 or email notify@boprc.govt.nz, this notification shall include the consent number RM17-0678.

5 The consent holder is responsible for ensuring that all contractors carrying out works under this consent are made aware of the relevant consent conditions, plans and associated documents.

6 The consent holder is advised that non-compliance with consent conditions may result in enforcement action against the consent holder and/or their contractors.

7 Options for minimising disturbance to the wetland could include cutting and removal of the bulk of the trees while leaving the stumps in place, so as to minimise machinery access to the wetland and disturbance to wetland soils associated with removal of whole stumps and roots.

Consent Number: **RM17-0678-CC.02**

Bay of Plenty Regional Council

Resource Consent

A resource consent:

- **Under section 12(1) of the Resource Management Act 1991 and Rule DD 14 of the Proposed Bay of Plenty Regional Coastal Environment Plan to undertake a discretionary activity to disturb the coastal marine area.**

subject to the following conditions:

1 Purpose

1.1 The purpose of this resource consent is to authorise and set conditions on the removal of Electrical Transmission Tower 118 from the Tauranga Harbour.

2 Location

2.1 As shown on the plan referenced as BOPRC Consent Plan RM17-0678/3.

3 Map Reference

3.1 At or about map reference NZTM 1881086, 5822018.

4 Legal Description

4.1 Tauranga Harbour.

5 Notification of Works

5.1 Not less than five working days prior commencing any works to remove Tower 118 from the Tauranga Harbour, the consent holder shall write to the Bay of Plenty Regional Council and request a site meeting between the principal contractor and the Bay of Plenty Regional Council. Notification at this time shall include details of who is responsible for on-site management and compliance with consent conditions.

5.2 Not less than ten working days prior to removal of the existing conductors and any tower deconstruction works, the consent holder shall notify the Bay of Plenty Harbourmaster in writing of the proposed works.

5.3 Not less than ten working days prior to commencing any works to remove Tower 118 from the Tauranga Harbour, the consent holder shall write to Ngati He hapū and Ngai Tukairangi hapū to provide an opportunity for cultural monitoring and/or site blessings/karakia. Evidence of this notification shall be kept on file and provided to the Bay of Plenty Regional Council on request.

6 Coastal Marine Area Works

6.1 All works to remove Tower 118 from the Tauranga Harbour shall be undertaken in accordance with the methodology set out in Section 2.3 of the Transpower New Zealand Ltd 'Assessment of Environmental Effects' dated 24 October 2017 and the Tonkin & Taylor 'Marine Ecological Assessment' dated September 2017.

6.2 The bulk of the above ground portion of Tower 118 shall be removed from the coastal marine area by helicopter after dismantling.

6.3 All works related to the removal of Tower 118 shall be completed as soon as practicable after commencement, however, must be finished within one month.

6.4 Prior to the commencement of any foundation removal works that will disturb the harbour bed, the consent holder shall make endeavours to develop a protocol in consultation with Ngāti Hē hapū that allows for a representative of Ngāti Hē hapū to undertake a walk over of the work site immediately around Tower 118 and relocate any Pāpaka (crabs) identified prior to tower and foundation removal commencing. The consent holder shall provide this protocol to the Council at least 10 working days prior to tower removal work commencing, including evidence of consultation with Ngāti Hē and the feedback received. The consent holder shall undertake any tower and foundation removal work in accordance with the protocol. In any event, all Pāpaka shall be relocated away from the work site.

7 Site Management

7.1 All works under this consent shall be undertaken during daylight hours.

7.2 All plant, equipment, debris and other construction related materials shall be removed from the Tauranga Harbour and all other areas associated with the works (access and refuelling sites) at the completion of works.

7.3 If the construction site is left unoccupied after dark, it must remain appropriately lit and visible to users of the harbour.

7.3 No refuelling activities or fuel storage shall be carried out within the coastal marine area, on the foreshore or within 20 metres above mean high water springs. The consent holder shall employ methods to avoid or minimise any fuel spillage, including the provision of appropriate security and containment measures, where necessary.

8 Review of Consent Conditions

8.1 The Bay of Plenty Regional Council may serve notice on the consent holder under section 128(1) of the Resource Management Act 1991 of its intention to review the conditions of the consent. The purpose of such a review is to ensure that sufficient avoidance or mitigation measures are being adopted to protect the ecological values of the Tauranga Harbour in the vicinity of Tower 118.

9 Resource Management Charges

9.1 The consent holder shall pay the Bay of Plenty Regional Council such administrative charges as are fixed from time to time by the Regional Council in accordance with section 36 of the Resource Management Act 1991.

10 Term of Consent

10.1 This consent shall expire on 23 August 2023.

11 The Consent

11.1 The Consent hereby authorised is granted under the Resource Management Act 1991 and does not constitute an authority under any other Act, Regulation or Bylaw.

Consent Number: **RM17-0678-CC.03**

Bay of Plenty Regional Council

Resource Consent

A resource consent:

- **Under Section 12(b)(a) of the RMA and Regulation 39 of the National Environmental Standard for Electrical Transmission Activities for the occupation of air space above the Coastal Marine Area.**

subject to the following conditions:

1 Purpose

1.1 The purpose of this resource consent is to authorise and set conditions on the occupation of air space above the Tauranga Harbour coastal marine area at Rangataua Bay by the Hairini-Mount Maunganui A Transmission Line Electrical Conductors.

2 Location

2.1 As shown on the plan referenced as BOPRC Consent Plans RM17-0678/3 and RM17-0678/4.

3 Map Reference

3.1 At or about map reference NZTM 1881086, 5822018.

4 Legal Description

4.1 Tauranga Harbour.

5 Notification of Works

5.1 Not less than five working days prior to installing the new conductors, the consent holder shall, in writing, request a site meeting between the principal contractor and the Bay of Plenty Regional Council. Notification at this time shall include details of who is responsible for on-site management and compliance with consent.

5.2 Not less than ten working days prior to installing the new conductors, and/or removing the existing conductors, the consent holder shall notify the Bay of Plenty Harbourmaster in writing of the proposed works.

5.4 Not less than ten working days prior to installing the new conductors, the consent holder shall write to Ngati He hapū and Ngai Tukairangi hapū to provide an opportunity for cultural monitoring and/or site blessings/karakia. Evidence of this notification shall be kept on file and provided to the Bay of Plenty Regional Council on request.

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

6 Coastal Marine Area Occupation

6.1 The electrical conductors shall span above the coastal marine area between Poles 33C (Maungatapu) and Pole 33D (Matapihi) in the general location of the State Highway 29A road bridge as shown on BOPRC Consent Plans RM17-0678/2, RM17-0678/3 and RM17-0678/4.

6.2 Works to install the new conductors shall be completed as soon as practicable after commencement, but within one month.

7 Site Management

7.1 No refuelling activities or fuel storage shall be carried out within the coastal marine area, on the foreshore or within 20 metres above mean high water springs. The consent holder shall employ methods to avoid or minimise any fuel spillage, including the provision of appropriate security and containment measures, where necessary.

7.2 All works associated with the installation of the electrical conductors shall be undertaken during daylight hours.

8 Maintenance

8.1 The consent holder shall ensure that the electrical conductors are maintained in a safe condition at all times, and shall undertake any maintenance work immediately, if so directed by the Bay of Plenty Regional Council.

9 Review of Consent Conditions

9.1 The Bay of Plenty Regional Council may serve notice on the consent holder under section 128(1) of the Resource Management Act 1991 of its intention to review the conditions of the consent. The purpose of such a review is to ensure that the actual or potential effects associated with the exclusive occupation of airspace above the coastal marine area are appropriately avoided, remedied or mitigated.

10 Resource Management Charges

10.1 The consent holder shall pay the Bay of Plenty Regional Council such administrative charges as are fixed from time to time by the Regional Council in accordance with section 36 of the Resource Management Act 1991.

11 Term of Consent

11.1 This consent shall expire on 23 August 2053.

12 The Consent

12.1 The Consent hereby authorised is granted under the Resource Management Act 1991 and does not constitute an authority under any other Act, Regulation or Bylaw.

Consent Number: **RM17-0678-LC.02**

Bay of Plenty Regional Council

Resource Consent

A resource consent:

- **Under sections 9(2)(a) of the Resource Management Act 1991 and Rule DW R25of the Bay of Plenty Regional Natural Resources Plan to undertake a restricted discretionary activity being to disturb a contaminated site.**

subject to the following conditions:

1 Purpose

1.1 The purpose of this resource consent is to authorise and set conditions on the disturbance of contaminated soils during the installation or removal of transmissions poles as part of the realignment of the Hairini to Mount Maunganui A Transmission line.

2 Location

2.1 The disturbance of contaminated land is restricted to the locations of existing or future Poles 33E, 48C, 48D, 48E, 119, 120, 121, 122, 123, 124, 125, 126, 127 and 127A, and access tracks as shown on BOPRC Consent Plans RM17-0678/4, RM17-0678/5, RM17-0678/6, RM17-0678/7 and RM17-0678/8.

3 Map Reference

3.1 At or about map reference NZTM 1921177, 5790240.

4 Legal Description

4.1 Part Ngāi Tūkairangi No. 2 Block (SA53C/196) and Lot 2 DPS 78629 (SA62C/83) Tumatanui 2B3A Block (Title ID 393312).

5 Notification of Works

5.1 No less than five working days prior to the overall start of works under this consent the consent holder shall request (in writing) a site meeting between the principal site contractor and the Bay of Plenty Regional Council. This request shall include details of who is to be responsible for site management and compliance with consent conditions.

5.2 No less than five working days prior to the completion of works under this consent and prior to the removal of sediment and erosion controls, the consent holder shall notify and request (in writing) a site meeting between the principal site contractor and the Bay of Plenty Regional Council.

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

5.3 No less than ten working days prior to undertaking the works the consent holder shall d invite a representative of Ngai Tukairangi on-site to undertake a karakia and cultural monitoring of topsoil stripping. Evidence of this invitation shall be kept and provided to the Bay of Plenty Regional Council within 48 hours of a request.

6 Contaminated Land Disturbance

6.1 The consent holder shall ensure that all disturbances of potentially contaminated areas are undertaken in accordance with the Transpower New Zealand Ltd *'Assessment of Environmental Effects'* dated 24 October 2017 including the methodology set out in Section 2.3.

6.2 No less than 20 workings days prior to the planned commencement of any disturbances to contaminated soils, the consent holder shall submit a Contaminated Site Management Plan (CSMP) prepared by a Suitably Qualified and Experienced Practitioner to the Bay of Plenty Regional Council for certification that it is in accordance with Ministry for the Environment Contaminated Land Management Guidelines No. 1 (Reporting on Contaminated Sites in New Zealand) and the requirements of condition 6.2. No works shall commence until the CSMP has been certified.

6.3 The CSMP required by Condition 6.2 shall include, but not be limited to the following:

- A brief summary of the works to be undertaken with references to other relevant documents if applicable (e.g., the PSI);
- Allocation of responsibilities such as who is responsible for implementing and monitoring the controls detailed within the CSMP for the entirety of the works covered by the CSMP;
- A summary of the identified sources associated with the contaminants of concern;
- Site control procedures such as site access, transport routes, location of clean areas and isolation of work areas;
- Health and safety protection measures, such as:
    - Site induction procedures
    - personal protective equipment requirements
    - personal hygiene requirements
    - first aid and decontamination procedures
- Environmental management procedures demonstrating that:
    - Any stockpiled material removed from the contamination site is plastic lined to contain all contaminants and imperviously covered so as to prevent contaminants leaching into uncontaminated ground;
    - Any machinery or equipment (including footwear) being used for works is washed down before leaving the site; and
    - Any contaminated material removed from the site is contained and disposed of at an appropriate and approved disposal facility.
- A list of key contacts, including the site owner/manager, primary contractor etc.

6.4 The certified CSMP shall be implemented for the duration of the works under this consent.

6.5 The consent holder shall clearly demarcate each contaminated area and control unauthorised access to that area.

6.6 The consent holder shall ensure that any stockpiles of excavated contaminated soils are plastic lined, effectively bunded to contain all contaminants and imperviously covered so as to prevent contaminants leaching into uncontaminated ground.

6.7 The consent holder shall ensure that any fill material brought into the activity site from off site, for deposition as fill material, is classified as 'cleanfill' in accordance with the Ministry for Environments Guide to the Management of Cleanfills (2002), and the Bay of Plenty Natural Resources Plan definition of cleanfill (Advice Note 2).

7 Erosion and Sediment Control

7.1 The Consent Holder shall ensure that erosion and sediment controls are designed and constructed in accordance with the Bay of Plenty Regional Council '*Erosion and Sediment Control Guidelines for Land Disturbing Activities – Guideline 2010/1'*.

7.2 The consent holder shall ensure that all sediment and erosion controls are installed prior to works commencing.

7.3 The consent holder shall ensure that all exposed areas of earth resulting from works authorised by this consent are effectively stabilised against erosion by vegetative groundcover or suitable alternative as soon as practicable and following the completion of each stage of works.

7.4 The consent holder shall divert uncontaminated catchment runoff away from the area of works.

7.5 No vegetation, soil, or other debris shall be left in a position where the material could become mobile by stormwater during heavy rainfall.

7.6 The consent holder shall ensure that the erosion and sediment controls and associated erosion protection devices are maintained in an effective capacity and good working order at all times during works and until the site is stabilised.

7.7 The consent holder shall ensure that any necessary maintenance of erosion and sediment controls identified by inspection under conditions of this consent or by Bay of Plenty Regional Council staff is completed within 24 hours.

7.8 The consent holder shall ensure that there is no tracking of soil or sediments off-site.

8 Dust Control

8.1 The consent holder shall adopt a proactive strategy for dust control, specifically by complying with the principles of dust management as set out in the Bay of Plenty Regional Council '*Erosion and Sediment Control Guidelines for Land Disturbing Activities – Guideline 2010/01'* so as to prevent a dust nuisance from occurring beyond the property boundary.

8.2 The consent holder shall ensure that an adequate supply of water for dust control (sufficient to apply a minimum of five millimetres per day to all exposed areas of the site), and an effective means for applying that quantity of water, is available on site at all times during construction and until such time as the site is fully stabilised.

8.3 The consent holder shall ensure that, at all times, the soil moisture level of exposed areas is sufficient, under prevailing wind conditions, to prevent dust generated by normal earthmoving operations from remaining airborne beyond the boundary of the work site.

8.4 The consent holder shall ensure that, outside of normal working hours, staff are available on-call to operate the water application system for dust suppression, as required by Bay of Plenty Regional Council compliance staff or following a substantiated public complaint.

9 Signage

9.1 Prior to the commencement of works under this consent, the consent holder shall erect a prominent sign adjacent to the entrance of site works, and maintain it throughout the period of the works. The sign shall clearly display, as a minimum, the following information:

- The consent holder;
- The main site contractor;
- A 24 hour contact telephone number for the consent holder or appointed agent; and
- A clear health and safety warning.

10 Sites of Archaeological, Historic or Cultural Significance

10.1 In the event that an archaeological site(s) and/or koiwi are unearthed, the consent holder is advised to immediately stop work on the part of the site that the archaeological site(s) is located and contact Heritage New Zealand, the Bay of Plenty Regional Council and all relevant iwi/ hapū for advice (refer Advice Note 3).

11 Review of Consent Conditions

11.1 The Bay of Plenty Regional Council may serve notice on the consent holder at any time under section 128(1) of the Resource Management Act 1991 of its intention to review the conditions of the consent. The purpose of such a review is to deal with any adverse environmental effect which may result from the consented activity.

12 Resource Management Charges

12.1 The consent holder shall pay the Bay of Plenty Regional Council such administrative charges as are fixed from time to time by the Regional Council in accordance with section 36 of the Resource Management Act 1991.

13 Term of Consent

13.1 This consent shall expire on 23 August 2023.

14 The Consent

14.1 The Consent hereby authorised is granted under the Resource Management Act 1991 and does not constitute an authority under any other Act, Regulation or Bylaw.

Advice Notes

1 The Bay of Plenty Regional Water and Land Plan defines cleanfill material as:

Natural materials such as clay, soil, rock and such other materials as concrete, brick or demolition products that are free of:

- *Combustible or putrescible components (including green waste) apart from up to 10 percent by volume untreated timber in each load;*
- *Hazardous substances or materials (such as municipal waste) likely to create leachate by means of biological or chemical breakdown;*
- *Any products or materials derived from hazardous waste treatment, stabilisation or disposal processes.*

The Ministry for Environment Guide for the Management Cleanfills (2002) defines cleanfill material as:

Material that when buried will have no adverse effect on people or the environment. Cleanfill material includes virgin natural materials such as clay, soil and rock, and other inert materials such as concrete or brick that are free of:

- *combustible, putrescible, degradable or leachable components,*
- *hazardous substances,*
- *products or materials derived from hazardous waste treatment, hazardous waste stabilisation or hazardous waste disposal practices,*
- *materials that may present a risk to human or animal health such as medical and veterinary waste, asbestos or radioactive substances, liquid waste.*

2 All conditions must be fulfilled to the satisfaction of the Chief Executive of the Bay of Plenty Regional Council, or representative.

3 No archaeological sites whether recorded or unrecorded under Subpart 2 of the Heritage New Zealand Pouhere Taonga Act 2014 can be destroyed, damaged or modified without the consent of Heritage New Zealand. In the event that an archaeological site(s) and/or koiwi are unearthed, the consent holder is advised to immediately stop work on the part of the site that the archaeological site(s) is located, and contact Heritage New Zealand and all relevant iwi/hapū for advice. Heritage New Zealand contact details: email - infolowernorthern@heritage.org.nz; phone - 07 577 4530. The Bay of Plenty Regional Council is able to advise of the contact details for the relevant iwi and hapū in this area.

4 Reporting, notification and submission of plans required by conditions of this consent should be directed (in writing) to the Pollution Prevention Manager, Bay of Plenty Regional Council, PO Box 364, Whakatāne or fax 0800 884 882 or email notify@boprc.govt.nz, this notification shall include the consent number RM17-0678.

5 The consent holder is responsible for ensuring that all contractors carrying out works under this consent are made aware of the relevant consent conditions, plans and associated documents.

6 The consent holder is advised that non-compliance with consent conditions may result in enforcement action against the consent holder and/or their contractors.

Consent Number: **RM17-0678-LC.04**

Bay of Plenty Regional Council

Resource Consent

A resource consent:

- **Under section 9(2)(a) of the Resource Management Act 1991 and Rule LMR4 of the Bay of Plenty Regional Natural Resources Plan to undertake a discretionary activity being to disturb land and soil as a result of earthworks.**

subject to the following conditions:

1 Purpose

1.1 The purpose of this resource consent is to authorise and set conditions on the carrying out of earthworks associated with the installation of a new electrical transmission pole (Pole 33C) within 20 metres of the coastal marine area.

2 Location

2.1 As shown on the plan referenced as BOPRC Consent Plan RM17-0678/2.

3 Map Reference

3.1 At or about map reference NZTM 1880973, 5821544.

4 Legal Description

4.1 State Highway 29 Road Reserve.

5 Notification of Works

5.1 No less than five working days prior to the overall start of works under this consent the consent holder shall request (in writing) a site meeting between the principal site contractor and the Bay of Plenty Regional Council. This request shall include details of who is to be responsible for site management and compliance with consent conditions.

5.2 No less than five working days prior to the completion of works under this consent and prior to the removal of sediment and erosion controls, the consent holder shall notify and request (in writing) a site meeting between the principal site contractor and the Bay of Plenty Regional Council.

5.3 No less than ten working days prior to undertaking the works the consent holder shall invite a representative of Ngati He hapū on-site to undertake cultural monitoring of topsoil stripping. Evidence of this invitation shall be kept and provided to the Bay of Plenty Regional Council on request.

6 Earthworks

6.1 All earthworks operations shall be carried out in accordance with the Transpower New Zealand Ltd ' *Assessment of Environmental Effects'* dated 24 October 2017 including and in particular the methodology set out in Section 2.3.

6.2 The consent holder shall ensure that no more than100 square metres of earth is exposed on site.

6.3 The consent holder shall ensure that all earthworks operations are completed as soon as practicable after commencements but within one month.

6.4 No earthworks shall be undertaken between 1 May and 15 September (inclusive) unless otherwise agreed in writing by the Bay of Plenty Regional Council.

6.5 All works shall be undertaken during daylight hours.

7 Erosion and Sediment Control

7.1 The Consent Holder shall ensure that erosion and sediment controls are designed and constructed in accordance with the Bay of Plenty Regional Council '*Erosion and Sediment Control Guidelines for Land Disturbing Activities – Guideline 2010/1'*.

7.2 All erosion and sediment controls shall be installed prior to the commencement of construction works.

7.3 The consent holder shall ensure that all exposed areas of earth resulting from works authorised by this consent are effectively stabilised against erosion by vegetative groundcover or suitable alternative as soon as practicable and following the completion of works.

7.4 The consent holder shall divert uncontaminated catchment runoff away from the area of works.

7.5 No vegetation, soil, or other debris shall be left in a position where the material could become mobile by stormwater during heavy rainfall.

7.6 The consent holder shall ensure that the erosion and sediment controls and associated erosion protection devices are maintained in an effective capacity and good working order at all times during works and until the site is stabilised.

7.7 The consent holder shall ensure that any necessary maintenance of erosion and sediment controls identified by inspection under conditions of this consent or by Bay of Plenty Regional Council staff is completed within 24 hours.

8 Signage

8.1 Prior to the commencement of works under this consent, the consent holder shall erect a prominent sign adjacent to the entrance of site works, and maintain it throughout the period of the works. The sign shall clearly display, as a minimum, the following information:

(i) The consent holder

(ii) The main site contractor;

(iii) A 24 hour contact telephone number for the consent holder or appointed agent;

(iv) A clear explanation that the contact telephone number is for the purpose of receiving complaints and information from the public about dust nuisance or any other problem resulting from the exercise of this consent.

9 Monitoring and Reporting

9.1 The consent holder shall ensure that the erosion and sediment controls are inspected within 12 hours of each rainstorm event which is likely to impair the function or performance of the erosion and sediment controls.

9.2 The consent holder shall maintain records of:

(i) The date and time of every inspection of erosion and sediment controls on the site;

(ii) The date, time and description of any maintenance work carriedout.

9.3 The consent holder shall forward a copy of records required by these conditions to the Bay of Plenty Regional Council within 48 hours of its request.

9.4 The Erosion and Sediment Control Plan shall remain on-site at all times and be made available for the Council Compliance Officers to refer to as required during site inspections.

10 Sites of Archaeological, Historic or Cultural Significance

10.1 In the event that an archaeological site(s) and/or koiwi are unearthed, the consent holder is advised to immediately stop work on the part of the site that the archaeological site(s) is located and contact Heritage New Zealand, the Bay of Plenty Regional Council and all relevant iwi/ hapū for advice (refer Advice Note 2).

11 Review of Consent Conditions

11.1 The Bay of Plenty Regional Council may serve notice on the consent holder at any time under section 128(1) of the Resource Management Act 1991 of its intention to review the conditions of the consent. The purpose of such a review is to deal with any adverse environmental effect which may result from the consented activity.

12 Resource Management Charges

12.1 The consent holder shall pay the Bay of Plenty Regional Council such administrative charges as are fixed from time to time by the Regional Council in accordance with section 36 of the Resource Management Act 1991.

13 Term of Consent

13.1 This consent shall expire on 23 August 2023.

14 The Consent

14.1 The Consent hereby authorised is granted under the Resource Management Act 1991 and does not constitute an authority under any other Act, Regulation or Bylaw.

Advice Notes

1 All conditions must be fulfilled to the satisfaction of the Chief Executive of the Bay of Plenty Regional Council, or representative.

2 No archaeological sites whether recorded or unrecorded under Subpart 2 of the Heritage New Zealand Pouhere Taonga Act 2014 can be destroyed, damaged or modified without the consent of Heritage New Zealand. In the event that an archaeological site(s) and/or koiwi are unearthed, the consent holder is advised to immediately stop work on the part of the site that the archaeological site(s) is located, and contact Heritage New Zealand and all relevant iwi/hapū for advice. Heritage New Zealand contact details: email - infolowernorthern@heritage.org.nz; phone - 07 577 4530. The Bay of Plenty Regional Council is able to advise of the contact details for the relevant iwi and hapū in this area.

3 Reporting, notification and submission of plans required by conditions of this consent be directed (in writing) to the Regulatory Compliance Manager, Bay of Plenty Regional Council, PO Box 364, Whakatāne or fax 0800 884 882 or email notify@boprc.govt.nz, this notification shall include the consent number RM17-0678-LC.04.

4 The consent holder is responsible for ensuring that all contractors carrying out works under this consent are made aware of the relevant consent conditions, plans and associated documents.

5 The consent holder is advised that non-compliance with consent conditions may result in enforcement action against the consent holder and/or their contractors.

6 In the event that potential contamination is identified during the earthworks, through the presence of soil staining, odour, uncharacterised fill, construction and demolition waste, or asbestos, all activities in the vicinity of the discovery shall cease immediately. The Bay of Plenty Regional Council should be notified, and If the material is deemed contaminated, another resource consent or consent variation may be required.

Consent Number: **RM17-0678-LC.05**

Bay of Plenty Regional Council

Resource Consent

A resource consent:

- **Under Section 9(2)(a) of the Resource Management Act 1991 and Rule 40A of the Regional Natural Resources Plan to undertake a controlled activity being the drilling of land which will intercept the water table.**

subject to the following conditions:

1 Purpose

1.1 The purpose of this resource consent is to authorise and set conditions on the drilling of land as part of pile and foundation works for the construction of two new electrical transmission poles (33C and 33D).

2 Location

2.1 As shown on the plans referenced as BOPRC Consent Plans RM17-0678/2 and RM17-0678/4.

3 Map Reference

3.1 At or about map reference NZTM 1880973, 5821544 and 1921177, 5790240.

4 Legal Description

4.1 State Highway Road reserve (Pole 33C) and Part Te Ngaio No. 1 Block (Title ID 456072).

5 Notification of Works

5.1 No less than five working days prior to the overall start of works under this consent the consent holder shall request (in writing) a site meeting between the principal site contractor and the Bay of Plenty Regional Council. This request shall include details of who is to be responsible for site management and compliance with consent conditions.

5.2 No less than ten working days prior to undertaking the works the consent holder shall invite a representative of Ngati He hapū (Pole 33C foundation drilling) or Ngai Tukairangi (Pole 33D foundation drilling) on-site to undertake cultural monitoring of the works. Evidence of this invitation shall be kept and provided to the Bay of Plenty Regional Council on a request.

6 Drilling Works

6.1 All drilling operations shall be carried out in accordance with the Transpower New Zealand Ltd '*Assessment of Environmental Effects*' dated 24 October 2017 including the methodology set out in Section 2.3.

6.2 The consent holder shall ensure that all drilling is completed as soon as practicable after commencement but within one month.

6.3 All drilling fluids shall be discharged to land in a manner where it shall not enter water.

6.4 All Drilling shall be undertaken in accordance with NZS 4411:2001 Environmental Standard for Drilling of Soil and Rock.

6.5 Following the completion of the drilling, any waste introduced during construction shall be removed from the site.

7 Review of Consent Conditions

7.1 The Bay of Plenty Regional Council may serve notice on the consent holder at any time under section 128(1) of the Resource Management Act 1991 of its intention to review the conditions of the consent. The purpose of such a review is to deal with any adverse environmental effect which may result from the consented activity.

8 Resource Management Charges

8.1 The consent holder shall pay the Bay of Plenty Regional Council such administrative charges as are fixed from time to time by the Regional Council in accordance with section 36 of the Resource Management Act 1991.

9 Term of Consent

9.1 This consent shall expire on 23 August 2023.

10 The Consent

10.1 The Consent hereby authorised is granted under the Resource Management Act 1991 and does not constitute an authority under any other Act, Regulation or Bylaw.

IN THE HIGH COURT OF NEW ZEALAND
TAURANGA REGISTRY

I TE KŌTI MATUA O AOTEAROA
TAURANGA MOANA ROHE

CIV-2020-470-31
[2021] NZHC 1201

BETWEEN	TAURANGA ENVIRONMENTAL PROTECTION SOCIETY INCORPORATED Appellant
AND	TAURANGA CITY COUNCIL and BAY OF PLENTY REGIONAL COUNCIL Respondents
	TRANSPOWER NEW ZEALAND LIMITED Applicant for consent

Hearing:	3-4 September 2020
Appearances:	J D K Gardner-Hopkins for the appellant and the Maungatapu Marae Trustees as an interested party M H Hill and R M Boyte for the respondents A J L Beatson, J P Mooar and E M Taffs for the applicant for consent Appearance excused for Ngāi Tūkairangi Trust, an interested party
Judgment:	27 May 2021

JUDGMENT OF PALMER J

This judgment was delivered by me on Thursday 27 May 2021 at 2.00 pm.
Pursuant to Rule 11.5 of the High Court Rules.

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Registrar/Deputy Registrar

Counsel/Solicitors:
J D K Gardner-Hopkins, Barrister, Wellington
Sharp Tudhope Lawyers, Tauranga
Cooney Lees Morgan, Tauranga
Bell Gully, Wellington
Lara Burkhardt, Mt Maunganui

Contents

Summary

[1] Ngati Hē was dispossessed of most of its ancestral lands but retains the Maungatapu Marae and beach at Rangataua Bay, on Te Awanui Tauranga (Tauranga Harbour). Ngāti Hē has a long-standing grievance about the location of electricity transmission lines across the Bay from the Maungatapu Peninsula to the Matapihi Peninsula. Some of the transmission poles will require replacement soon. In 2016, to address Ngāti Hē's grievance, Transpower initiated consultation with iwi about realignment of the transmission lines, including at Rangataua Bay. Ngāti Hē supported removal of the existing lines and initially did not oppose their proposed new location. But when it became clear that a large new pole, Pole 33C, would be constructed right next to the Marae, Ngāti Hē concluded the proposed cure would be worse than the disease and opposed the proposal. Consents were granted for the proposal realignment which the Environment Court upheld.[1] The Tauranga Environmental Protection Society Inc appeals the decision of the Environment Court, supported by the Maungatapu Marae Trustees from Ngati Hē.

[2] I uphold the appeal. I find:

(a) The "bundled" way in which the Court considered the effects of removing the A-Line and construction of the new line did not constitute an error of law.

(b) Proper application of the law requires a different answer from that reached by the Environment Court. When the considered, consistent, and genuine view of Ngāti Hē is that the proposal would have a significant and adverse impact on an area of cultural significance to them and on Māori values of the Outstanding Natural Features and Landscapes (ONFL), it is not open to the Court to decide it would not.

(c) The Court erred in law in applying an "overall judgment" approach to the proposal and in its approach to pt 2 of the Resource Management

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1 *Tauranga Environmental Protection Society Incorporated v Tauranga City Council* [2020] NZEnvC 43 [Environment Court] at [218].

Act 1991 (RMA). The Court was required to carefully interpret the meaning of the planning instruments it had identified (the Bay of Plenty Regional Coastal Environment Plan (RCEP) in particular) and apply them to the proposal.

(d) The relevant provisions of the RCEP do not conflict and neither do the provisions of the higher order New Zealand Coastal Policy Statement (NZCPS) and the National Policy Statement on Electricity Transmission (NPSET). There are cultural bottom lines in the RCEP:

(i) Policy IW 2 requires adverse effects on Rangataua Bay, an "area of spiritual, historical or cultural significance" to Ngāti Hē, to be avoided "where practicable".

(ii) Policy NH 4, NH 5(a)(ia) and NH 11(1) require the adverse effects on the medium to high Māori values of Te Awanui at ONFL 3 to be avoided unless there are "no practical alternative locations available", and the "avoidance of effects is not possible", and "adverse effects are avoided to the extent practicable".

(e) Determining whether the exceptions to the cultural bottom lines apply requires interpretation and application of the "practicable", "practical" and "possible" thresholds. The Court erred in failing to recognise that this determines whether the proposal could proceed at all. The technical feasibility of alternatives to the proposal means the avoidance of adverse effects on ONFL 3 at Rangataua Bay is possible. On the basis of the Court's existing findings, Policy NH 11(1)(b) is therefore not satisfied and consideration providing for the proposal under Policy NH 5 is not available.

[3] These are material errors. I quash the Environment Court's decision. But I consider it desirable for the Environment Court to further consider the issues of fact relating to the alternatives. With goodwill and reasonable willingness to compromise

on both sides, it may be possible for an operationally feasible proposal to be identified that does not have the adverse cultural effects of the current proposal. And, if the realignment does not proceed over Rangataua Bay, it may still be able to proceed in relation to Matapihi. I remit the application to the Environment Court for further consideration consistent with this judgment.

The application for consents in context

Ngāti Hē and te Maungatapu Marae

[4] Ngāti Hē is a hapū of Ngāi Te Rangi. After the battles of Pukehinahina (Gate Pā) and Te Ranga in 1864, much of Ngāi Te Rangi's land was confiscated for settlement under the New Zealand Settlements Act 1863 and Tauranga District Lands Act 1868.[2] The confiscations were then reviewed by Commissioners and land was returned.[3]

[5] The confiscated land included that of Ngāti Hē at Maungatapu, a peninsula in the south of Te Awanui Tauranga (Tauranga Harbour), jutting into Rangataua Bay. In 1884, the Crown "awarded" back to Ngāti Hē two blocks of land on Maungatapu peninsula, some three kilometres east of central Tauranga.[4] Block 2 was part of the tip of the Maungatapu peninsula. Ngāti Hē has since lost part of that land too. Some was taken for the public purposes of putting in a motorway and electricity transmission lines. Some was subject to forced sale, because Ngāti Hē was unable to pay rates, and then sub-divided.[5] As stated in the agreed Historical Account in the Deed of Settlement between Ngāi Te Rangi and the Crown, upon which the Crown's acknowledgement and apology to Ngāi Te Rangi was based:[6]

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2 *Ngāi Te Rangi and Ngā Pōtiki Deed of Settlement of Historical Claims* (14 December 2013) [Deed of Settlement], cl 2 (CBD 303.0702 and 303.0703). The Deed is conditional upon settlement legislation coming to force, which has not yet occurred.

3 See generally Waitangi Tribunal *Te Raupatu o Tauranga Moana: Report on the Tauranga Confiscation Claims* (Wai 215, 2004) at chs 4 and 10.

4 Maungatapu 1 and 2 Blocks. Commissioner Brabant "Land Returned to Ngaiterangi Tribe Under Tauranga District Land Acts" [1886] AJHR G10; Heather Bassett *Aspects of the Urbanisation of Maungatapu and Hairini, Tauranga* (July 1996) at 6 (CBD 301.0024); and Des Heke *Transpower Rangataua Realignment Project: Ngāti Hē Cultural Impact Assessment* (September 2017) at 6 (CBD 304.0966).

5 Deed of Settlement, above n 2, cl 2.71.

6 Clause 2.72.

> The Maungatapu subdivision contributed to the reduction of Ngāti He landholdings on the peninsula to 11 hectares by the end of the twentieth century. Maungatapu was once the centre of a Ngāti He community who used their lands for gardens, but now the hapū only maintains the marae and headland domain, along with a small urupā.

[6] Amongst the Crown's many acknowledgements in the Deed, it acknowledged:

(a) public works, including "the motorway and infrastructure networks on the Maungatapu and Matapihi Peninsulas", have had "enduring negative effects on the lands, resources, and cultural identity of Ngāi Te Rangi";[7]

(b) "the significant contribution that Ngāi Te Rangi . . . [has] made to the wealth and infrastructure of Tauranga on account of the lands taken for public works";[8] and

(c) "the significance of the land, forests, harbours, and waterways of Tauranga Moana to Ngāi Te Rangi . . . as a physical and spiritual resource".[9]

[7] As stated in evidence in this proceeding:[10]

> The result of all these forms of alienation has been that very little land in Maungatapu and Hairini is still owned by Māori. There are a handful of reserve areas, such as marae and urupā, and some families live in the area on their individual sections. The traditional rohe of Ngāti Hē and Ngāi Te Ahi now has the overwhelming characteristics of a well populated residential suburb, in which there is less scope for Māori interests and activities to be promoted than there was in the past.

[8] The Maungatapu Marae (the Marae) of Ngāti Hē , also called Opopoti, is on the northern tip of the Maungatapu peninsula.[11] The wharenui, Wairakewa, and wharekai, Te Ao Takawhaaki, look to the northeast, towards the bridge and Matapihi peninsula. Te Kōhanga Reo o Opopoti is established on the eastern side of the Marae, between the Marae and a health facility next to State Highway 29A. To the west of

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7 Clauses 3.15 and 3.14.5.
8 Clause 3.16.1.
9 Clause 3.18.1.
10 Bassett, above n 4, at 6 (CBD 301.0024).
11 Environment Court, above n 1, at [10].

the Marae is a large flat area that was Te Pā o Te Ariki and is now Te Ariki Park, home to the rugby field, tennis/netball courts and clubrooms of Rangataua Sports and Cultural Club. The land on which the Club is situated is a Maori reservation managed by Ngāti Hē.[12]

Ngāi Tūkairangi

[9] Ngāi Tūkairangi, another hapū of Ngāi Te Rangi, has a marae and other land on the Matapihi headland.[13] Te Ngāio Pā, near the southern tip of the Matapihi Peninsula, is associated with Ngāi Tūkairangi, Ngāti Hē, Ngāti Tapu, and Waitaha.[14] Approximately 60 hectares in Matapihi is owned by over 1,470 Ngāi Tūkairangi or Ngāti Tapu landowners.[15] The Ngāi Tūkairangi No 2 Orchard Trust has managed orchard land in the area since 1992.[16]

The A-line

[10] In the 1950s, the Maungatapu 2 block was implicated in plans for a motorway and a new electricity transmission line.[17] In 1958, the Maungatapu 2 block, including the beach in front of it, was reserved as a marae and recreation area under s 439 of the Māori Affairs Act 1953.

[11] Also in 1958, the Ministry of Works, a department of the Crown, constructed the "A-line", an electricity transmission line. It is located very near Ngāti Hē's remaining land. It is supported by poles in Rangataua Bay and passes over some 40 private residences and above the playing fields of Te Ariki Park. Ngāti Hē complained but the Ministry took the position that there was no alternative route for the power lines.[18] The Crown Law Office has acknowledged that the electricity department did not properly inform those affected.[19] The Crown acknowledged in the

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12 Heke, above n 4, at 15 (CBD 304.0975).
13 Environment Court, above n 1, at [28].
14 At [29].
15 Brief of Evidence of Peter Te Ratahi Cross, (25 March 2019) [Cross Brief] at [7] (CBD 202.0388).
16 Environment Court, above n 1, at [188].
17 Bassett, above n 4, at 10 (CBD 301.0030).
18 At 11 (CBD 301.0032).
19 Rachael Willan *From Country to Town: A Study of Public Works and Urban Encroachment in Matapahi, Whareroa and Mount Maunganui* (December 1999) at 85 (CBD 301.0081).

Treaty settlement that it did not send notices to all the owners of land taken, which may have been why Ngāti Hē owners did not apply for compensation within the required timeframe.[20] Ngāti Hē's concerns about the location of the A-Line infrastructure were included in their claim to the Waitangi Tribunal in 2006.[21] The claim referred to the absence of compensation for, or adequate notification of, the construction of the power lines.

[12] The power lines were also placed through the middle of Ngāi Tūkairangi's land, despite the hapū's opposition.[22] The A-Line went directly over Te Ngāio Pā on the southern tip of the Matapihi peninsula. The effect of the A-line on the use and development of horticultural lands at Matapihi was also the subject of Treaty of Waitangi claims to the Waitangi Tribunal by Ngāi Tūkairangi in 1988 and 1997.[23] These claims also concerned the construction of the power lines without compensation nor adequate consultation.[24]

[13] In 1959, a bridge was constructed from the northern end of the Maungatapu peninsula to the southern end of the Matapihi peninsula. This is now State Highway 29A, to Mt Maunganui. Construction substantially altered the site of Te Pā o Te Ariki of Ngāti Hē, disturbing an ancient urupā and exposing bones.[25]

The B-line

[14] Under the State-Owned Enterprises Act 1986, the electricity assets of the Ministry of Works were transferred to the Electricity Corporation of New Zealand. In 1991, the electricity transmission assets were further transferred to Transpower, the SOE which still manages the national grid. In mid-1991, work began on a second transmission line to Mt Maunganui and Papamoa. In 1993, Transpower undertook a feasibility study for erecting a new line along the Maungatapu to Matapihi portion of

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20 Deed of Settlement, above n 2, cl 2.54.

21 Environment Court, above n 2, at [44]; and Waitangi Tribunal *Tauranga Moana: Report on the Post-Raupatu Claims Volume 1* (Wai 215, 2006).

22 Cross Brief, above n 15, at [10].

23 Environment Court, above n 1, at [44]; and Hikitapua Ngata *Transpower Line Realignment Project: Ngai Tūkairangi Hapu Cultural Impact Assessment* at 10 (CBD 304.1008). Wai 211 was heard as part of the foreshore and seabed inquiry. Wai 688 was heard as part of the Kaipara inquiry.

24 Ngata, above n 23, at 10 (CBD 304.1008).

25 Bassett, above n 4, at 13 (CBD 301.0034); and Deed of Settlement, above n 2, cl 2.56.

the state highway.[26] That would enable the A-line to be removed. The B-line was constructed in 1995. It crosses Rangataua Bay through a duct underneath the Maungatapu-Matapihi bridge and underground on the approaches at each end of the bridge.[27] Ms Raewyn Moss from Transpower confirms the resulting expectation:[28]

> … When the B-line was constructed in 1995, there was an expectation at the time that the A-line would eventually be re-aligned onto the B-line. I understand that Ngāti Hē, Ngāi Tūkairangi, Māori trustee land owners also share this expectation. This has been the subject of discussion between the parties and Transpower over many years.

The realignment proposal

[15] The A-Line has not yet been moved. Now, the condition of Poles 116 and 117, located in Te Ariki Park, is deteriorating and the poles need to be replaced. In particular, Pole 117 is close to the edge of the cliff above the harbour and recently required temporary support to protect it from coastal erosion.[29] Tower 118, situated in Rangataua Bay, is due for major refurbishment in the next 10 years.[30]

[16] Recently, Transpower developed a realignment proposal that would remove Poles 116 and 117 and Tower 118 from Rangataua Bay. Instead, aerial lines would extend between two new steel monopoles, Pole 33C on Maungatapu, at a height of approximately 34.7 metres, and Pole 33D at Matapihi, at a height of approximately 46.8 metres. The lines would no longer pass over Ngāti Hē land or private residences at Maungatapu or over Ngāi Tūkairangi land at Matapihi. This is depicted in the illustration below, with the red lines and poles to be removed, the green lines and poles to be added and the blue lines and poles to be retained.[31]

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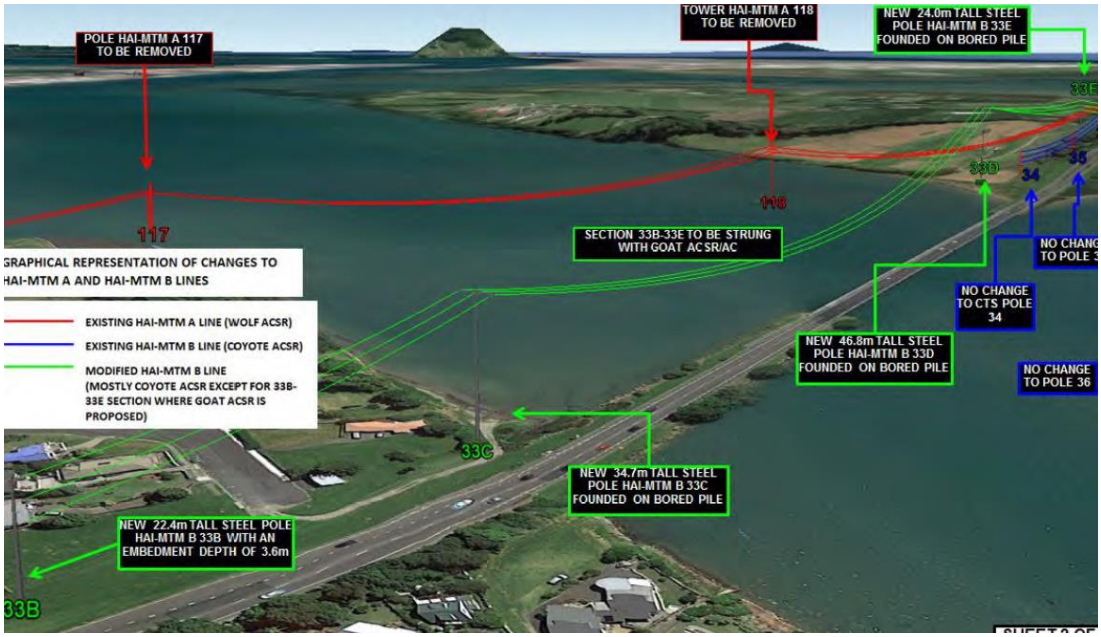
26 Willan, above n 19, at 79 (CBD 301.75).
27 Environment Court, above n 1, at [42].
28 Notes of Evidence of Environment Court [NOE] 15/9–14 (CBD 201.0015).
29 Environment Court, above n 1, at [40].
30 At [42].
31 Transpower *Options Report: HAI-MTM-A and B Transmission Line Alterations, Rangataua Bay, Tauranga* (July 2017) at Sch A.1 (CBD 304.1103).



[17] Transpower's objectives for this project, set out in its Assessment of Effects on the Environment, are to:[32]

> a) Enable Transpower to provide for the long-term security of electricity supply into Mount Maunganui;
>
> b) Remove an existing constraint from an important cultural and social facility for the Maungatapu community; and from horticultural activities for the Matapihi community; and
>
> c) Honour a longstanding undertaking to iwi and the community to remove Tower 118 from the harbour.

[18] From March 2013, Transpower discussed the project with Ngāti Hē and Ngāi Tūkairangi, among others.[33] The proposal was a "welcome surprise" to Ngāi Tūkairangi, which supports it.[34] Removal of the lines will allow more flexible farming practices, use of shelter planting and reconfiguration of the orchard.[35]

[19] Ngāti Hē and the Marae also initially supported the proposal. But once the applications were notified, and Ngāti Hē and the Marae realised the size, nature and

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32 Transpower *Assessment of Effects on the Environment: Realignment of the HAI-MTM-A Transmission Line, Maungatapu to Matapihi including Rangataua Bay, Tauranga* (24 October 2017) at 8 (CBD 304.0784).

33 Environment Court, above n 1, at [47].

34 At [12].

35 At [14].

location of the new Pole 33C, directly adjacent to the entrance to the Marae, they opposed it. A mock-up of the view of Pole 33C from the Marae is depicted below.[36]

The application and Council decisions

[20] In 2017, Transpower applied for the required resource consents for the proposal from the Tauranga City Council and the Bay of Plenty Regional Council (the Councils):[37]

(a) From the Tauranga City Council under the National Environmental Standards for Electricity Transmission Activities (NESETA) regulations for relocation of support structures, removal of willow and other vegetation and construction of the additional poles.

(b) From the Bay of Plenty Regional Council for earthworks, disturbance of contaminated land, drilling of foundations below ground water, modification of wetland, disturbance of the seabed and occupation of the coastal marine area airspace.

[21] Section 2 of the RMA defines the "coastal marine area" to mean "the foreshore, seabed, and coastal water, and the air space above the water", up to the line of mean high water springs.

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36 *Transpower Hairini to Mount Maunganui Re-Alignment: Landscape and Visual Graphics, Attachments to the Environment Court Evidence of Brad Coombs* (30 January 2018) at 39 (CBD 202.0514).

37 Environment Court, above n 1, at [50], Table 1.

[22] The Councils each appointed an independent hearing commissioner to consider and decide the consent applications. On 23 August 2018, the commissioners jointly decided to grant land use consents to realign the A-Line, subject to various conditions.

Appeal to the Environment Court

[23] The Tauranga Environmental Protection Society (TEPS) is an association of 14 people whose views of the harbour after realignment would be impacted by the new powerlines or poles and who made submissions opposing the application. TEPS appealed to the Environment Court. The trustees of the Maungatapu Marae, Ngāi Tūkairangi Hapū Trust, Te Rūnanga o Ngāi Te Rangi Iwi Trust and Mr Luke Meys joined the appeal as parties under s 274 of the RMA:

(a) The Marae supported removal of the A-Line, as the subject of their long-held grievance and a danger to users of the Sports Club. But the Marae opposed the new poles and lines. Ngāti Hē would rather wait longer to get the right result.

(b) Similarly, Ngāi Te Rangi supported removal of the A-Line and its relocation. It opposed the method by which the realignment would cross Rangataua Bay.

(c) Ngāi Tūkairangi conditionally opposed the appeal on the basis it would delay the removal of transmission infrastructure on Matapihi land, which would have positive cultural and other effects for them.[38] However, if the appellants' concerns could be met through changes within the scope of the application, Ngāi Tūkairangi would wish to consider that.

(d) Mr Meys, whose property is under the existing A-Line, supported the proposal, with urgency, and opposed the appeal.

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38 At [16]–[17].

The Environment Court decision

[24] The Court refused the appeal and amended the conditions of consent.[39] The structure of its decision was to:

(a) identify the background to, and nature of, the proposal and consent application;

(b) outline the legal framework and the relevant policies and plans;

(c) identify three preliminary consenting issues: bundling; alternatives; and maintenance or upgrade;

(d) consider the cultural effects of the proposal;

(e) consider the effects on the natural and physical environment; and

(f) consider and amend the conditions of the consents.

[25] In its conclusion, the Court observed that neither the Councils nor the Court on appeal "have the power to substantially alter Transpower's proposal or to require any third party, such as the New Zealand Transport Authority, to participate in the proposal".[40] It said "[i]f we consider that the proposal, essentially as applied for, is inappropriate, then we may refuse consent".[41] In summary, the Court in its concluding reasoning:

(a) Found the removal of the A-Line will result in positive effects for all people, land and water and for Ngāti Hē and Ngāi Tūkairangi.[42]

(b) Noted it had found the proposal is a single one and its elements should be considered together.[43]

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39 At [271]–[272].
40 At [260].
41 At [260].
42 At [261].
43 At [262]–[263].

(c) Held that the proposed relocation "does not result in wholly positive effects" and it must have regard to Policy 15 of the NZCPS because the "location is not ideal". In particular, placing the line above the bridge with the associated tall poles "creates an increased degree of new and adverse visual effects on that part of Te Awanui, particularly when seen from Maungatapu Marae and Te Kōhanga Reo o Opopoti and for some of the residents on the eastern side of SH 29A".[44]

(d) Found the alternatives of laying the A-Line on or under the seabed, or in ducts attached to the bridge, "appear from the evidence to be impracticable", though they are technically feasible, because of the cost.[45] The Court does not have the power to require Transpower to amend the proposal.

(e) Found "[t]he character or nature of the effects at the heart of this case are essentially those that relate to restrictions on using land, visual impact and the imposition of the works on sites of significance to Māori."[46] The positive effects of removal of the existing A-Line are "significantly greater than the adverse effects in intensity and scale" in terms of land use, visual impact and effects on sites of significance to Māori, "even while taking account of the impact of the relocated line on views from the marae and proximity to the kōhanga reo".

(f) Considered it "must undertake a fair appraisal of the objectives and policies read as a whole".[47] The Court did not accept Policy 15 of the NZCPS requires consent to be declined or the proposal amended on the basis it has adverse effects on the ONFL. The NZCPS "does not have that kind of regulatory effect" and its terms do not provide that "any use or development in an ONFL would be inappropriate". What is inappropriate "requires a consideration of what values and attributes of the environment are sought to be protected as an ONFL and what the

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44 At [264].
45 At [265].
46 At [266].
47 At [267].

effects of the use or development may be on the things which are to be protected".

(g) Noted it is important that the existing environment of the ONFL includes the existing bridge and national grid infrastructure.[48]

(h) Considered it must also "have regard under s 104(1)(b)" to the relevant objectives and policies of the NPSET, RCEP and District Plan.[49] Those instruments "generally treat both the protection of ONFLs and the provision of network infrastructure as desirable, but do not go further to particularise how those broad objectives or policies are to be pursued or how potential conflict between them is to be resolved". Policy 6 of the NPSET guides the Court, consistently with the proposal, but "there is no guidance in either the NPSET or the NZCPS as to how potential conflict between those national policies is to be resolved".

(i) Said finally:

> [270] As noted above, where a decision-maker is faced with a range of competing concerns, and no possible outcome would be wholly without adverse effects, we must reach a decision as to which outcome better promotes the sustainable management of natural and physical resources, as defined in s 5 RMA. In the absence of any practicable alternative, the obvious counterfactual to the proposal is the status quo. In our judgment, the removal of the existing line and its relocation within the Road zone applying to SH 29A and above the Maungatapu Bridge is more appropriate overall and therefore better than leaving the line where it is.

The appeal

[26] Under s 299 of the RMA, a party to a proceeding before the Environment Court "may appeal on a question of law to the High Court" against a decision, report or recommendation of the Environment Court. Under r 20.18 of the High Court Rules 2016, the appeal is "by way of rehearing".

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48 At [268].
49 At [269].

[27] TEPS appeals the Environment Court's decision. The Marae Trustees support the appeal as an interested party. Transpower, as the applicant for consent, supports the Environment Court's analysis. Ngāi Tūkairangi Trust supports the submissions of Transpower and does not make any additional submissions. The Councils, as the consent authorities, separately support the Court's decision.

[28] Counsel argued six or seven grounds of appeal. There was quite a lot of overlap in all parties' submissions from one ground to another. I group the grounds of appeal in terms of five issues and treat them in a different order. I treat submissions made by counsel in relation to the issue to which they are most relevant. The issues are:

(a) Was the Environment Court wrong to "bundle" the effects together?

(b) Was the Court wrong in its findings about adverse effects?

(c) Did the Court err in its approach to pt 2 of the RMA?

(d) Did the Court err in interpreting and applying the planning instruments?

(e) Was the Court wrong in its assessment of alternatives, including the status quo?

Issue 1: Was the Environment Court wrong to bundle the effects together?

The Environment Court's decision

[29] The Environment Court addressed the issue of "bundling" as the first preliminary issue. It stated:

> [96] It is generally accepted that where a proposal requires more than one consent and there is some overlap of the effects of the activity or activities for which consent is required, then the consideration of the consents should be bundled together so that the proposal is assessed in the round rather than split up, possibly artificially, into pieces.[50] Where, however, the effects to be

[50] *Bayley v Manukau City Council* [1999] 1 NZLR 568 (CA) at 579–580; and *King v Auckland City Council* [2000] NZRMA 145 (HC) at [47]–[50].

> considered in relation to each activity are quite distinct and there is no overlap, then a holistic approach may not be needed.[51]

[30] The Court recorded but rejected the appellant's argument that the proposal was in two parts that should be assessed separately using a structured approach.[52] It considered the term "effect" is defined broadly and inclusively in s 3 of the Resource Management Act 1991 (RMA) and is subject to the requirements of context.[53] The Court considered case law has generally interpreted and applied the statutory definition of "effect" in a realistic and holistic way.[54] It concluded:

> [110] These passages indicate that the correct approach to the assessment of effects involves not merely the consideration of each effect but also the relationships of each effect with the others, whether positive or adverse. This is consistent with the inclusion of cumulative effects in the definition in s 3: while many cases have considered the overall impact of cumulative adverse effects, there is nothing in s 3 which would prevent consideration of the cumulative impact of positive and adverse effects. Where effects are directly related and quantifiable in commensurable ways, then it may even be possible to sum the overall effect, but these passages also indicate that commensurability is not a pre-requisite to such consideration.
>
> [111] We also consider that such an approach is not limited to the level of individual effects but applies similarly to the whole activity. While one may conceive of an activity as separate elements with separate effects, that approach may not properly address the proposal as it is intended to occur or operate. Numerous provisions of the RMA, including the functions of territorial authorities and regional councils, indicate that the statutory purpose is to be pursued or given effect by methods which help to achieve the integrated management of the effects of the use, development or protection of resources. While there may be separate or ancillary activities which require separate consideration, the analysis should not be artificial. This approach is consistent with the identification of activities in terms of planning units which can assist in such integration.
>
> [112] In this case, we are satisfied that the proposal is to be assessed as a single one with its activities bundled together for the purposes of identifying the correct activity classification and considering the effects, positive and adverse, cumulatively. We note that counsel for the Appellant acknowledged that its two parts may only proceed together: without the new line, there would be no removal of the existing one. We agree and see that as determinative of this point.

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51 *Bayley v Manukau City Council,* above n 50, at 580; and *Body Corporate 97010 v Auckland City Council* [2000] 3 NZLR 513; [2000] NZRMA 529 (CA) at [21]–[22].

52 Environment Court, above n 1, at [100].

53 At [104].

54 At [106]–[108], citing *Elderslie Park Ltd v Timaru District Council* [1995] NZRMA 433 (HC); *Marlborough District Council v New Zealand Rail Ltd*]1995] NZRMA 357 (EnvC); and *Auckland City Council v Minister for the Environment* [1999] NZRMA 49 (EnvC).

[31] In its overall conclusion, the Environment Court said that, even though it was "treating the proposal as a single one", the effects of the elements of the proposal "must be identified and analysed separately as they involve different things, but having done that, the judgment of whether the effects are appropriate … must be done in terms of all the effects".[55]

Submissions

[32] Mr Gardner-Hopkins, for TEPS and Ngāti Hē, submits the Environment Court erred in rejecting a structured approach. He submits the Court should have considered the two distinct elements of the removal of the A-Line and construction of the new infrastructure separately. He submits doing so is particularly important given the "avoid" policies which require a proposal with adverse effects to be squarely confronted. He submits the Court netted off the adverse effects on the Marae with the benefits of removing Poles 116 and 117. The effect of that approach was to subsume the adverse effects into an overall net-effect analysis. This masked the effects on cultural values and circumvented the requirement to confront the terms of the planning documents.

[33] Mr Beatson, for Transpower, submits the Court properly accepted that relocation of the A-Line depended on consents being granted, which determined whether or not to consider the effects in a holistic way. He submits the Court was correct, given that the removal and placement are integrally related, and was consistent with the assessment of all expert witnesses and the authorities.

[34] Ms Hill, for the Councils, submits there is no material error of law. Separate assessment of each part of the proposal against the avoid policies would not necessarily prohibit a proposal with adverse effects. It would just require the effects to be squarely confronted. The Environment Court was clear that the effects of the separate parts of the proposal must be identified and analysed separately and it squarely confronted the effects of the proposal. The structured approach is not supported by the policy framework. The Court's "realistic and holistic" approach was

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55 Environment Court, above n 1, at [263].

appropriate and consistent with sound resource management practice, whereas the structured approach has no supporting authority.

Did the Court err in applying a bundling approach?

[35] The "bundled" way in which the Court considered the effects of removing the A-Line and construction of the new line did not constitute an error of law. The two elements of the proposal, removing old infrastructure and constructing new infrastructure, are integrally related. One would not occur independently of the other, as Mr Gardner-Hopkins acknowledged. The effects on cultural values were incorrectly determined, as I discuss in Issue 2. But they were not masked by the Court's approach. The Environment Court was correct to consider the effects of the proposal relating to Rangataua Bay in a realistic and holistic way. The effects on Matapihi and Maungatapu seem more independent of each other. Perhaps they could be separately considered. But that is not the argument advanced here. The problems with the Court's reasoning were not caused by its approach to bundling.

Issue 2: Was the Court wrong in its findings about adverse effects?

[36] The Court was required to consider whether the proposal had certain adverse effects. This issue concerns whether the Court's findings regarding adverse effects constituted an error of law.

Relevant provisions

[37] The Court was required to interpret and apply two policies of the Bay of Plenty Regional Coastal Environment Plan (RCEP).[56]

[38] First, Iwi Management Policy IW 1(d) requires proposals "which may affect the relationship of Māori and their culture, traditions and taonga" to "recognise and provide for" "[a]reas of significant cultural value identified in Schedule 6 and other areas or sites of significant cultural value identified by Statutory Acknowledgements,

[56] Relevant extracts from the RCEP and other planning instruments are provided in full in the Annex to this judgment.

iwi and hapū resource management plans or by evidence produced by Tāngata whenua and substantiated by pūkenga, kuia and/or kaumātua".

[39] Schedule 6 identifies Te Awanui as an Area of Significant Cultural Value (ASCV 4):

> Te Awanui and surrounding lands form the traditional rohe of Ngāi Te Rangi, Ngāti Ranginui and Ngāti Pūkenga, which extends from Wairakei in Pāpāmoa across the coastline to Ngā Kurī a Whārei at Otawhiwhi - known as "*Mai i ng*ā *Kurī a Whārei ki Wairakei*." Te Awanui is a significant area of traditional history and identity for the three Tauranga Moana iwi – Ngāi Te Rangi, Ngāti Ranginui and Ngāti Pūkenga. Hapū of the Tauranga Moana iwi maintain strong local communities which are dependent on maintenance of the life-supporting capacity of the harbour and surrounding land. Maintenance of kaimoana and coastal water quality is particularly important.
>
> …
>
> Te Awanui is rich in cultural heritage sites for Waitaha and the Tauranga Moana iwi. Many of these sites are recorded in Iwi and Hapū Management Plans and other historical documents and files. Treaty Settlement documents also contain areas of cultural significance to iwi and hapū. These iwi, along with their hapū, share Kaitiakitanga responsibilities of Te Awanui.
>
> Traditionally, Tauranga Moana (harbour) was as significant, if not more so, than the land to tāngata whenua. It was the source of kaimoana and the means of access and communication among the various iwi, hapū and whānau around its shores. Today there are 24 marae in the Tauranga Moana district.

[40] IW 2 of the RCEP applies to "adverse effects on resources or areas of spiritual, historical or cultural significance to tāngata whenua in the coastal environment identified using criteria consistent with those included in Appendix F set 4 to the RPS [Regional Policy Statement]". Advice Note 2 to the Policy states that "[t]he Areas of Significant Cultural Value identified in Schedule 6 are likely to strongly meet one or more of the criteria listed in Appendix F set 4 to the RPS".

[41] Second, Natural Heritage Policy NH 4 applies to "adverse effects" "on the values and attributes of" "[ONFL] (as identified in Schedule 3)". Te Awanui (Tauranga Harbour) is identified as ONFL 3, including the harbour around Maungatapu and Matapihi. Schedule 3 states "[t]he key attributes which drive the requirement for classification of ONFL, and require protection, relate to the high natural science values associated with the margins and habitats; the high transient

values associated with the tidal influences; and the high aesthetic and natural character values of the vegetation and harbour patterns".

[42] Schedule 3 of the RCEP provides assessment criteria for "Māori values" as "Natural features and landscapes that are clearly special or widely known and influenced by their connection to the Māori values inherent in the place". "Māori values" of ONFL 3 are rated as "medium to high" and evaluated as follows:

> Ancient pā, mahinga kai, wāhi tapu, kāinga, taunga ika.
>
> Te Awanui is a significant area of traditional history and identity for the three Tauranga Moana Iwi – Ngāi Te Rangi, Ngāti Ranginui and Ngāti Pūkenga. Waitaha of Arawa also has strong ancestral connections to Te Awanui.
>
> Te Awanui includes many cultural heritage sites, many of which are recorded in Iwi and Hapū Management Plans and other historical documents and files (including Treaty Settlement documents).

[43] Policy NH 4A provides:

> When assessing the extent and consequence of any adverse effects on the values and attributes of the areas listed in Policy NH 4 and identified in Schedule … 3 to this Plan …:
>
> (a) Recognise the existing activities that were occurring at the time that an area was assessed as having Outstanding Natural Character, being an Outstanding Natural Feature or Landscape …
>
> (b) Recognise that a minor or transitory effect may not be an unacceptable adverse effect;
>
> (c) Recognise the potential for cumulative effects that are more than minor;
>
> (d) Have regard to any restoration and enhancement of the affected attributes and values, and
>
> (e) Have regard to the effects on the tāngata whenua cultural and spiritual values of ONFLs, working, as far as practicable, in accordance with tikanga Māori.

[44] The Tauranga City Plan, which has the legal status of a District Plan, should also be interpreted and applied. It identifies Te Ariki Pā/Maungatapu as a significant Māori area (No M 41) of Ngāti Hē.[57] Its values are recorded as:

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[57] Environment Court, above n 1, at [26].

> Mauri: The mauri and mana of the place or resource holds special significance to Māori;
>
> Wāhi Tapu: The Place or resource is a Wāhi tapu of special, cultural, historic and or spiritual importance to the hapū;
>
> Kōrero Tuturu / Historical: The area has special historical and cultural significance to the hapū;
>
> Whakaaronui o te Wa / Contemporary Esteem: The condition of the area is such that it continues to provide a visible reference point to the hapū that enables an understanding of its cultural, architectural, amenity or educational significance.

[45] The iwi management plans, included in the Annex to this judgment, and invoked in other planning instruments, relevantly provide:

(a) Policy 10 of Te Awanui Tauranga Harbour Iwi Management Plan 2008 specifically records that "[i]wi object to the development of power pylons in Te Awanui".

(b) Policy 15.1 and 15.2 of the Tauranga Moana Iwi Management Plan is to "[o]ppose further placement of power pylons on the bed of Te Awanui" and "[p]ylons are to be removed from Te Ariki Park and Opopoti (Maungatapu) and rerouted along the main Maungatapu road and bridge".

(c) The Ngāi Te Rangi Resource Management Plan states:

> Marae provide the basis for the cultural richness of Tauranga Moana. The key role that they play in supporting the needs of their whanau, hapu, and wider communities – Maori and non Maori – shall be recognised in the development of resource management policies, rules and practices. The evolving nature of that role must also be accommodated.
>
> …
>
> Resource consents for the upgrading or provision of additional high tension power transmission lines, or other utilities, will not in general be supported.

[46] Te Tāhuna o Rangataua (Rangataua Bay) is also listed in the New Zealand Heritage List/Rārangi Kōrero as a wāhi tapu historically associated with several iwi and hapū, including Ngāti Hē.[58]

Environment Court's decision on adverse effects

[47] In its lengthy discussion of cultural effects, the Environment Court outlined the consultation process, the iwi management plans, and the cultural impact assessments of the proposal.[59] It summarised the evidence of each witness from the Marae, Ngāi Te Rangi and Ngāi Tūkairangi.[60] In particular:

(a) The late Mr Taikato Taikato, chairperson of the Maungatapu Marae Trust and kaumātua, supported the removal of the A-Line from Te Ariki Park but did not support its replacement as an aerial line. This was because the cable would be directly in front of the marae and would "move the lines from our backs and put them back in front of our faces".[61] He had concerns about the noise from the lines. He believed Ngāti Hē could wait another year or two to get the right result. Mr Taikato agreed that he would want his mokopuna to enjoy the benefits that come with electricity, and that, should consent be refused, negotiations about replacing Poles 116 and 117 would have to start all over again.

(b) Dr Kihi Ngatai focused on the significance of Te Pā o Te Ariki, the pā site of Ngāti Hē. He told the Court his main purpose as a member of the Te Pā o Te Ariki Trust is to get the line shifted away from this significant site because it is wāhi tapu and should be left as it was when it became tapu; without powerlines.

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58 Heritage New Zealand *New Zealand Heritage List/Rārangi Kōrero – Report for a Wāhi Tapu Area: Te Tāhuna o Rangataua* at 5 and 22 (CBD 303.0663 and 303.0680).

59 Environment Court, above n 1, at [153]–[169].

60 At [170]–[193].

61 At [170]; and Statement of Evidence of Taikato Taikato on behalf of the Maungatapu Marae Trust, (25 March 2019) at 3 (CBD 202.0370).

(c) Ms Hinerongo Walker, a kuia and a Trustee of both the Maungatapu Marae and the kōhanga reo, and Ms Parengamihi Gardiner, a kuia who lives in the Kaumātua Flats on Te Ariki, gave evidence together. Ms Walker was concerned about the visual aesthetics and constant humming of the realignment and the impact on the marae and kōhanga reo. Ms Gardiner said they had been trying to have the lines removed, and confirmed she had submitted in favour of the proposal to remove the lines from Te Ariki Park. However, she said she did not want them removed if it meant an impact on the marae, the kōhanga reo or other people. When asked whether they supported the removal of Tower 118 from the middle of Te Awanui, they said that depended "on the removal of lines from here" and they looked it as a whole package.[62]

(d) Ms Matemoana McDonald, of Ngāti Hē and a councillor on the Bay of Plenty Regional Council, gave evidence on the changes to the cultural landscape of Ngāti Hē over her lifetime.[63] She said the Transpower proposal adds insult to injury in terms of what Ngāti Hē have lost in providing for the needs of the city, and said they do not want two new poles in close proximity to their sacred marae. She wanted to see alternative options considered and discussed to find a better solution to the proposal. She accepted that Transpower had put a lot of effort into trying to find a workable solution to the A-Line issue. She questioned why Pole 33C could not go to the other side of SH 29A, because although it could have effects on other parties on that side of the road, those houses would change hands over time, whereas Ngāti Hē would always be present at their marae. She confirmed that "Te Awanui and Te Tahuna has much significance as what the marae does".[64]

(e) Ms Ngawaiti Hera Ririnui, chairperson of Te Kōhanga Reo o Opopoti, said the potential effect of Pole 33C on tamariki that live on the marae

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62 NOE 260/3.
63 Statement of Evidence of Matemoana McDonald (8 April 2019) (CBD 202.0378).
64 NOE 276/6–9.

or attend the kōhanga reo was seen as negative, as there is no research that proves or disproves whether there is an impact on health from such powerlines.[65] She gave evidence of tamariki having full access to the area around the Marae and "tamariki out on the beach at Rangataua being taught by our kaimahi about what it means to be part of our community and be a member of Ngāti Hē".[66] She saw the pole as a "monstrous dark structure that's going to be hanging over our marae on a daily basis, lines that are going to be slung across our marae swinging in the wind for our tamariki to see".[67] She said generations have tried to fight the changes in the surrounding environment, but have never won. She agreed removal of the poles and wires from Te Ariki Park would be a benefit, but not if the poles were relocated to beside the kōhanga reo.

(f) Ms Yvonne Lesley Te Wakata Kingi, secretary of the Maungatapu Marae committee for 25 years, said she felt they were having to continue a battle to maintain the mana on their land. She talked about their use of the beach.[68] She stated they are being treated in the way Māori were when new people first began to settle there. She described wanting the marae to be a happy place, not only for Māori but for the visitors who come there.

(g) Mr Mita Michael Ririnui, a kaumātua, the chair of the Ngāti Hē Hapū Trust, and the Ngāti Hē representative on the Ngāi Te Rangi Settlement Trust and Te Rūnanga O Ngāi Te Rangi Iwi Trust, clarified that Ngāti Hē Hapū Trust supported the removal of the existing line from Te Ariki Park. However, the Trust had not given any support to the proposed structures including Pole 33C. He said the proposed

65 Environment Court, above n 1, at [179].
66 NOE 281/12–25.
67 NOE 281/27–30.
68 NOE 286/4–15.

structures are considered "a blight on the [Ngāti Hē] estate" and marae.[69]

(h) Mr Paul Joseph Stanley, Chief Executive of Te Runanga o Ngāi Te Rangi Iwi Trust, submitted "[i]t will be much better … if those lines were put across with the bridge or underneath the harbour".[70]

[48] In relation to cultural effects, the Court:

(a) said its assessment of cultural effects was not assisted by the RCEP because it "is not specific about cultural values and attributes of Rangataua Bay / Te Awanui";[71]

(b) identified "the key cultural issues" to be "the damage to the mana of Maungatapu Marae and concern about the environment, particularly at the kōhanga reo there";[72]

(c) traversed the process of consultation in preparing the application;[73]

(d) summarised the submissions on the notified consent application, focussing on Ngāti Hē's position, including in this (implicitly critical) paragraph:[74]

> [205] The evidence for Ngāti Hē did not make any mention of the adverse effects on Ngāti Tūkairangi of not allowing the realignment. It did not address in detail the cultural matters affected by the existing line crossing the harbour, or the effects on the harbour and sea bed of the removal of Tower 118. The effects on cultural values relating to the moana generally did not appear to be front of mind. The evidence did not mention any cultural effects of the alternatives that Ngāti Hē preferred in terms of effects on the seabed of, for example, excavations for new piles or a trench to take the line below

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69 NOE 291/5–6.
70 NOE 265/19–20.
71 Environment Court, above n 1, at [194].
72 At [195].
73 At [196]–[197].
74 At [198]–[206].

> the harbour floor. The evidence called by Ngāi Te Rangi supported the Ngāti Hē point of view.

(e) found that Transpower had carried out a full and detailed consultation, and that Ngāti Hē changed its mind, as it was entitled to do;[75]

(f) noted Ngāti Hē's frustration and anger about the original construction of the A-Line and accepted the cultural effects of that had adversely affected them for the last half-century;[76]

(g) found the removal of the A-Line and poles from Ngāti Hē's land at Te Ariki Park and of Tower 118 in Rangataua Bay would have positive effects;[77]

(h) "deeply regretted" the "adverse effects from their point of view" of Pole 33C, but found there was no opportunity to move the pole without adversely affecting other persons not before the Court;[78]

(i) found Ngāti Hē's preferred alternatives of a strengthened or new bridge or under-sea-bed crossing would reduce the effects on the marae and kōhanga reo but "may also, from our understanding of the evidence" have greater effects within the [Coastal Marine Area] and on the ONFL than those that will result from the aerial transmission line";[79]

(j) observed that Ngāi Tūkairangi consider the effects of the proposal on their land would be highly beneficial;[80]

(k) observed there is no certainty that a proposal Ngāti Hē can support will come forward or achieve their desired outcomes;[81]

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75 At [207]–[208].
76 At [209].
77 At [211].
78 At [212].
79 At [213].
80 At [214].
81 At [214]–[215].

(l) suggested changes to activities or to the environment may result in the cumulative effect being less than before and doubted the only proper starting point for assessing cumulative effects was prior to any development;[82]

(m) held that the question was whether Ngāti Hē is better or worse off in terms of the assessment of cumulative effects, deducting the removal of adverse effects from the creation of adverse effects, and noted Ngāti Hē "are clear in their view that they are worse off, not least because they see the proposed change as continuing to subject them to adverse effects";[83]

(n) considered no other group would be worse off by the proposal and some, "particularly Ngāi Tūkairangi and the residents along Maungatapu Road" would be better off and refusing consent would leave them worse off;[84]

(o) noted Transpower has said it will walk away from the realignment project if the appeal is granted and then strengthen or replace its infrastructure on Te Ariki Park, which does not require further consent;[85] and

(p) concluded:[86]

> [220] Ultimately, we have had to assess the realistic alternatives and the likely effects of those through the cultural lens as best we can, taking into consideration the interests of both hapū. **From the above analysis we do not find the proposed realignment to have cumulative adverse cultural effects on Ngāti Hē.** Existing adverse effects at Te Ariki Park will be removed and new adverse effects will occur near the marae and the kōhanga reo. We are conscious that the benefits to Ngāi Tūkairangi will be considerable. We conclude that the benefits of the realignment to Ngāti Hē, coupled with the benefits to Ngāi Tūkairangi, are greater than the adverse

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82 At [216].
83 At [217].
84 At [218].
85 At [219].
86 Emphasis added.

> effects of Pole 33C's placement near the marae and the kōhanga reo. For Ngāti Hē, those benefits will be felt as soon as the structures and line are removed from Te Ariki Park, and there is some urgency to that. Their removal will immediately facilitate change. The opportunity to change the configuration of the A-Line in relation to a bridge or sea-bed location may arise in future but Ngāti Hē cannot rely on that.

[49] In relation to the effects on the ONFL, the Environment Court compared and assessed the evidence of expert witnesses, in particular that of Ms Ryder for the Councils and Mr Brown for TEPS.[87] The Court was "unable to confirm Mr Brown's opinions in relation to what he considered [were] the significant effects on Māori values in ONFL 3 on the basis of the evidence provided by the cultural witnesses".[88]

[50] The Court further concluded:

> [246] We have no doubt about the importance of Rangataua Bay to the marae and to Ngāti Hē hapū. But we must draw the argument back to the assessment of the effects on ONFL 3 and its values, attributes and associations. The activities that will take place there are the removal of Tower 118 and the addition of a powerline above the SH 29A bridge. We heard no evidence about the effect of the removal of Tower 118 on Maori Values in the ONFL 3, except, as Ms Ryder pointed out, that there is a strong preference of iwi for no power pylons to be present in Te Awanui – and we cannot accept that taking this structure out of the centre of Rangataua Bay, where it stands alone, will not have benefits to Te Awanui in this area. Similarly, the removal of the powerlines to the SH 29A corridor consolidates the infrastructure into one place rather than having the line strung across the otherwise open Rangataua Bay, again surely a cultural benefit in relation to its current intrusion into the open airspace above the bay.
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> [247] The cultural witnesses expounded more on the effects on the marae of Pole 33C (and to a lesser extent pole 33D) with concern, as noted above, for the mana of the marae and the health of the tamariki who attend the kōhanga reo directly adjacent to it than they did on the effects of the activities that will take place within ONFL 3, the latter being the subject of this evaluation.
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> [248] During the removal of Tower 118 the works will be visible albeit short-lived and the realignment of the powerline to a new position above and parallel with the bridge will similarly be visible and could be considered by some viewers to be fleetingly adverse. The works may be visible from the marae and vicinity. We consider those effects both short term and long term to be *de minimis*. On the other hand, there will benefits to the ONFL from the removal of Tower 118 and the powerline.

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87 Summarised at [243], Table 3.
88 At [244].

Submissions on adverse effects

[51] Mr Gardner-Hopkins, for TEPS and Ngāti Hē, submits:

(a) The Court erred in light of the evidence before it, because the true and only reasonable conclusion is that there would be:

(i) at least some adverse effects in terms of ASCV 4 or otherwise on resources or areas of spiritual, historical or cultural significance to tāngata whenua in the coastal environment, contrary to Policy IW 2; and/or

(ii) significant, or at least some, adverse effects on Ngāti Hē's association with the cultural values of ONFL 3, contrary to Policy NH 4(b).

(b) It is for Ngāti Hē to identify the cultural impacts on them and they have done so. All the Ngāti Hē witnesses promoted the same overall outcome and gave a consistent message. They did not support the proposal because the benefits of the removal of the A-Line did not outweigh the adverse effects. Not one witness said the proposal should proceed if the cost was the poles being in front of the Marae. The evidence focussed on the visual dominance of the poles but kaumātua and kuia also raised wider issues of the connectedness of the Marae and the reserve with Rangataua Bay. The visual effects can clearly affect the aesthetic and experience of the ONFL. The moderate to high rating of Māori values in ONFL 3 answers the submission that Māori values are not a key component of the ONFL at the Bay.

(c) The Environment Court navigated around all that, finding the effects were de minimis. It was focussed on the effects of aerial lines crossing the harbour on the ONFL, not the effects of the large structures on either side that will impact on Ngāti Hē's cultural association with the harbour. If the Court had applied the right framework and focussed on

the poles as well as the lines, it could not have found the effects to be *de minimis*.

(d) It cannot be right that any adverse effect needs to be assessed against the Tauranga harbour as a whole, because that would require a proposal of a massive scale. In the context of this proposal, the appropriate scale must be Rangataua Bay. If the project proceeds and Poles 33C and 33D are constructed, the effects on Ngāti Hē and the Marae will continue for another two to three generations. They do not want an additional visual intrusion into their connectedness with Rangataua Bay from their marae or beach. If that is not available now, they are prepared to wait.

[52] Mr Beatson, for Transpower, submits:

(a) It could not be further from the truth to suggest the Court found there were no effects on cultural values at all or it imposed its own assessment of the cultural effects. The Court spent some 20 pages summarising the consultation and evidence on cultural effects. It weighed the evidence before concluding there was an overall positive cultural effect. The benefits of the realignment to Ngāti Hē and Ngāi Tūkairangi would be greater than the adverse effects of Pole 33C on the Marae and kōhanga reo. Its approach is consistent with *SKP Incorporated* and *Trans-Tasman Resources*.[89]

(b) The Court focussed its enquiry on the effects of ONFL. It noted the main adverse cultural effects related to visual effects on the Marae and kōhanga reo enjoyment of the ONFL, rather than on the values and attributes of ONFL 3. The description of the values and attributes is a guide to the key focus of the ONFL. Adverse effects on Māori values would not necessarily lead to the conclusion there is an adverse effect on the ONFL as a whole, in terms of the description. The Court found

[89] *SKP Incorporated v Auckland Council* [2018] NZEnvC 81; and *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2020] NZCA 86, [2020] NZRMA 248.

the conclusion that the effects on the Māori values would be significant was not supported by the evidence of the cultural witnesses.[90]

(c) The Environment Court's findings were well supported by the landscape and cultural evidence. As the primary finder of fact it should be given latitude to do so. The appellant has not cleared the high bar of an "only true and reasonable conclusion". An assessment of the effects should take an overall approach, allowing the significant positive effects of the relocation to be taken into account. The relocation is more desirable than retaining the status quo.

[53] Ms Hill, for the Councils, submits:

(a) The weight given to particular considerations by the Environment Court is not able to be revisited as a question of law. It should be given some latitude in reaching findings of fact within its area of expertise, with which the High Court should not readily intervene.

(b) The Environment Court thoroughly set out and carefully evaluated the cultural evidence. It observed the evidence given by the cultural witnesses focussed on the visual effects of the pole in front of their marae rather than the effects on the cultural values of ONFL 3. The values and attributes of the ONFL include the national grid infrastructure so that is why the effect of the proposal is *de minimis*.

(c) Policy IW 2 is not a directive policy. The Court clearly explained its approach to the cumulative effects on Ngāti Hē arising from historical matters. The effects on Ngāti Hē are only part of the wider cultural equation. Cultural values are often intangible and it is difficult to avoid something that cannot be seen.

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90 Environment Court, above n 1, at [228].

Did the Court err in its findings about adverse effects?

[54] It is clear from the evidence before the Court, as summarised above, that Ngāti Hē considers the re-alignment proposal would have an overall adverse effect compared with the status quo. In particular, they are concerned about the implications of the location of Pole 33C on their use and enjoyment of their marae and kōhanga reo, and the effects on the ONFL. The Environment Court summarised the submissions this way:

> [198] Submissions received on the notified consent application in 2018 indicated opposition to the proposal, specifically around Pole 33C, and the effects on the ONFL. Neither had been raised previously. The effects of Pole 33C were expressed in terms of cultural values, effects of noise and electro-magnetic radiation, visual effects of the pole and line, effects on kōhanga reo children, effects on the mana of the marae, ongoing cumulative effects on the Hapū of developments being imposed on their land over the last 50 or so years, which they claimed was illegal (that matter is not being pursued through this hearing), and the need for greater attention to alternatives they preferred which were bridge and sea-bed options, including a new bridge (and cycleway).

[55] That view is understandable given the history and cultural values of Ngāti Hē that are recognised in ASCV 4 and ONFL 3 of the RCEP and substantiated by the evidence of kuia and kaumātua of Ngāti Hē. It is consistent with the identification in the Tauranga City Plan of Te Ariki Pā and Maungatapu as a significant area for Ngāti Hē with special values and significance in terms of mauri, wāhi tapu, korero tuturu and whakaaronui o te Wa. It is consistent with the significance of Tauranga Moana to Ngāi Te Rangi as a physical and spiritual resource, recognised by the Crown in the Deed of Settlement. It is consistent with the objections in the Iwi Management Plans to power pylons and the emphasis of Ngāi Te Rangi's Resource Management Plan on the importance of marae. It is consistent with the Marae Sightlines Report, which was in evidence before the Environment Court and referred to by several witnesses. That report was prepared for SmartGrowth and the Combined Tāngata Whenua Forum in 2003 to review the visual setting, values and landscape context of 36 marae in the Western Bay of Plenty.[91] Its conclusions stated:[92]

> Protecting visual access and linkages to the ancestral landscape is critical to the personal and cultural wellbeing of the tāngata whenua of the rohe.

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91 Kaahuia Policy Resource Planning & Management *Marae Sightlines Report* (December 2003) (CBD 301.0143).

92 At 34–35 (CBD 301.0163–301.0164).

> Discrete taonga identifiable as landscape markers or pou whenua cue the oral traditions, poetry and waiata, traces events leaders and traditions, catalyses and facilitates the education of generation to generation and serves as personal mentor.
>
> …
>
> The sense of belonging and turangawaewae is dependent on the quality of the visual of the surrounding landscape. The challenge then is to promulgate a landscape management principle dedicated to tāngata whenua interest to protect the mnemonic – iconic values associated with their rohe and turangawaewae. Particular regard for their relationship with the landscape as a component of landscape quality and diversity is required.

[56] In its decision, the Court explicitly noted that Ngāti Hē "were opposed to the aerial transmission line and wanted a bridge or sea bed harbour crossing".[93] It recorded that "[t]hey are clear in their view that they [will be] worse off, not least because they see the proposed change as continuing to subject them to adverse effects".[94] The Court recorded that "the evidence called by Ngāi Te Rangi supported the Ngāti Hē point of view".[95] In its conclusion, the Court said:

> [264] The proposed relocation of the A-Line to an alignment which follows SH 29A and is located above the Maungatapu Bridge does not result in wholly positive effects. While it enables the removal of the existing line and ensures security of electricity supply, its location is not ideal. In particular, placing the line above the Maungatapu Bridge, with associated tall poles, creates an increased degree of new and adverse visual effects on that part of Te Awanui, particularly when seen from Maungatapu Marae and Te Kōhanga Reo o Opopoti and for some of the residents on the eastern side of SH 29A.

[57] The depth of Ngāti Hē's opposition to the proposal is reflected in their preference for the status quo over the proposal. In its Deed of Settlement with Ngāi Te Rangi, the Crown acknowledged the infrastructure networks on the Maungatapu peninsula "have had enduring negative effects on the lands, resources, and cultural identity of Ngāi Te Rangi" while making a "significant contribution . . . to the wealth and infrastructure of Tauranga".[96] The Court said:

> [209] The cultural evidence described the frustration and anger held by the hapū over many years as a result of the original construction of the A-Line across Te Ariki Pā and the earthworks for roading and bridge construction that affected their marae. We acknowledge the information and opinions provided about the history of development activities in the Ngāti Hē rohe and accept

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93 Environment Court, above n 1, at [200].
94 At [217].
95 At [205].
96 Deed of Settlement, above n 2, cls 3.15.5 and 3.16.1.

that these cultural effects have adversely affected the hapū for the last half century.

[58] Yet Ngāti Hē preferred that status quo to the proposal.

[59] The Environment Court's conclusion in relation to the cultural effects of the proposal, relevant to IW 2, or the effects on the values of the ONFL relevant to NH 4, did not reflect the evidence before it:

(a) Having set out in 67 paragraphs the extent and depth of Ngāti Hē's firm opposition to the proposal, in one paragraph the Court effectively found that the adverse cultural effects would be outweighed by the beneficial effects.[97] That involved the Court saying explicitly that it did not find that the proposed realignment would have cumulative adverse cultural effects on Ngāti Hē,[98] even though it had found Ngāti Hē clearly considers it would.[99]

(b) In relation to the ONFL, the Court said it had no doubt about the importance of Rangataua Bay to the marae and Ngāti Hē.[100] That is clearly demonstrated by the evidence before it. But the Court concluded the long-term visual effects of the works from the marae and vicinity to be "de minimis".[101]

[60] The Supreme Court's judgment in *Bryson v Three Foot Six Ltd* is the most authoritative current exploration of the parameters of questions of law.[102] In summary:

(a) Misinterpretation of a statutory provision obviously constitutes an error of law.[103]

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97 Environment Court, above n 1, at [220].
98 At [220].
99 At [217].
100 At [246].
101 At [248].
102 *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 72. Applied in an RMA context in *Estate Homes Ltd v Waitakere City Council* [2006] 2 NZLR 619 (CA) at [198].
103 At [24].

(b) Applying law that the decision-maker has correctly understood to the facts of an individual case is not a question of law. "Provided that the court has not overlooked any relevant matter or taken account of some matter which is irrelevant to the proper application of the law, the conclusion is a matter for the fact-finding court, unless it is clearly insupportable".[104]

(c) But "[a]n ultimate conclusion of a fact-finding body can sometimes be so insupportable – so clearly untenable – as to amount to an error of law, because proper application of the law requires a different answer".[105] The three rare circumstances in which that "very high hurdle"[106] would be cleared are where "there is no evidence to support the determination" or "the evidence is inconsistent with and contradictory of the determination" or "the true and only reasonable conclusion contradicts the determination".[107]

[61] I consider the Court's conclusions about the evidence were insupportable in terms of *Bryson v Three Foot Six Ltd*. The Court accurately summarised Ngāti Hē's clear opposition to the proposal on the basis of its significant adverse effects on an area of cultural significance and on the Māori values on the ONFL. But it refused to find that the proposed realignment would have cumulative adverse cultural effects on Ngāti Hē and it found that the long-term visual effects from the marae and vicinity would be "de minimis".

[62] The evidence of Ngāti Hē, as summarised above, is contradictory of those findings. The evidence is that, in Ngāti Hē's view, Pole 33C will have a significant and adverse impact on their use and enjoyment of the Marae and on their cultural relationship with Te Awanui, even taking into account the removal of the existing

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104 At [25].

105 At [26]. The sentence quoted in *Bryson* contained a semi-colon rather than the word "because", which was inserted in the application of the principle in the subsequent Supreme Court judgment in *Vodafone New Zealand Ltd v Telecom New Zealand Ltd* [2011] NZSC 138, [2012] 3 NZLR 153 at [52].

106 *Bryson v Three Foot Six Ltd*, above n 102, at [27].

107 *Edwards v Bairstow* [1956] AC 14 (HL) at 36. These can also be seen as circumstances of unreasonableness: *Hu v Immigration Protection Tribunal* [2017] NZHC 41, [2017] NZAR 508 at [28] and footnote 27.

adverse effects. For the purposes of IW 2, this constitutes a significant adverse effect on Rangataua Bay, an "area of spiritual, historical or cultural significance to tāngata whenua" identified in ASCV 4. For the purposes of NH 4, taking into account the considerations in NH 4A, it constitutes a significant adverse effect on the medium to high Māori values of Te Awanui at ONFL 3. I consider those are the true and only reasonable conclusions. Even though cultural effects may be intangible, they are no less real for those concerned, as the evidence demonstrates.

[63] The Court's approach is not saved by a distinction between the "values and attributes" of the ONFL and the ONFL itself. The Māori values of ONFL 3 are rated as medium to high and clearly encompass connections to ancestral and cultural heritage sites. The evidence is that Pole 33C would interfere with those connections with Rangataua Bay, including on the beach.

[64] As Mr Gardner-Hopkins submits, an effect of a proposal at Rangataua Bay does not have to be assessed for its impact on the whole Tauranga Harbour, just Rangataua Bay. And neither is the Court's approach saved by it being an overall assessment of cultural effects, including the effects on Ngāi Tukairangi. The Court clearly rested its conclusions on its findings that the effects on Ngāti Hē alone would be, on balance, positive for Ngāti Hē. It relied on evidence from an expert landscape architect for the councils, Ms Ryder, to that effect.[108] But that was not Ngāti Hē's view. As the Court recorded Mr Gardner-Hopkins submitted:[109]

> While the evidence for the marae trustees was not articulated in terms of cultural values of the ONFL it provides significant support for the importance of Rangataua Bay to the Marae and Ngāti Hē Hapū (and other mana whenua). It provides real world support for and elaboration on the "cultural values" as expressed in the RCEP for ONFL 3 but with greater specificity as to location and content. The evidence was genuine and heartfelt, and should not need a "cultural expert" to have to put it into "planning speak".

[65] The effect of the Court's decision was to substitute its view of the cultural effects on Ngāti Hē for Ngāti Hē's own view. The Court is entitled to, and must, assess the credibility and reliability of the evidence for Ngāti Hē. But when the considered, consistent, and genuine view of Ngāti Hē is that the proposal would have a significant

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108 Environment Court, above n 1, at [228]–[229].
109 At [245].

and adverse impact on an area of cultural significance to them and on Māori values of the ONFL, it is not open to the Court to decide it would not. Ngāti Hē's view is determinative of those findings.

[66] Deciding otherwise is inconsistent with Ngāti Hē's rangatiratanga, guaranteed to them by art 2 of the Treaty of Waitangi, which the Court was bound to take into account by s 8 of the RMA. It is inconsistent with the requirement on the Court, as a decision-maker under the RMA, to "recognise and provide for" "the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga" as a matter of national importance in s 6(e) of the RMA. It is inconsistent with the approach in *SKP Incorporated v Auckland Council*, approved by the High Court in 2018 that:[110]

> … persons who hold mana whenua are best placed to identify impacts of any proposal on the physical and cultural environment valued by them, and making submissions about provisions of the Act and findings in relevant case law on these matters.

[67] Deciding otherwise is also inconsistent with the requirement of Policy IW 5 of the RCEP, and similar statements in Policies IW 2B(b) and IW 3B(e) of the RPS. Contrary to the Court's finding, the RCEP is specific enough about the cultural values and attributes of Rangataua Bay and Te Awanui. Policy IW 5 states:[111]

> Decision makers shall recognise that only tāngata whenua can identify and evidentially substantiate their relationship and that of their culture and traditions with their ancestral lands, water, sites, wāhi tapu and other taonga. Those relationships must be substantiated for evidential purposes by pūkenga, kuia and/or kaumātua.

[68] Mr Taikato and Mr Ririnui are kaumātua. Ms Walker and Ms Gardiner are kuia. The evidence of Ngāti Hē is clear.

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110 *SKP Incorporated v Auckland Council*, above n 89, at [157]. On appeal, Gault J considered the general statement of position in support of the proposal by the party taken to represent mana whenua "resolved any cultural effects issue". (He accepted that finer grained evidence would be required in an application for re-hearing where two entities were claiming mana whenua with competing evidence on cultural effects): *SKP Inc v Auckland Council* [2020] NZHC 1390, (2020) 21 ELRNZ 879 at [57].

111 Bay of Plenty Regional Council *Proposed Bay of Plenty Regional Coastal Environment Plan (RCEP)* at 38 (CBD 302.0302).

[69] I do not readily reach a different view of the facts to that of the Environment Court. But I consider proper application of the law requires a different answer from that reached by the Court regarding the significant adverse effect of the proposal on an area of cultural significance to Ngāti Hē and on the Māori values of the ONFL. Accordingly, the Court's findings about those matters constitute an error of law. Whether that matters to the outcome of the appeal depends on how material the error was, which I consider in the context of the remaining issues.

Issue 3: Did the Court err in its approach to pt 2 of the RMA?

[70] This ground of appeal is whether the Court erred in not applying pt 2 of the RMA. It is integrally related to the submissions of counsel about whether the Court should have, and did, apply an "overall judgment" approach.

Part 2 of the RMA and the former overall judgment approach

[71] Part 2 of the RMA provides the overall sustainable management purpose and principles of the Act. Section 5(1) in pt 2 states that the purpose of the Act "is to promote the sustainable management of natural and physical resources". Section 5(2) explains that "sustainable management" means "managing the use, development, and protection of natural and physical resources in a way … which enables people and communities to provide for their "social, economic, and cultural well-being" while:

> (a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
>
> (b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
>
> (c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.

[72] The Act then provides for a cascading hierarchy of legal instruments in "a three-tiered management system" which give effect to pt 2.[112] A document in a tier must give effect to, or not be inconsistent with, those in the tiers above. The highest tier is national policy statements, which set out objectives and identify policies to

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[112] *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 [*EDS v King Salmon*] at [10] and [30].

achieve them. The next tier are regional policy instruments, which identify objectives, policies and methods of achieving them including rules, that are increasingly detailed as to content and location.

[73] The tiers of planning instruments are the legal instruments which "flesh out" how the purpose and principles in pt 2 apply in a particular case in increasing detail and specificity.[113] The Supreme Court explained in *EDS v King Salmon* the importance of attending to the wording of the planning instruments, as with any law:

> [129] When dealing with a plan change application, the decision-maker must first identify those policies that are relevant, paying careful attention to the way in which they are expressed. Those expressed in more directive terms will carry greater weight than those expressed in less directive terms. Moreover, it may be that a policy is stated in such directive terms that the decision-maker has no option but to implement it. So, 'avoid' is a stronger direction than 'take account of'. That said however, we accept that there may be instances where particular policies in the NZCPS 'pull in different directions'. But we consider that this is likely to occur infrequently, given the way that the various policies are expressed and the conclusions that can be drawn from those differences in wording. It may be that an apparent conflict between particular policies will dissolve if close attention is paid to the way in which the policies are expressed.
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> [130] Only if the conflict remains after this analysis has been undertaken is there any justification for reaching a determination which has one policy prevailing over another. The area of conflict should be kept as narrow as possible. The necessary analysis should be undertaken on the basis of the NZCPS, albeit informed by s 5. As we have said, s 5 should not be treated as the primary operative decision-making provision.
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> [131] A danger of the 'overall judgment' approach is that decision-makers may conclude too readily that there is a conflict between particular policies and prefer one over another, rather than making a thoroughgoing attempt to find a way to reconcile them…

[74] So, although pt 2 is relevant to decision-making, because it sets out the RMA's overall purpose and principles, the basis for decision-making is the hierarchy of planning documents.[114] The Supreme Court noted in *EDS v King Salmon* that pt 2 of the RMA may be relevant if a planning document, there the NZCPS, does not "cover the field" or to assist in a purposive interpretation if there is uncertainty as to the meaning of particular policies in the NZCPS.[115]

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113 At [151].
114 At [151].
115 At [88].

[75] There has been some debate as to the implications for this approach of following the subsequent Court of Appeal judgment in *RJ Davidson Family Trust v Marlborough District Council*.[116] There, the Court of Appeal accepted that, in considering a resource consent application compared with a plan change proposal, a decision-maker must have regard to the provisions of pt 2 when appropriate.[117] The Court said that applications for resource consent "cannot be assumed" to "reflect the outcomes envisaged by pt 2" and "the planning documents may not furnish a clear answer to whether the consent should be granted or declined".[118] It did not consider that the Supreme Court's rejection of the "overall judgment" approach prohibited consideration of pt 2 in the context of resource consent applications.[119]

[76] There are obiter comments by the Court of Appeal in *RJ Davidson Family Trust* that appear to suggest the Supreme Court's proscription of the "overall judgment" approach in *EDS v King Salmon* might not apply outside a context that engages the NZCPS.[120] However, this case does engage the NZCPS. It is clear that, where the NZCPS is engaged, any consent application will necessarily be assessed applying the provisions of the NZCPS and other relevant plans, and also pt 2 if it is otherwise unclear whether the consent should be granted or not.[121] Part 2 cannot be used "for the purpose of subverting a clearly relevant restriction in the NZCPS".[122] Where there is "doubt" as to the outcome of the consent application on the basis of the NZCPS, recourse to pt 2 is necessary.[123] Recourse to pt 2 may or may not assist, depending on the provisions of the relevant plan.[124]

[77] In any case, I read the Court of Appeal's comments as being focussed on permitting reference to pt 2 of the RMA. I do not read the Court of Appeal to be endorsing the previous approach of courts simply listing relevant considerations, including provisions of planning documents, and stating a conclusion under the rubric

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116 *RJ Davidson Family Trust v Marlborough District Council* [2018] NZCA 316, [2018] 3 NZLR 283.
117 At [47].
118 At [51].
119 At [66].
120 At [67]–[69] and [71].
121 At [71] and [73].
122 At [71].
123 At [75].
124 At [75].

of an "overall judgment" in relation to consent applications that do not engage the NZCPS. The Supreme Court was clear about the obvious defects of that approach.[125] It is inconsistent with the text and purpose of the RMA, inconsistent with the need to give meaning to the text of the plans as the legal instruments made under the RMA, and inconsistent with the rule of law. The Court of Appeal's statement, that in all cases not involving the NZCPS "the relevant plan provisions should be considered and brought to bear on the application" makes it clear it does not advocate for that.[126] Rather, the Court considered there must be "a fair appraisal of the objectives and policies [of a plan] read as a whole".[127] While the Court of Appeal expanded on the use of pt 2 of the RMA, I do not consider its judgment contradicted the reasoning of the Supreme Court in warning about the defects of the overall judgment approach in relation to particular consent applications.

[78] This was illustrated in *Royal Forest and Bird Protection Society of New Zealand Inc v Bay of Plenty Regional Council*.[128] That case involved a challenge to the formulation of natural heritage policies for the Regional Coastal Environment Plan (RCEP) on the basis of inconsistency with the NZCPS. Wylie J held:

(a) The Environment Court was not entitled to focus on the unchallenged provisions of the planning document at issue, or the one immediately above it and ignore or gloss over higher order planning documents.[129]

(b) The Court erred in resolving tensions in RCEP policies primarily by reference to the RCEP's objectives, with only limited reference to the RPS and NZCPS.[130] The Court "failed to make 'a thoroughgoing attempt to find a way to reconcile' the provisions it considered to be in tension".[131]

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125 *EDS v King Salmon*, above n 112, at [131]–[140].
126 *RJ Davidson Family Trust v Marlborough District Council,* above n 116, at [73].
127 At [73], citing *Dye v Auckland Regional Council* [2002] 1 NZLR 337 (CA) at [25].
128 *Royal Forest and Bird Protection Society of New Zealand Inc v Bay of Plenty Regional Council* [2017] NZHC 3080, [2019] NZRMA 1.
129 At [84].
130 At [89].
131 At [98], citing *EDS v King Salmon*, above n 112, at [131].

(c) The "proportionate" approach adopted by the Environment Court was an overall judgment approach, "albeit by a different name", of the sort that had been "roundly rejected" by the majority of the Supreme Court in *EDS v King Salmon*.[132] It was not available to the Court to suggest that the benefits and costs of regionally significant infrastructure that could have adverse effects on areas of Indigenous Biological Diversity, which are areas with outstanding natural character in the coastal environment, should be assessed on a case-by-case basis having regard to all relevant factors.[133]

(d) Accordingly, the Environment Court erred in:

(i) approving policies and a rule that did not give effect to the requirements set out in policies 11(a), 13(1)(a) and 15(a) of the NZCPS;[134]

(ii) by failing to consider the directive nature of Policies CB 2B and CE 6B of the RPS;[135] and

(iii) by failing to recognise that the objectives in the RCEP recognise that "provision needs to be made for regionally significant infrastructure, but not in all locations in the coastal marine area".[136]

[79] The Supreme Court's decision in *EDS v King Salmon*, and the Court of Appeal's decision in *RJ Davidson*, requires decision-makers to focus on the text and purpose of the legal instruments made under the RMA. A decision-maker considering a plan change application must identify the relevant policies and pay careful attention to the way they are expressed.[137] As with any legal instrument, the text of the

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132 At [103]
133 At [106].
134 At [123].
135 At [129].
136 At [135].
137 At [128]–[129].

instrument may dictate the result. Where policies pull in different directions, their interpretation should be subjected to "close attention" to their expression. Where there is doubt after that, recourse to pt 2 is required.[138] The same approach, of carefully interpreting the meaning and text of the relevant policies, is required in applying them to consent applications, for the same reasons. That is consistent with the standard purposive interpretation of enactments, as summarised by the Supreme Court in *Commerce Commission v Fonterra Co-operative Group Ltd*:[139]

> [22] It is necessary to bear in mind that s 5 of the Interpretation Act 1999 makes text and purpose the key drivers of statutory interpretation. The meaning of an enactment must be ascertained from its text and in the light of its purpose. Even if the meaning of the text may appear plain in isolation of purpose, that meaning should always be cross checked against purpose in order to observe the dual requirements of s 5. In determining purpose the court must obviously have regard to both the immediate and the general legislative context. Of relevance too may be the social, commercial or other objective of the enactment.

The Environment Court's treatment of pt 2

[80] Here, the Environment Court held, with reference to *RJ Davidson*, that it is "necessary to have regard to Part 2, when it is appropriate to do so", but reference to pt 2 is "unlikely to add anything" where it is clear a plan has been competently prepared having regard to pt 2.[140] "[A]bsent such assurance, or if in doubt, it will be appropriate and necessary to do so".[141] The Court considered submissions about whether reference to pt 2 was required here, in particular regarding the relationship between the NPSET and NZCPS, or whether those instruments were clear and had been reconciled in the formulation of the RCEP.[142] The Court considered evidence of expert planning witnesses about whether to refer to pt 2,[143] which is irrelevant and an error given that the necessity or otherwise of reference to pt 2 is an issue of law. The Court said:

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138 At [75].

139 *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22].

140 Environment Court, above n 1, at [59].

141 At [59].

142 At [60]–[67], citing *Royal Forest and Bird Protection Society of New Zealand Inc v Bay of Plenty Regional Council*, above n 128, and related Environment Court judgments.

143 At [66].

> [68] We agree that the RCEP is comprehensive, has been tested through hearing and appeal processes and provides a clear policy framework and consenting pathway for these applications. Accordingly, our evaluation of the statutory provisions focusses on the relevant policies in the RCEP. We also address the higher order policy documents and the District Plan.

[81] The Court acknowledged the need to give effect to national policy statements according to their particular terms, rather than on the basis of a broad overall judgment.[144]

[82] In the final two paragraphs of its concluding reasoning, after rejecting the argument that the NZCPS required consent to be declined, the Court said:

> [269] The NPSET, the RCEP and the District Plan also contain relevant objectives and policies to which we must have regard under s 104(1)(b). The regional and district plans generally treat both the protection of ONFLs and the provision of network infrastructure as desirable, but do not go further to particularise how those broad objectives or policies are to be pursued or how potential conflict between them is to be resolved. Policy 6 of the NPSET guides us to using a substantial upgrade of transmission infrastructure as an opportunity to reduce existing adverse effects of transmission, and the proposal is consistent with that. There is no guidance in either the NPSET or the NZCPS as to how potential conflict between those national policies is to be resolved.
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> [270] As noted above, where a decision-maker is faced with a range of competing concerns, and no possible outcome would be wholly without adverse effects, we must reach a decision as to which outcome better promotes the sustainable management of natural and physical resources, as defined in s 5 RMA. In the absence of any practicable alternative, the obvious counterfactual to the proposal is the status quo. In our judgment, the removal of the existing line and its relocation within the Road zone applying to SH 29A and above the Maungatapu Bridge is more appropriate overall and therefore better than leaving the line where it is.

Submissions on pt 2 and the overall judgment approach

[83] Mr Gardner-Hopkins, for TEPS and Ngāti Hē, submits the Court erred by failing to assess the proposal against pt 2, including ss 6(3), 7(a) and 8, directly. The nature of the issues, the meaning of the policies and the relationship between the NZCPS and NPSET made it "appropriate and necessary" for it to do so. He submits the Court erred in applying an overall judgment of the proposal against s 5 selectively, without analysis, and without consideration of the balance of pt 2. *RJ Davidson* does

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144 At [92].

not mean that reference to pt 2 only occurs if there is a problem. Rather, pt 2 and superior planning instruments must be taken into account in a difficult case, as it was here. He submits that pt 2 should be used in a purposive interpretation of the terms in the RCEP.

[84] Mr Beatson, for Transpower, submits:

(a) *EDS v King Salmon* rejected the previous "overall broad judgment approach". *RJ Davidson* confirms recourse to pt 2 is only necessary where there is a question as to whether a plan has been competently prepared having regard to pt 2. The Court was correct that it is up to a decision-maker to give competing policies such weight as it thinks necessary in the context.

(b) The Court found there is no need for an overall evaluation under pt 2 at the consenting stage where plans have been prepared having regard to pt 2. Here, the Court found the RCEP is comprehensive and provides a clear policy and consenting pathway for the project, so it focussed on the RCEP policies. The relevance to a proposal of higher order documents, which have been reconciled and prepared in accordance with pt 2, does not justify concluding it is unclear as to whether consent should have been granted. No defect within the RCEP has been identified that makes recourse to pt 2 necessary. The Court's concluding paragraphs were not attempting to undertake a pt 2 analysis.

(c) Regardless of its decision that recourse to pt 2 was not necessary, the Court carefully set out the cultural evidence provided by witnesses, the consultation undertaken by Transpower, the potential cumulative cultural effects and how the cultural effects on both hapū would be impacted by the proposal. That is the same analysis that would be undertaken under ss 6(e), 7(a) and 8. Addressing those sections directly would have added nothing. Sections 7(b), 7(c) and 7(f) of pt 2 of the RMA would also be relevant. The conclusions reached would inevitably have been the same.

[85] Ms Hill, for the Councils, submits the Environment Court exercised a discretionary judgment not to consider the proposal against pt 2.[145] As the Court of Appeal held in *RJ Davidson*, assessment against pt 2 is only necessary where a plan has not been competently prepared in accordance with pt 2. The Court correctly observed that, in applying the policies, no specific outcomes are particularised and no outcome that would wholly avoid adverse effects was possible.[146] Its consideration of s 5 did not purport to be an assessment against pt 2.

Did the Court err in its approach to pt 2?

[86] I outlined above the proper approach to pt 2 of the RMA and the legal defects of the overall judgment approach. Consistent with *EDS v King Salmon* and *RJ Davidson Family Trust,* a Court will refer to pt 2 if careful purposive interpretation and application of the relevant policies requires it. That is close to, but not quite the same as, Mr Gardner-Hopkins' submission that recourse to pt 2 is required "in a difficult case". To the extent that Mr Beatson's and Ms Hill's submissions attempt to confine reference to pt 2 only to situations where a plan has been assessed as "competently prepared", I do not accept them.

[87] Mr Beatson is correct that the Court here considered that the RCEP is comprehensive and provides a clear policy framework and consenting pathway for the proposal.[147] The Court also correctly acknowledged the need to give effect to the National Policy Statement according to their particular terms "rather than on the basis of a broad overall judgment".[148] But the Court did not provide the careful analysis required of how the relevant planning instruments should be interpreted and applied to the proposal. It stated that the planning instruments contain "relevant objectives and policies to which we must have regard".[149] That generic characterisation recalls the overall judgment approach that the Supreme Court ruled out in *EDS v King Salmon*. The planning instruments are more than "relevant" and the Court must do more than "have regard" to them.

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145 Environment Court, above n 1, at [59]–[68].
146 At [269].
147 At [68].
148 At [92].
149 At [269].

[88] In the last two paragraphs of its reasoning, the Court characterised the regional and district plans as generally treating as desirable both the protection of ONFL and provision of network infrastructure. It characterised Policy 6 of the NPSET as guiding it to reduce existing adverse effects of transmission. But the Court said the NPSET and NZCPS do not provide guidance as to how potential conflict between them should be resolved. So it fell back on reaching "a decision as to which outcome better promotes the sustainable management of natural and physical resources, as defined in s 5 RMA".[150] In only two further sentences, the Court made a "judgment" that the proposal was "more appropriate overall" than the status quo.[151] This is effectively, and almost explicitly, the application of an overall judgment approach. As such, it was an error of law.

[89] Instead, what the Court was required to do was to carefully interpret the meaning of the planning instruments it had identified, the RCEP in particular, and apply them to the proposal. If the text of the RCEP was not sufficient to do that, as the Court considered they were not, it was required to have recourse to the higher-level instruments such as the NZCPS and NPSET, and to pt 2 of the Act. The Court did consider the NZCPS and NPSET and found them insufficient. Yet all parties agreed the Court did not have recourse to pt 2.

[90] The Court's approach to pt 2, and its use of an overall judgment approach, was a legal error. Whether that makes sufficient difference to the outcome to sustain the appeal depends on the outcome of that exercise, which I examine next.

Issue 4: Did the Court err in interpreting and applying the planning instruments?

[91] The submissions on this ground of appeal centred on whether one national policy statement, the NZCPS, is inconsistent or takes priority over another, the NPSET. Lying behind that were submissions as to whether the NZCPS or the RCEP contains directive provisions determining the result of the application.

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150 At [270].
151 At [270].

The RMA and bottom lines

[92] The Supreme Court in *EDS v King Salmon* clarified that a policy of preventing adverse effects of development on particular areas is consistent with the sustainable management purpose of the RMA.[152] It held that "avoid", in s 5 and the NZCPS, is a strong word that has its ordinary meaning of "not allowing" or "preventing the occurrence of".[153] The use in s 5 of "remedying and mitigating" indicates that developments with adverse effects could be permitted if they were mitigated or remedied, assuming they were not avoided.[154]

[93] Specific decisions depend on the application of the hierarchy of planning instruments. Accordingly, the RMA envisages that planning documents may (or may not) contain "environmental bottom lines" that may determine the outcome of an application.[155] This illustrates why it is important to focus on, and apply, the text of the planning instruments rather than simply mentioning them and reaching some "overall judgment".[156]

[94] The RMA also envisages that there may be cultural bottom lines. As Whata J stated recently in *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd*, "… there is comprehensive provision within the RMA for Māori and iwi interests, both procedurally and substantively".[157] The cascading hierarchy of the RMA, and the legal instruments under it, accord an important place to the cultural values of Māori. That is reflected in pt 2 of the Act:

(a) The core purpose of the Act, stated in s 5, is to promote sustainable management by managing the "use, development and protection of resources in a way which enables people and communities" to provide for their "social, economic, and cultural well-being" at the same time as sustaining the potential of resources to meet the reasonably foreseeable needs of future generations.

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152 *EDS v King Salmon*, above n 112, at [24](d).
153 At [24](b), [96] and [126].
154 At [24](b).
155 At [47].
156 At [39]–[41].
157 *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd* [2020] NZHC 2768 at [29].

(b) The requirements on all persons exercising functions and powers under the Act in relation to "managing the use, development, and protection of natural and physical resources":

(i) to "recognise and provide for" "the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga" as one matter of national importance in s 6(e);

(ii) to "have particular regard to" kaitiakitanga in s 7(a); and

(iii) to "take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi)" in s 8.

Māori values in the RMA recognised in case law

[95] The implications of those pt 2 provisions have been recognised in case law. In 2000, in his last sitting in the Judicial Committee of the Privy Council in *McGuire v Hastings District Council*, Lord Cooke described pt 2 of the RMA as "strong directions, to be borne in mind at every stage of the planning process".[158] They mean "that special regard to Māori interests and values is required in such policy decisions as determining the routes of roads".[159] In that case, which involved a challenge to the designation of a road through Māori land, the Privy Council held "if an alternative route not significantly affecting Maori land which the owners desire to retain were reasonably acceptable, even if not ideal, it would accord with the spirit of the legislation to prefer that route".[160] This principle would extend to not constructing the new route at all in that case if "other access was reasonably available".[161] All authorities making decisions are therefore "bound by certain requirements, and these include particular sensitivity to Maori issues".[162] The Judicial Committee was satisfied that Māori land rights are adequately protected by the RMA.[163]

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158 *McGuire v Hastings District Council* [2000] UKPC 43, [2002] 2 NZLR 577 at [21].
159 At [21].
160 At [21].
161 At [21].
162 At [21].
163 At [29].

[96] Similarly, in 2014 the Supreme Court in *EDS v King Salmon* affirmed that "the obligation in s 8 to have regard to the principles of the Treaty of Waitangi will have procedural as well as substantive implications, which decision-makers must always have in mind".[164] In its reasoning rejecting the "overall judgment approach", the Supreme Court held that s 58 of the RMA was inconsistent with the NZCPS being no more than a statement of relevant considerations.[165] Section 58 contemplates the possibility, depending on the meaning of the planning instruments, that there might be absolute protection from the adverse effects of development — a potential environmental bottom line.

[97] The Supreme Court's emphasis on s 58 is also relevant to this case. Section 58(1)(b) empowers a NZCPS to state objectives and policies about "the protection of the characteristics of the coastal environment of special value to the tangata whenua including waahi tapu, tauranga waka, mahinga mataitati, and taonga raranga" and, in s 58(1)(gb), "the protection of protected customary rights". This indicates that cultural bottom lines, as well as environmental bottom lines, can be provided for under the NZCPS. Whether there are particular cultural bottom lines depends on the text and interpretation of the relevant planning instruments.

[98] In 2020, the Court of Appeal in *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* (currently under appeal to the Supreme Court), the Court of Appeal considered an appeal of decisions on consent applications under the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012.[166] The Court held the decision-maker erred by "failing to give separate and explicit consideration" to environmental bottom lines; failing to address the effects of the proposals on the cultural and spiritual elements of kaitiakitanga; and in failing to identify relevant environmental bottom lines under the NZCPS and consider whether the proposal would be consistent with them.[167]

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164 *EDS v King Salmon*, above n 112, at [88].
165 At [117].
166 *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board,* above n 89.
167 At [12](a), [12](c), and [12](d) and [201].

[99] The Court held the interests of Māori in relation to all taonga, referred to in the Treaty of Waitangi and regulated by tikanga, were included in a statutory requirement to take into account the effects of activities on "existing interests".[168] It held it was necessary for the decision-maker to "squarely engage with the full range of customary rights, interests and activities identified by Māori as affected by the TTR proposal, and to consider the effect of the proposal on those existing interests".[169] The Court stated:

> [174] In this case, the DMC needed to engage meaningfully with the impact of the TTR proposal on the whanaungatanga and kaitiakitanga relationships between affected iwi and the natural environment, with the sea and other significant features of the marine environment seen not just as physical resources but as entities in their own right – as ancestors, gods, whānua – that iwi have an obligation to care for and protect.

[100] Also in 2020, in *Ngāti Maru v Ngāti Whātua Ōrakei Whaia Maia Ltd*, after comprehensively traversing the ways in which the RMA recognises Māori cultural values, Whata J observed that:[170]

> [73] … the obligation 'to recognise and provide for' the relationship of Māori and their culture and traditions with their whenua and other tāonga must necessarily involve seeking input from affected iwi about how their relationship, as defined by them in tikanga Māori, is affected by a resource management decision. …
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> …
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> [102] … where an iwi claims that a particular resource management outcome is required to meet the statutory directions at ss 6(e) , 6(g) 7(a) and 8 (or other obligations to Māori), resource management decision-makers must meaningfully respond to that claim. …

The NZCPS and NPSET

[101] The NZCPS and NPSET are national policy statements which bear on the interpretation of lower order planning instruments. The NZCPS of 1994 was the first national policy statement formulated. It was substantially revised in 2010, under s 58 of the RMA. Under s 56, the purpose of a NZCPS is "to state objectives and policies in order to achieve the purpose of this Act in relation to the coastal environment of New Zealand". Under ss 62(3), 67(3) and 75(3), regional policy statements, regional plans and district plans must "give effect" to the NZCPS. Its 29 policies support seven

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168 At [163] and [177].
169 At [170].
170 *Ngāti Maru v Ngāti Whātua Ōrakei Whaia Maia Ltd,* above n 157.

stated objectives. The relevant Objectives and Policies are set out in the Annex to this judgment. As explored further below they involve three sets of relevant values: protection of natural features and landscape; culture; and social, economic, and cultural values.

[102] Policy 15 of the NZCPS was a particular focus in *EDS v King Salmon* and is in this case too. The Supreme Court held that:

(a) Policy 15 of the NZCPS, in relation to natural features and landscapes, states a policy of directing local authorities to avoid adverse effects of activities on natural character in areas of outstanding natural landscapes in the coastal environment.[171]

(b) The overall purpose of the direction is to "protect the natural features and natural landscapes (including seascapes) from inappropriate subdivision, use and development".[172] It provides a graduated scheme of protection that requires avoidance of adverse effects in outstanding areas but allows for avoidance, mitigation or remedying in others.[173]

(c) The broad meaning of "effect" in s 3 must be assessed against the opening words of the policy.[174] Consistent with Objectives 2 and 6, "avoid" in Policy 15 bears its ordinary meaning as stated above.[175] Similarly, "inappropriate" use and development should be assessed against the characteristics of the environment that the Policy seeks to preserve.[176]

(d) Policies 15(a) and 15(b) provide "something in the nature of a bottom line".[177] It considered "there is no justification for reading down or otherwise undermining the clear terms" of the policy.[178]

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171 *EDS v King Salmon*, above n 112, at [58] and [61].
172 At [62].
173 At [90].
174 At [145].
175 At [96].
176 At [100]–[102] and [126].
177 At [132].
178 At [146].

[103] The NPSET was the second national policy statement formulated. Under s 45 of the RMA its purpose is to "state objectives and policies for matters of national significance that are relevant to achieving the purpose of this Act". Sections 62(3), 67(3) and 75(3) also require regional policy statements, regional plans and district plans to effect to it. The NPSET sets out the objectives and policies for managing the electricity transmission network under the RMA. The relevant Objectives and Policies are also set out in full in the Annex to this judgment. They set out relevant considerations for, and impose requirements on, decision-makers.

The relationship between the NZCPS and NPSET

[104] In an interim judgment in *Transpower New Zealand Ltd v Auckland Council*, Wylie J considered the respective relationships of the NZCPS and NPSET to the purposes of the RMA.[179] He noted that documents lower in the planning hierarchy are required to give effect to both of them and he considered *EDS v King Salmon*.[180] He noted that a national policy statement "can provide that its policies are simply matters decision-makers must consider in the appropriate context, and give such weight as they consider necessary" and accepted that the NPSET does so provide.[181] Before undertaking a detailed analysis of the text of the NPSET policies, regional policy statement and district plan provisions relevant there, he said:

> [83] I also agree with Ms Caldwell and Mr Allan that the New Zealand Coastal Policy Statement at issue in *King Salmon*, and the NPSET, derive from different sections of the Act, which use different terms. Section 56 makes it clear that the purpose of the New Zealand Coastal Policy Statement is to state policies in order to achieve the purpose of the Act. In contrast, the NPSET was promulgated under s 45(1). Its purpose is to state objectives and policies that are relevant to achieving the purpose of the Act. Section 56 suggests that the New Zealand Coastal Policy Statement is intended to give effect to the Part 2 provisions in relation to the coastal environment. A national policy statement promulgated pursuant to s 45 contains provisions relevant to achieving the Resource Management Act's purpose. The provisions are not an exclusive list of relevant matters and they do not necessarily encompass the statutory purpose. In this regard I note that a number of the policies relied on in this case, including Policy 10, start with the words "(i)n achieving the purpose of the Act".
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> [84] I accept the submission advanced by Ms Caldwell and Mr Allan that the NPSET is not as all embracing of the Resource Management Act's purpose set

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179 *Transpower New Zealand Ltd v Auckland Council* [2017] NZHC 281 at [77]–[84].
180 At [77]–[78].
181 At [82].

> out in s 5 as is the New Zealand Coastal Policy Statement. In my judgment, a decision-maker can properly consider the Resource Management Act's statutory purpose, and other Part 2 matters, as well as the NPSET, when exercising functions and powers under the Resource Management Act. They are not however entitled to ignore the NPSET; rather they must consider it and give it such weight as they think necessary.

Regional and District planning instruments

[105] Regional and District planning instruments sit below the national policy statements but are more detailed in their provisions. The RCEP is required by s 67(3)(b) of the RMA to give effect to the NZCPS and national policy statements including the NPSET. The RCEP sets out issues, objectives and policies in relation to the coastal environment in the Bay of Plenty regarding the same three sets of values as the NZCPS and taking into account the requirements of the NPSET. The relevant provisions of the RCEP involve the same three sets of values involved in the NZCPS noted above.

[106] Consent authorities consider the granting of consents under s 104 of the RMA, which provides that "the consent authority must, subject to Part 2, have regard to: actual and potential effects on the environment of allowing the activity; relevant provisions of planning instruments; and any other matter it considers relevant and necessary". Here, the Resource Management (National Environmental Standards for Electricity Transmission Activities) Regulations 2009 (NESETA Regulations) specify what activities relating to existing transmission lines are permitted, controlled, restricted discretionary, discretionary, or non-complying. They are national environmental standards made under s 43 of the RMA and take precedence over the District Plan, under s 43B. Transpower's proposal here involved controlled, restricted discretionary or discretionary activities under the NESETA Regulations.[182]

[107] The Tauranga City Plan is a District Plan for the purposes of s 43AA of the RMA. Its purpose is to enable the Council to carry out its functions under the RMA. Relevant provisions are included in the Annex. They involve the same three sets of values involved in the NZCPS and RCEP.

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[182] Environment Court, above n 1, at [55] and Table 1.

The Court's treatment of the planning instruments

[108] The Environment Court agreed that the RCEP is comprehensive, has been tested and "provides a clear policy framework and consenting pathway for these applications."[183] Accordingly, its "evaluation of the statutory provisions focusses on the relevant policies in the RCEP". It also addressed the higher order policy documents and the District Plan.

[109] After outlining the NPSET and the NZCPS in its decision, the Environment Court noted the *Transpower New Zealand Ltd v Auckland Council* decision. Despite its later recourse to an overall judgment approach, the Court said:

> [77] There is no basis on which to prefer or give priority to the provisions of one National Policy Statement over another when having regard to them under s 104(1)(b) RMA, much less to treat one as "trumping" the other. What is required by the Act is to have regard to the relevant provisions of all relevant policy statements. Where those provisions overlap and potentially pull in different directions, then the consent authority or this Court on appeal, must carefully consider the terms of the relevant policies and how they may apply to the relevant environment, the activity and the effects of the activity in the environment.

[110] The Court noted no party had identified any policy in the RPS which set out anything not otherwise found in the other planning instruments. It noted the RCEP gives effect to the RPS through more specific direction, and there was no contest in relation to any of the RPS provisions.[184] Therefore, it did not quote any of the RPS provisions. It set out relevant provisions of the RCEP. It considered it should have regard to the District Plan and iwi management plans and outlined some of their relevant provisions.

[111] The Court addressed the issue of whether the proposal is a maintenance project or an upgrade, and whether it includes new infrastructure, for the purposes of Policies 4 and 6 of the NPSET.[185] It agreed with expert evidence that the proposal is a "substantial" rather than "major" upgrade and that it is not new infrastructure.[186] The

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183 At [68].
184 At [78].
185 From [145].
186 At [150].

Court also said it was guided by Policies 7 and 8 of the NPSET but concluded those policies were not determinative. They are expressed to deal with the planning and development of the transmission system, which "indicates these policies relate to future and new works rather than to upgrades of the existing system".[187]

[112] The Court said its assessment of cultural effects was not assisted by the RCEP because it "is not specific about cultural values and attributes of Rangataua Bay / Te Awanui".[188]

[113] In its concluding reasoning, the Court said:

> [259] … While a range of competing concerns have been raised, and no possible outcome would be wholly without adverse effects, we must reach a decision as to which outcome better promotes the sustainable management of natural and physical resources, as defined in s 5 RMA.
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> …
>
> [267] The relevant policy framework applicable to the assessment of these effects of the proposal is extensive, as set out earlier in this decision, and is not limited to Policy 15 of the NZCPS. In having regard to the statutory planning documents under s 104(1)(b) RMA we must undertake a fair appraisal of the objectives and policies read as a whole.[189] We do not accept the argument that Policy 15 would require consent to be declined or the proposal to be amended on the basis that it has adverse effects on the ONFL. As a policy, it does not have that kind of regulatory effect. In its terms, it requires avoidance of adverse effects of activities on the ONFL to protect the natural landscape from inappropriate use and development. The policy does not entail that any use or development in an ONFL would be inappropriate. The identification of what is inappropriate requires a consideration of what values and attributes of the environment are sought to be protected as an ONFL and what the effects of the use or development may be on the things which are to be protected.
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> [268] It is important to note that this is not a proposal to undertake and use a new intensive commercial development in an ONFL. The existing environment of the ONFL includes the existing bridge and national grid infrastructure.
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> [269] The NPSET, the RCEP and the District Plan also contain relevant objectives and policies to which we must have regard under s 104(1)(b). The regional and district plans generally treat both the protection of ONFLs and the provision of network infrastructure as desirable, but do not go further to particularise how those broad objectives or policies are to be pursued or how

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187 At [152].
188 At [194].
189 *Dye v Auckland Regional Council*, above n 127, at [25]; and *RJ Davidson Family Trust v Marlborough District Council*, above n 116, at [73].

> potential conflict between them is to be resolved. Policy 6 of the NPSET guides us to using a substantial upgrade of transmission infrastructure as an opportunity to reduce existing adverse effects of transmission, and the proposal is consistent with that. There is no guidance in either the NPSET or the NZCPS as to how potential conflict between those national policies is to be resolved.
>
> [270] As noted above, where a decision-maker is faced with a range of competing concerns, and no possible outcomes would be wholly without adverse effects, we must reach a decision as to which outcome better promotes the sustainable management of natural and physical resources, as defined in s 5 RMA. In the absence of any practicable alternative, the obvious counterfactual to the proposal is the status quo. In our judgment, the removal of the existing line and its relocation within the Road zone applying to SH 29A and above the Maungatapu Bridge is more appropriate overall and therefore better than leaving the line where it is.

Submissions on application of the planning instruments

[114] Mr Gardner-Hopkins, for TEPS and Ngāti Hē, submits:

(a) The Court erred in not giving the more directive provisions of the NZCPS priority over the less directive provisions of the NPSET. NZCPS is a mandatory document at the top of the hierarchy of planning instruments with the purpose under s 56 of achieving the purpose of the RMA. It could have, but did not, refer specifically to NPSET. The NPSET states objectives and policies that are only relevant to achieving the purpose of the RMA. The NPSET is not as all-embracing of the RMA's purpose. It was intended to be only a guide for decision-makers — a relevant consideration, subject to pt 2, which is not to prevail over the RMA's purpose. Accordingly, if one national policy statement has to give way to another, the NPSET must give way to the NZCPS, particularly Policy 15.

(b) The Court erred in finding that the proposal constitutes a substantial, rather than a major, upgrade and that it is not new infrastructure. This follows from the extent of works proposed in a different location, amounting to almost 40 new structures and several kilometres of lines, the benefit to mana whenua as promoted by Transpower, and the major nature of some of the new poles such as Poles 33C and 33D.

Accordingly, the Court should have applied Policy 4 of the NPSET, which contains an "avoid" directive, rather than Policy 6.

(c) The Court failed to have regard to Policy IW 2 of the RCEP and its directive to avoid adverse effects on sites of cultural significance or to be sure that it is not possible to avoid them or not practicable to minimise them. It also failed to apply NH 4, which provides that adverse effects on the values and attributes of ONFLs must be avoided. Policy SO 1 confirms the primacy of IW 2 and NH 4.

[115] Mr Beatson, for Transpower, submits:

(a) There is no difference in the status of the NZCPS and the NPSET. When they are both engaged and read together, the specific overrides the general, according to *EDS v King Salmon* and *Transpower New Zealand Ltd v Auckland Council.* Therefore, the "reduce existing adverse effects" language in Policy 6 and "seek to avoid" language of Policy 8 of the NPSET should be preferred over the NZCPS "avoid". Making anything of the silence of NZCPS as to NPSET is a speculative and fruitless exercise.

(b) There is no bottom line, or absolute policy of avoidance of all adverse effects, in Policy 15(a) of the NZCPS. That policy directs that the adverse effects of *inappropriate* development should be avoided, which is context-dependent. The Court assessed the proposal against Policy 15(a) and other instruments. Policy IW 2 of the RCEP does not have direct relevance to this ground of appeal because it does not reference the criteria in set 2 to the RPS. The Court accepted Ms Golsby's expert planning evidence for the Council that Policy IW 2 does not direct avoidance of all adverse effects, as it allows remedying, mitigating and offsetting them.[190]

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[190] Reply Evidence of Paula Golsby, 4 April 2019 at [26] (CBD 203.0824).

(c) In any case, the RCEP gives effect to both the NZCPS and NPSET, as it is required to do by s 67(3) of the RMA. It reconciles the tensions between them. As the Environment Court held in *Infinity Investment Group Holdings Ltd v Canterbury Regional Council*, higher order instruments should be regarded as particularised in the relevant plan unless there is a problem with the plan itself.[191]

(d) The Court presumably did not engage with Policies NH 4, NH 5 and NH 11 on the basis of the evidence that effects on the ONFL were avoided. If NH 4 is triggered, Policies NH 5(a) and NH 11(a) provide an alternative consenting pathway. Transpower adopts the Councils' submissions on that issue. A project should not have to meet two different thresholds within the same policy context. Policy IW 2 does not direct avoidance of all adverse effects, as it allows remedying, mitigating and offsetting them. The Court relied on the evidence of Ms Ryder for the Councils, and concluded the proposal was consistent with NH 4.[192]

(e) Even if there were adverse effects on the Māori values of ONFL 3, they would not have made a difference to the outcome. Māori values are only one part of the values and attributes associated with the ONFL. They would not necessarily lead to the conclusion there was an adverse effect on the ONFL as a whole. ONFL 3 is identified in the RCEP as having existing infrastructure located within it, which must be relevant to assessing the appropriateness of its relocation.

(f) The Court's findings that Policy 6 of NPSET had greater relevance than Policy 4, that the proposal was consistent with it, and that the finding that the proposal is a substantial upgrade, are not susceptible to being overturned on appeal unless it is clear there is no evidence to support the interpretation. This is not the case.

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191 *Infinity Investment Group Holdings Ltd v Canterbury Regional Council* [2017] NZEnvC 35, [2017] NZRMA 479.

192 Environment Court, above n 1, at [228]–[229]. Statement of Evidence of Rebecca Keren Ryder, 11 February 2019 (CBD 202.0517).

[116] Ms Hill, for the Councils, adopts Transpower's submissions. In addition, she submits:

(a) The Environment Court correctly applied *EDS v King Salmon* by directly applying the RCEP without recourse to the NZCPS and NPSET. There is no authority requiring otherwise. The process of reconciling the NZCPS and NPSET has already been undertaken through the recent development of the RCEP. If the Court is required to re-examine whether the NH policies appropriately reconcile relevant national policy statement directions in every subsequent consent application, planning processes could be rendered futile.

(b) The Court was not required to assess the proposal against the detail of each policy such as IW 2, but to undertake a fair appraisal of the objectives and policies read as a whole. The Court did consider the proposal against the intent of IW 2. It carefully evaluated the cultural effects based on the evidence of the tāngata whenua witnesses and Mr Brown and gave considerable attention to cultural mitigation opportunities.[193] It was conscious that the existing environment includes the existing bridge and national grid infrastructure.

(c) The finding of adverse effects was not contrary to Policies IW 2 or NH 4(b) because: those policies require consideration as a whole; avoidance of adverse effects is not required by IW 2; NH 4(b) only requires avoidance of effects on the particular "values and attributes" of ONFL 3; the effect of Poles 33C and 33D does not detract from the identified factors, values, and associations with the ONFL of the whole harbour; the Māori values component of the ONFL is only one of several components; and the Court was unable to confirm there were significant effects on the Māori values of ONFL 3.

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[193] Environment Court, above n 1, at [165], [167], [194]–[220], [232], [233] and [244]–[248].

Did the Court err in applying the planning instruments?

[117] I agree it was reasonable for the Environment Court to focus particularly on the RCEP as providing a clear policy framework and consenting pathway and as giving effect to the RPS through more specific direction.[194] There are provisions of the RPS and Tauranga City Plan that are relevant but they supplement and reinforce the interpretation and application of the RCEP undertaken below. It is arguable that provisions of the Tauranga City Plan further constrain the decision.[195] But this was not the subject of submission, so I do not consider it further.

[118] The more major difficulty with the Court's decision is that, consistent with its overall judgment approach, the Court did not sufficiently analyse or engage with the meaning of the provisions of the RCEP or apply them to the proposal here. The Court rejected the proposition that the NZCPS requires consent to be declined because it does not have that regulatory effect. It suggested the regional and district plans "generally treat both the protection of ONFLs and the provision of network infrastructure as desirable".[196] But it considered they did not "particularise how those broad objectives or policies are to be pursued or how potential conflict between them is to be resolved".[197] Then it mentioned Policy 6 of the NPSET and suggested there is no guidance as to how "potential conflict" between the NPSET and NZCPS is to be resolved, and moved to its overall judgment.[198] As I held above, the Court's employment of the overall judgment approach, and failure to analyse the relevant policies carefully, is an error of law.

[119] The starting point is the RCEP. When they are examined carefully, the three sets of values in them can be seen to overlay and intersect with each other without conflicting.

[120] Interpreting and applying the natural heritage provisions of the RCEP:

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194 At [68] and [78].
195 For example, Policy 6A.1.7.1(g).
196 At [269].
197 At [269].
198 At [269].

(a) Issue 7 of the RCEP, which gives a clue to its purpose, is that "Māori cultural values … associated with natural character, natural features and landscapes … are often not adequately recognised or provided for resulting in adverse effects on cultural values". Consistent with Policy 15 of the NZCPS, Objective 2(a) is to protect the attributes and values of ONFL from inappropriate use and development "and restore or rehabilitate the natural character of the coastal environment where appropriate".

(b) Te Awanui is identified in sch 3 of the RCEP as ONFL with medium to high Māori values, "a significant area of traditional history and identity" and as including "many cultural heritage sites", many of which are recorded in iwi management plans and Treaty settlement documents. That is reinforced by the recognition in the Tauranga City Plan of Te Ariki Pā/Maungatapu as a significant area for Ngāti Hē in terms of mauri, wāhi tapu, kōrero tuturu and whakaaronui o te wa. I found in Issue 2 that the proposal would constitute a significant adverse effect on the medium to high Māori values of Te Awanui at ONFL 3.

(c) The natural heritage policies include a requirement on decision-makers in Policy NH 4 to avoid adverse effects on the values and attributes of the OFNL, in order to achieve Objective 2: protecting the attributes and values of ONFL from inappropriate use and development. This is consistent with and reflected in the Tauranga City Plan, as it must be. As noted in relation to Issue 2, I consider the proposal's adverse effect on Ngāti Hē's values in ONFL 3 would constitute an adverse effect on the ONFL.

(d) Under Policies NH 4A and 9A respectively:

(i) The assessment of adverse effects should: recognise the activities existing at the time the area was assessed as ONFL and have regard to the restoration of the affected attributes and

values and the effects on the cultural and spiritual values of the tāngata whenua.

(ii) Recognise and provide for Māori cultural values, including by "avoiding, remedying or mitigating cumulative adverse effects on the cultural landscape", "assessing whether restoration of cultural landscape features can be enabled", and "applying the relevant iwi resource management policies". Those policies object to power pylons and emphasise that "Marae provide the basis for the cultural richness of Tauranga Moana".[199]

(e) So, if a proposal is found to adversely affect the values and attributes of the ONFL having regard to all those considerations, as I have held this one does, the default decision is that it should be avoided under NH 4.

(f) But, nevertheless, Policy NH 5(a)(ia) requires decision-makers to "consider providing for" proposals that relate to the construction, operation, maintenance, protection or upgrading of national grid, even though will adversely affect those values and attributes. Policy 11(1) in turn sets out the requirements for NH 5(a) to apply, including that:

> (a) There are no practical alternative locations available outside the areas listed in Policy NH 4; and
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> (b) The avoidance of effects required by Policy NH 4 is not possible; and
>
> …
>
> (d) Adverse effects are avoided to the extent practicable, having regard to the activity's technical and operational requirements; and
>
> (e) Adverse effects which cannot be avoided are remedied or mitigated to the extent practicable.

[199] Ngāi Te Rangi Resource Management Plan. See also Te Awanui Tauranga Harbour Iwi Management Plan 2008 (Objective 1, Policies 1, 2, 10), Tauranga Moana Iwi Management Plan 2016 (Policies 15.1, 15.2, 15.4).

(g) Policies NH 4 and NH 5 do not conflict. NH 5 is simply an exception, if all the circumstances specified in NH 11 apply, to the default rule in NH 4, assessed by reference to NH 4A and NH 9A (including the iwi management plans).

[121] The Iwi Resource Management Policies of the RCEP must also be applied:

(a) Schedule 6 of the RCEP identifies Te Awanui as an ASCV, with reference to iwi management plans and other historical documents and Treaty settlement documents.

(b) Policy IW 1 of the RCEP requires proposals "which may" affect the relationship of Māori and their culture, traditions and taonga, to "recognise and provide" for" areas of significant cultural value identified in sch 6, and other sites of cultural value identified in hapū resource management plans or evidence. Policy IW 5 provides that "only tāngata whenua can identify and evidentially substantiate their relationship and that of their culture and traditions with their ancestral lands, water, sites, wāhi tapu and other taonga".

(c) Similarly, but slightly differently to Policy NH 4, Policy IW 2 requires "adverse effects on resources or areas of spiritual, historical or cultural significance to tāngata whenua in the coastal environment identified using criteria consistent with those included in Appendix F set 4 to the RPS" to be avoided as a default. As Advice Note 2 states, ASCVs are likely to strongly meet one or more criteria in Appendix F. Unlike the ONFL, the ASCV applies directly to the land on which the Marae is situated. I held in Issue 2 that the proposal constitutes a significant adverse effect on an area of cultural significance to Ngāti Hē.

(d) The qualification in IW 2 is that, where avoidance is "not practicable", the adverse effects must be remedied or mitigated. Where that is not possible either, it may be that offsetting positive effects can be provided. Policy 7C.4.3.1 of the District Plan expands slightly on that.

[122] The issues, objectives and policies related to activities in the coastal marine area must also be interpreted and applied:

(a) Issue 40 recognises that activities in the coastal marine area can promote social, cultural, and economic wellbeing, may need to be located in the coastal marine area in appropriate locations and in appropriate circumstances, but may cause adverse effects.

(b) Policy SO 1 recognises infrastructure is appropriate in the coastal marine area but that is explicitly made subject to the NH and IW policies "and an assessment of adverse effects on the location", which involve the practicability tests as above. That is reinforced by Objective 10A.3.3 and Policies 10A.3.3.2(c) and 10A.3.3.2(d) of the District Plan that minor upgrading of electric lines "avoids or mitigates" and "address[es]", respectively, potential adverse effects. Objective 10B.1.1 and Policy 10B.1.1.1 of the District Plan provides that adverse effects should be "avoided, remedied or mitigated to the extent practicable". Policy 10A.3.3.1 requires network utility infrastructure to be placed underground unless certain conditions apply.

[123] So, read carefully together, the iwi resource management policies are consistent with the natural heritage policies and with the structures and occupation of space (SO) policies:

(a) Policy IW 2 of the RCEP requires that adverse effects on areas of spiritual, historical or cultural significance to tāngata whenua must be avoided "where practicable". The Environment Court erred in failing to interpret and apply Policy IW 2. This is not a matter of evidence, however expert. Expert witnesses cannot and should not give evidence on issues of law, as it appears Ms Golsby was permitted to do.[200] The interpretation and application of the law is a matter for the Court.

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[200] Reply Evidence of Paula Golsby, 4 April 2019 at [26] (CBD 203.0824).

(b) Similarly, Policies NH 4 and 4A of the RCEP require that "adverse effects must be avoided on the values and attributes of ONFL". However, a decision-maker can still consider providing for a proposal in relation to the national grid if, under NH 5(a)(ia) and NH 11(1), there are "no practical alternative locations available" outside the areas listed in NH 4, the "avoidance of effects" is not possible, and "adverse effects are avoided to the extent practicable, having regard to the activity's technical and operational requirements". The Court did not apply these either.

(c) I do not accept the submission that there cannot be two different thresholds in the IW and NH policies. The thresholds are similar and must each be satisfied for the proposal to proceed.

(d) Policies NH 4 and NH 5 do not conflict. NH 5 is simply an exception, in the circumstances specified in NH 11, to the default rule in NH 4, assessed by reference to NH 4A and NH 9A.

(e) Under Policy SO 1, the analysis of adverse effects overrides the default approach that infrastructure is appropriate in the coastal marine area. Policy SO 2 also invokes the requirements of both the NZCPS and NPSET.

[124] The last point expressly directs reference to the "requirements" of NZCPS and NPSET. Even if it did not, as I held in Issue 3, a Court will refer to pt 2 and higher order planning instruments if careful purposive interpretation and application of the relevant policies requires that. But it is wrong to turn first to the NZCPS and NPSET. Whether consent needs to be declined depends on an application of the RCEP (and District Plan) provisions interpreted in light of the NZCPS and NPSET.

[125] I agree with the Environment Court that the NZCPS itself does not necessarily require consent to be declined.[201] That is clear on the face of the relevant policies and because of the operative role of the RCEP. I also agree with the Court that, in relation

[201] Environment Court, above n 1, at [267].

to the issues at stake here, neither the NZCPS nor the NPSET should necessarily be treated as "trumping" the other and neither should be given priority over or "give way" to the other.[202] As the Supreme Court in *EDS v King Salmon* stated, their terms should be carefully examined and reconciled, if possible, before turning to that question. It may be that, in relation to a specific issue, the terms of one policy or another is more specific or directive than another, and accordingly bear more directly on the issue, as counsel submit. In *Transpower New Zealand Ltd v Auckland Council,* Wylie J characterised the NPSET as providing relevant considerations in general.[203] I agree that a number of the policies do that. And it may be that the NPSET is not as "all embracing" of the RMA's purpose as the NZCPS.[204] But the terms of both national policies inform the interpretation and application of the relevant planning instrument to the specific issue in determining the outcome, as Wylie J demonstrated.[205]

[126] I do not agree with the implication of the Environment Court's reasoning that the NZCPS and NPSET conflict in their application to this proposal.[206] I accept the submissions of Mr Beatson and Ms Hill that, in relation to this issue, the RCEP gives effect to the NZCPS and NPSET and reconciles them. I consider their requirements are consistent with each other as expressed in both the RCEP and District Plan. In more detail:

(a) Objective 2 and Policy 15 of the NZCPS, as interpreted by the Supreme Court in *EDS v King Salmon*, reinforce the nature of the natural heritage policies of the RCEP as bottom lines in requiring adverse effects to be avoided. The circumstances in which use and development are "appropriate" under Policy 15 are set out in the RCEP. Adverse effects should be avoided, but may be considered if no practical alternative locations are available, avoidance of adverse effects is not possible and they are avoided to the extent "practicable".

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202 At [77].
203 *Transpower New Zealand Ltd v Auckland Council,* above n 179, at [82].
204 At [84].
205 At [85]–[104].
206 Environment Court, above n 1, at [269].

(b) Objective 3 and Policy 2 of the NZCPS, as outlined above, reinforce the Iwi Resource Management policies of the RCEP as cultural bottom lines in requiring adverse effects to be avoided unless "not practicable".

(c) Objective 6 and Policy 6 of the NZCPS reinforce the recognition in Issue 40 and Policies SO 1 and SO 2 of the importance to well-being of use and development of electricity transmission in "appropriate places and forms" on the coast or coastal marine area and within "appropriate limits". Policy 6 specifically references the need to make "appropriate" provision for marae and associated developments of tāngata whenua, to "consider how adverse visual impacts of development can be avoided" and "as far practicable and reasonable" apply controls of conditions to avoid those effects. Policy 6 also recognises that activities with a "functional need to be located in the coastal marine area" should be, in "appropriate" places, and those that do not, should not.

(d) The NPSET similarly recognises the national significance of electricity transmission while managing its adverse effects. Policies 2, 5, 6, 7 and 8 put requirements on decision-makers. But Policy 2 is general in requiring that they "recognise and provide for the effective operation" etc of the network. Policy 5 is more specific in requiring decision-makers to "enable the reasonable operational, maintenance and minor upgrade requirements of transmission assets when considering environmental effects. That is consistent with the general requirements of the NZCPS as expressed in the more detailed regime for doing so set out in the RCEP and District Plan. Policy 6 is relative, in requiring decision-makers to "reduce" existing adverse effects where there are "substantial upgrades of transmission infrastructure". And Policies 7 and 8 are consistent with the NZCPS and RCEP in requiring decision-makers to "avoid" or "seek to avoid" certain adverse effects.

[127] I do not consider Mr Gardner-Hopkins' submission that the Court erred in finding the proposal constitutes a "substantial" rather than "major" upgrade makes much difference to the outcome. Policy 4 of the NPSET requires decision-makers to

"have regard" to the extent to which adverse effects of major upgrades have been minimised, which must be relevant anyway, under other provisions. Policy 6 adds an element of proactivity in requiring "substantial upgrades" to be used as an opportunity to "reduce existing adverse effects". Each bears on the outcome of the application, but neither is determinative. If it does matter, I consider it was open to the Court to find the proposal was a "substantial" upgrade on the basis of the evidence before it. I am more dubious about the Court's conclusion that Policies 7 and 8 relate only to future and new works rather than to upgrades of the existing system. I see no reason why upgrades do not involve planning of the transmission system and the purpose of those policies, of avoiding adverse effects, may apply to upgrades.

[128] More generally, to the extent that there is room for differences to be found between the NZCPS and NPSET, both instruments are reconciled and given effect in the RCEP and District Plan. But the Court needed to carefully interpret the RCEP and apply it to the facts here, as outlined above, in light of the higher order instruments. Reference to the general principles in pt 2 of the Act, particularly ss 6(e), 7(a) and 8, simply confirms the analysis undertaken above.

[129] I found in Issue 2 that as a matter of fact and law, the proposal would have a significant adverse effect on an "area of spiritual, historical or cultural significance to tāngata whenua" and a significant adverse effect on the medium to high Māori values of Te Awanui at ONFL. That means the bottom lines in Policies IW 2 and NH 4 of the RCEP respectively may be invoked:

(a) Under IW 2, the adverse effects on Rangataua Bay as an "area of spiritual historical or cultural significance to tāngata whenua" must be avoided "where practicable".

(b) Under NH 4, NH 5(a)(ia) and NH (11), the adverse effects on the medium to high Māori values of Te Awanui at ONFL 3 must be avoided unless there are "no practical alternative locations available", and the "avoidance of effects is not possible", and "adverse effects are avoided to the extent practicable".

[130] So, whether the cultural bottom lines in the RCEP are engaged depends on whether the "practicable", "possible" and "practical" thresholds are met. That requires consideration of the alternatives to the proposal, which is the next issue.

Issue 5: Was the Court wrong in its assessment of alternatives?

[131] In this issue I deal with the grounds of appeal regarding whether the Court erred in failing to adequately consider alternatives and whether it erred in law in considering the status quo was the obvious counterfactual. Both of those issues relate to how the Court assessed the alternatives.

Law of alternatives

[132] In *EDS v King Salmon*, the Supreme Court considered whether a decision-maker was required to consider alternatives sites when determining a site-specific plan change that is located in, or fails to avoid, significant adverse effects on an ONFL.[207] It considered previous case law, including the High Court's judgment in *Meridian Energy Ltd v Central Otago District Council*, which rejected the proposition that alternatives must be considered.[208]

[133] The Supreme Court held that consideration of alternatives may be necessary depending on "the nature and circumstances" of the particular application and the justifications advanced in support of it.[209] If an applicant claims that an activity needs to occur in the coastal environment and it would adversely affect the preservation of the natural character, or that a particular site has features that make it especially suitable, the decision-maker ought to test those claims. That will "[a]lmost inevitably" involve consideration of alternative localities.[210] In that case, it considered the obligation to consider alternatives sites arose from the requirements of the NZCPS and sound decision-making, as much as from s 32 of the RMA.[211]

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207 *EDS v King Salmon*, above n 112, at [156].
208 *Meridian Energy Ltd v Central Otago District Council* [2011] 1 NZLR 482 (HC).
209 *EDS v King Salmon*, above n 112, at [170].
210 At [170].
211 At [172].

The Environment Court's treatment of alternatives

[134] In its decision, the Environment Court stated:[212]

> [46] Transpower considered a range of options for taking the transmission line across Rangataua Bay including bridge or sea bed cable options as well as the aerial crossing option. The bridge and sea bed options were rejected for reasons that included costs being between 10 and 20 times more than those of an aerial crossing, programming issues, health and safety effects and access and maintenance considerations.

[135] In its second preliminary issue section, the Court considered whether it was necessary for Transpower to consider alternative methods for realignment of the A-Line and, if so, whether its assessment and evaluation was adequate.[213] In summary, the Court said:

(a) An assessment of alternatives "may be relevant" under s 104(1)(a) of the RMA if the adverse effects are significant or, under the RCEP, if there are adverse effects of an activity on the values and attributes of ONFL 3.[214] The Court referenced Policies NH 4 and NH 5.

(b) It noted that the identification of the attributes of ONFL 3 in sch 3 of the RCEP recognises that the current uses of ONFL 3 includes national grid infrastructure.[215] It considered it may follow, "in the absence of any policy for the removal of such uses", that it "might be considered to be generally appropriate within it on the basis that they do not undermine or threaten the things that are to be protected".[216] This does not take into account IW 2, NH 4, NH 5 and NH 11(1).

(c) The Court considered "an applicant is not required to undertake a full assessment or comparison of alternatives, or clear off all possible alternatives, or demonstrate its proposal is best in net benefit terms"

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212 Environment Court, above n 1, at [46], citing Transpower's Assessment of Effects on the Environment, above n 32.
213 At [113].
214 At [115].
215 At [116].
216 At [116].

and "[a]ll that is required is a description of the alternatives considered and why they are not being pursued".[217]

(d) The Court considered a list of seven options considered by Transpower in Table 2, entitled "Principal options considered by Transpower":

Option	Option Description	Comments
1	Do nothing	Poles A116 and A117 will still require replacement. Ongoing maintenance and access issues will remain. Does not resolve historic grievances with iwi.
2	Underground cable between Poles A116 and A117 on Ngāti Hē land (sports field)	Would require two new cable termination structures to replace Poles A116 and A117. Ongoing maintenance and access issues will remain. Does not resolve historic grievances with iwi.
All remaining options below involve relocation of the circuit onto or adjacent to the HAI-MTM-B support poles between poles B28 and B48, and removal of redundant HAI-MTM-A line poles from Te Ariki Park, residential and horticultural land.		
3(a)	Aerial crossing of Rangataua Bay in a single span.	Requires two monopoles of approximately 34.7 m on the Maungatapu side and 46.8 m high on the Matapihi side, and removal of the existing Tower A118 from the CMA.
3(b)	Aerial crossing of Rangataua Bay utilising a strengthened or replacement Tower A118 in the CMA.	Requires one monopole of up to 40 m high on the Maungatapu side of the harbour and a 12m to 17m high concrete pi-pole on the Matapihi side. Existing Tower A118 in the CMA is retained.
4(a)	Integrate a cable into a potential future replacement road bridge.	New cable termination structures required on either side in the order of 15m to 20m high. New bridge would need to be designed to accommodate an additional transmission cable.
4(b)	Cable across estuary on a new stand-alone footbridge or cable bridge	New cable termination structures required on either side in the order of 15m to 20m high. New bridge structure required.
4(c)	Cable across existing bridge - east side	New cable termination structures required on either side in the order of 15m to 20m high. Terminate on

[217] At [117].

		west side adjacent to Marae, but then cross to east side (opposite side to existing cable) as soon as practicable. Thrust bore under road required.

(e) The Court recorded that Transpower rejected option 2 for cultural reasons and lack of wider benefits.[218] Transpower rejected the options attaching a cable to the bridge or beneath the seabed for reasons of operational and security of supply risk, unacceptable costs and the need for substantial termination structures on either side of the waterway. Transpower shortlisted the two aerial crossing options. Its preferred option was the single span, option 3(a).

(f) The Court considered in some detail the potential alternatives of under-seabed and bridge-attachment cables because they were particularly mentioned by TEPS, the Marae and Ngāi Te Rangi.[219] The cost of the bridge-crossing option was estimated by Transpower at more than 10 times that of the aerial crossing.[220] The costs of undergrounding was "at least an order of magnitude more" than an aerial route.[221] On that basis, the Court considered these alternatives were "impracticable".[222]

(g) The Court held that "[a] relocated A-Line crossing of the harbour on a strengthened existing bridge would appear to be technically feasible".[223] But it considered that the cost alone meant Transpower "has a clear reason for discounting a bridge option".[224] It considered imposing a condition requiring that cost "could well be unreasonable" and "would also be likely to go beyond the Court's proper role in adjudicating disputes under the RMA".[225] The Court considered that, if it were to conclude that level of expenditure was necessary to avoid,

218 At [122].
219 At [123] and [124]–[137].
220 At [130].
221 At [136].
222 At [265].
223 At [138].
224 At [139].
225 At [140].

remedy or mitigate the adverse effects "then the more appropriate course could be to refuse consent to the proposal".[226] It accepted Transpower's dismissal of the under-sea options on the same basis.

(h) The Court considered all of the alternatives would place tall structures in the ONFL "whether above or below it or on its margins".[227]

(i) Accordingly, it concluded "the alternatives to have been appropriately assessed and the reasons for the selection of the project on which Transpower wishes to proceed to be sound".[228]

[136] Later, in considering the cultural effects of the proposal, the Court held that the alternatives may have greater effects on the values and attributes of the harbour than the proposal.[229] In acknowledging Ngāti Hē's view that the effects of a new Pole 33C outweigh the benefits of the A-Line removal, the Court said "there is no certainty that a proposal they can support will come forward, and if it does, whether it will achieve the outcomes they desire".[230] It noted evidence, though not from NZTA, that NZTA has no plans to upgrade the bridge to a standard that could support the lines.[231] The Court also said:

> [219] Transpower has in effect said that it will walk away from the realignment project altogether if the appeal is granted. It would then strengthen or replace its infrastructure on Te Ariki Park which is work that does not require any further consent. We have no ability to require that they do otherwise. We do not regard this as any kind of threat or otherwise as an inappropriate position: it simply recognises that if an activity requires resources consent but cannot obtain it, then not undertaking that activity is an obvious option for the unsuccessful applicant.

[137] As noted in relation to Issue 4, in its concluding reasoning, the Court said:

> [265] The alternatives of laying the re-located A-Line on or under the seabed or in ducts attached to the Bridge appear from the evidence to be impracticable. While technically feasible, the uncontroverted evidence is that the works involved would entail costs of an order of magnitude greater than the estimated costs of Transpower's proposal. We have already found that we

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226 At [140].
227 At [143].
228 At [144].
229 At [213].
230 At [214].
231 At [215].

> do not have the power to require Transpower to amend its proposal in a manner that would result in a cost increase of that kind. To do that would go beyond the scope of the power to impose conditions on the proposal as it would effectively result in a new proposal.

[138] And, in the last two sentences of its last paragraph, the Court said:

> [209] … In the absence of any practicable alternative, the obvious counterfactual to the proposal is the status quo. In our judgment, the removal of the existing line and its relocation within the Road zone applying to SH 29A and above the Maungatapu Bridge is more appropriate overall and therefore better than leaving the line where it is.

Submissions on alternatives

[139] Mr Gardner-Hopkins, for TEPS and Ngāti Hē, submits:

(a) It is accepted there is a functional need for the lines to cross Rangataua Bay at some location. But Transpower did not try very hard to consider alternatives. It did not commission a detailed investigation as to whether strengthening the bridge would feasibly accommodate the A-Line. Its costs were "back of the envelope" figures provided by email.

(b) The RCEP's requirements that adverse effects be avoided in the IW 2 and NH 11 policies mean the Court must satisfy itself there are not possible alternatives or no practicable alternatives that would avoid the adverse effects. The terms "not practicable" and "not possible" in Policies IW 2 and NH 11 establish a very high threshold. The term "not possible" must impose a higher threshold than "not practicable". The threshold in NH 11(1)(d) is not met because it only requires having regard to technical and operational requirements.

(c) The Environment Court did not engage with what it understood the two terms to mean. It simply listed the relevant policies, applied the *Meridian Energy* test, and made no assessment of the requirements. It dismissed the bridge and under-sea alternatives solely for cost reasons, but cost is not the determining element — its weight depends on the context. The Court made no findings as to whether the bridge and

under-sea alternatives were "possible" or "practicable", or what they mean in the regulatory context here, so it failed to have regard to Policies IW 2 and NH 11.

(d) It would accord with the spirit of pt 2 of the RMA, consistent with *McGuire*, to prefer an alternative. Transpower's 2017 Options Report identifies two alternative ways of achieving the project while avoiding the adverse effects required to be avoided by IW 2. They would involve using a cable across the bridge, with a termination structure of, at most, half the height of the proposed structures, some distance away from the Marae.[232] It was not established that the termination structures of these alternatives, however "Dalek-like" (as apparently discussed at the Environment Court hearing), would need to be placed where Pole 33C is proposed to go or whether they could go in a different location, further away from the Marae.

(e) Posing the status quo as the obvious counterfactual was a mistake, given the evidence. At the least, the Court should have acknowledged that declining consent would not necessarily deprive Ngāti Hē and others of the benefits of the current proposal in removing the A-Line alignment across Rangataua Bay. But it is unlikely the status quo would be maintained, given the evidence that Pole 117, on a cliff face, is subject to erosion and episodic erosion events of three to six metres at a time.

(f) Mr McNeill, Transpower's Investigations Project Manager, agreed that if Transpower had known the proposal did not have Ngāti Hē and Maungatapu Marae support, it would have said "no way" and would "continue to meet and to, yeah, come up with other proposals…".[233] Ms Raewyn Moss, a General Manager at Transpower, gave evidence that Transpower would need to consider whether to proceed with the

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232 Transpower New Zealand Ltd *Options Report: HAI-MTM-A and B Transmission Line Alterations, Rangataua Bay, Taurauga* (July 2017) at 16–18 (CBD 304.1087–304.1089).

233 NOE 34/19–21.

Matapihi aspect of the proposal if that was the only aspect granted consent.[234] Another Transpower witness confirmed it was possible from an engineering perspective, with modification to how the lines connected.[235]

(g) Transpower has an obligation to address the historical breach of the Treaty of Waitangi, especially given the assurance that the A-Line would be relocated to the new B-Line path when the B-Line was proposed some 25 years ago. Otherwise, the existing bridge and motorway will be a justification for further infrastructure being located alongside them with further negative cumulative effects.

[140] Mr Beatson, for Transpower, submits:

(a) The approach in *Meridian Energy Ltd* is correct. Transpower undertook a comprehensive analysis of all technically viable alternative options. "Practicable" imports feasibility, viability, and cost considerations. In NH 11(1), "practicable" is clearly informed by Transpower's technical and operational requirements.

(b) Transpower satisfied the requirements of NH 5 and NH 11, given avoidance of all effects is not possible and adverse effects are avoided to the extent practicable. Ugly termination structures of 23 metres, characterised as "Daleks" would be required for any alternate option.[236] The alternatives of laying the relocated A-Line on or under the seabed or attached to the bridge were found to be impracticable, not solely for cost reasons. The Court's findings were reasonable and supported by evidence.

(c) The Court was entitled to rely on, and prefer, the evidence of Transpower as to its plans and ability to retain the existing A-Line alignment if consent is declined. Mr McNeill's comments provide no

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234 NOE 27/12–15.
235 NOE 114/10–20.
236 Evidence of Richard Joyce (1 February 2019) (CB 203.623) at [28] and following photograph.

guarantee unspecified alternatives would have been pursued. Ms Moss provided clear statements that Transpower would maintain Poles 116 and 117.[237] It is not clear whether it would be practically possible to split the Matapihi and Maungatapu aspects of the proposal.

(d) Mr Thomson confirmed maintenance of the A-Line is achievable if realignment does not proceed, with Pole 117 being relocated further inland.[238] The Court accepted Transpower could apply for a new consent for the anchor blocks associated with Pole 117 and continue to operate until all appeals were determined. Mr Beatson advises this is what has transpired. The Court also noted other regulatory avenues open to Transpower to secure the failing poles.

(e) What Transpower is trying to do is entirely consistent with *McGuire.* It has worked extremely hard to come up with a solution that it felt struck the right balance between cost and resolving the ongoing source of contention. It put it forward in good faith and got agreement and still considers it is a suitable response. There is no legal obligation on Transpower to move the A-Line under the RMA. Transpower does not have the obligations of the Crown under s 9 of the State-Owned Enterprises Act 1986 and there has been a Treaty settlement with Ngāi Te Rangi. Transpower would not be creating an additional transgression by maintaining the A-Line where it is. But dialogue with Ngāti Hē would continue in any case.

[141] Ms Hill, for the Councils, submits:

(a) *Meridian Energy* does not require all possible alternatives to be evaluated nor proof that the intended proposal is the best of the alternatives. Avoidance of adverse effects to the "extent practicable"

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237 Statement of Evidence of Raewyn Moss, 1 February 2019 at [38] (CBD 203.0612); and NOE 15/18–22.

238 Statement of Evidence of Colin Thomson, 1 February 2019 at [26] (CBD 203.645).

under NH 11(d) and NH 11(e) clearly relates to the particular proposal rather than to alternatives.

(b) The Environment Court did not dismiss particular options but assessed the adequacy of Transpower's consideration of them and whether a clear rationale for discounting an option was provided.[239] It set out detailed reasons why Transpower discounted particular options. It clearly considered whether avoidance of adverse effects was "not possible" having regard to the alternatives.[240] The Court assessed mitigating or offsetting adverse effects and found the alternatives were impracticable. It found the alternatives may affect the values and attributes of the harbour to a greater extent than the aerial line, and avoidance of adverse effects was not possible under any scenario.

(c) The Councils adopt the submissions of Transpower in relation to the status quo issue. In addition, it is difficult to know how such an error, if established, would be material to the outcome. Even if the prospect of the A-Line remaining is less certain than the Court considered it to be, the Court would be unable to establish there is another feasible alternative to the status quo with the requisite certainty or to direct Transpower to implement that.

Did the Court err in its treatment of alternatives?

[142] As determined in Issue 4, both the IW 2 and NH 4 Policies of the RCEP require consideration of whether it is "practicable" and "possible" to avoid adverse effects and whether alternative locations are "practical". If it is practicable to avoid the proposal's adverse effects on the area of spiritual, historical or cultural significance to Ngāti Hē, the proposal must not proceed under Policy IW 2. If there are practical alternative locations of the infrastructure, or it is possible to avoid the proposal's adverse effects on the Māori values of Te Awanui as ONFL 3, then the proposal must not proceed under Policy NH 4, NH 5(a)(ia) and NH 11(1)(a) and (b).

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239 Environment Court, above n 1, at [46] and [144].
240 At [143].

[143] Either way, applying *EDS v King Salmon*, the practicability, practicality, and possibility of alternatives is a material fact which directly affects the available outcome of the application. This is more than something that "may be relevant" as the Court characterised them.[241] *EDS v King Salmon* has overtaken *Meridian Energy* in that regard. In this context, given the nature of the application and the relevant law, the Court was legally required to examine the alternatives in order to determine whether they are practicable, practical and possible with respect to the meaning of those terms in the relevant policies of the RCEP. Furthermore, the Court is required to satisfy itself that the alternatives are not practicable, practical and possible in order to be able to consider agreeing to the proposal. The Court's findings would determine whether the relevant adverse effects must, as a matter of law, be avoided under Policies IW 2 and NH 4 of the RCEP.

[144] In *Wellington International Airport Ltd v New Zealand Air Line Pilots' Association Industrial Union of Workers Inc*, the Supreme Court considered the meaning of "practicable" in the context of the Civil Aviation Act 1990:[242]

> [65] 'Practicable' is a word that takes its colour from the context in which it is used. In some contexts, the focus is on what is able to be done physically; in others, the focus is more on what can reasonably be done in the particular circumstances, taking a range of factors into account. Unlike the Court of Appeal, we do not find the dictionary definitions of much assistance given the flexibility of the word and the importance of context to determining its meaning. Rather, we consider that the assessment of what is "practicable" must take account of the particular context of Appendix A.1 and the statutory framework that produced it and will depend on the particular circumstances of the relevant airport, including the context in which the request for the Director's acceptance is made.

[145] The Environment Court dealt with practicability rather differently. In its conclusion, the Court considered that the alternatives favoured by Ngāti Hē were technically feasible but would "entail costs of an order of magnitude greater" than the proposal.[243] It therefore concluded, apparently because it did not consider it had the power to require Transpower to amend its proposal, that the alternatives "appear from

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241 At [115].

242 *Wellington International Airport Ltd v New Zealand Air Line Pilots Association Inc Industrial Union of Workers* [2017] NZSC 199, [2018] 1 NZLR 780.

243 Environment Court, above n 1, at [46] and [265].

the evidence to be impracticable".[244] The Court determined that, when faced with a range of competing concerns and no possible outcome would be wholly without adverse effects, it had to decide which outcome better promotes the sustainable management of natural and physical resources as defined in s 5 of the RMA.[245]

[146] The Court misdirected itself in law by not interpreting and analysing the "practicable", "possible" and "practical" in the context of the policies and the proposal. It erred in failing to recognise that the practicability, practicality or possibility of alternatives are directly relevant to whether the proposal could proceed at all.[246]

[147] The "practicability" of avoiding adverse effects in Policy IW 2 relates to cultural values. The emphasis on the Treaty of Waitangi and cultural values, and potential for cultural bottom lines in the RMA and planning instruments suggests that cultural values should not be underestimated. Issue 7 of the RCEP suggests they are "often not adequately recognised or provided for". It is always difficult to put a price on culture, which is what is implied in a finding that the cost of an alternative is "too" high. That conclusion should not be too readily reached. And a conclusion has to be that of the Court, not of the applicant. But the cost of network infrastructure is eventually felt by all electricity consumers, as well as the Crown. I do not consider, in this context, that cost must be irrelevant to practicability or to practicality.

[148] What cost is "too" high to satisfy an alternative not being "practicable" is a matter of fact and degree to be assessed in the circumstances. I do not rule out the possibility that, if the Court had itself examined robust costings of the alternatives, it may still have concluded the cost to be too high to be "practicable". I do not consider the reference in NH 11(d) to having regard to technical and operational requirements excludes the possibility of having regard to cost implications. A court would have to consider and weigh that. For the same reason, it may reasonable for a court to conclude that no "practical" alternative locations are available. It is hard to draw a meaningful distinction between "practical" and "practicable" in this context.

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244 At [265].
245 At [270].
246 At [265].

[149] But the requirement of Policy NH 11(1)(b), that "the avoidance of effects required by Policy NH 4 is not possible", does not involve an assessment of costs. The plain meaning of "possible" in NH 11(1)(b) suggests that if an alternative is technically feasible it is possible, whatever the cost. That interpretation is reinforced by the use of "practical" in NH 11(1)(a) and "practicable" in NH 11(d). This interpretation is not inconsistent with the wording of NH 11(1)(a) because (a) relates to the practicality of alternative locations while (b) relates to the possibility of avoidance of effects. It is not inconsistent with NH 11(1)(d) and (e) because they relate to the avoidance, remedying or mitigation of all "adverse effects" to the extent practicable, while (b) requires the avoidance of effects required by Policy NH 4 to be possible. Policy NH 4 relates to the values and attributes of ONFL, which are different. It is the values and attributes of the ONFL that are the subject of the cultural bottom line in Policy 15(a) of the NZCPS, supported by pt 2 of the RMA.

[150] So, the technical feasibility of the alternatives to the proposal means the avoidance of adverse effects on ONFL 3 at Rangataua Bay is possible. Policy NH 11(1)(b) is therefore not satisfied and consideration of providing for the proposal under Policy NH 5 is not available.

[151] I also consider the Court's consideration of the alternatives was focussed too widely on the alternatives considered by Transpower. The Court should have focussed on the precise issues that constituted the adverse effects that had to be avoided unless one of the exceptions applied. As I found in Issue 2, those effects centred on the effect of Pole 33C. What were the alternatives to the location, size and impact of that on the area of cultural significance to Ngāti Hē and the Māori values of Te Awanui at ONFL 3? Could Pole 33C be situated in a location that did not have those adverse effects but did not have the cost implications of the alternatives Transpower considered?

[152] The status quo was one of the alternatives that Transpower, and the Court, considered. The Court was obliged to consider Transpower's evidence that it would walk away from the realignment project if the appeal was granted. It was open to the Court to regard that as an obvious option for Transpower. It was not required to give greater weight to Mr McNeill's evidence or even to make a finding either way. Predicting the future of this proposal is inherently speculative. But examination of the

status quo option needed to be included in the analysis of alternatives. It was not a matter of preferring the proposal to the status quo, as the Court said. In law, it was a matter of whether the proposal was lawfully available, given the alternatives.

[153] Finally, Mr Gardner-Hopkins submits Transpower has an obligation to address the location of the transmission lines as an ongoing breach of the Treaty of Waitangi. Mr Beatson submits it does not. This was not fully argued before me and the issue is not part of the appeal, so I do not comment further. Neither do I further consider how it might affect the obligations on the decision-maker in relation to the proposal. But there is no doubt that further discussion between Transpower and Ngāti Hē over these issues would be consistent with the principles of the Treaty of Waitangi, given the unhappy history of the transmission lines at issue.

Relief

Law of relief on RMA appeals

[154] Section 299 of the RMA provides that appeals are made in accordance with the High Court Rules 2016. Rule 20.19 provides:

> (1) After hearing an appeal, the court may do any 1 or more of the following:
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> (a) make any decision it thinks should have been made:
>
> (b) direct the decision-maker—
>
> (i) to rehear the proceedings concerned; or
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> (ii) to consider or determine (whether for the first time or again) any matters the court directs; or
>
> (iii) to enter judgment for any party to the proceedings the court directs:
>
> (c) make any order the court thinks just, including any order as to costs.
>
> …
>
> (3) The court may give the decision-maker any direction it thinks fit relating to—
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> (a) rehearing any proceedings directed to be reheard; or

(b) considering or determining any matter directed to be considered or determined.

(4) The court may act under subclause (1) in respect of a whole decision, even if the appeal is against only part of it.

…

(6) The powers given by this rule may be exercised in favour of a respondent or party to the proceedings concerned, even if the respondent or party did not appeal against the decision concerned.

[155] As Dunningham J observed in *Gertrude's Saddlery Ltd v Queenstown Lakes District Council*, the "usual course" is to refer the matter back to the Environment Court.[247] But "the High Court has been prepared to substitute its own decision where the outcome is inevitable and there is no need to make further factual determinations in the specialist Court".[248]

[156] In *Carter Holt Harvey Ltd v Te Runanga o Tuwharetoa Ki Kawerau*, Heath J quashed a decision imposing a condition and referred it back to the Environment Court for rehearing, leaving the rest of the decision undisturbed.[249]

[157] In *Te Runanga o Ngāti Awa v Bay of Plenty Regional Council*, Gault J said: [250]

> [207] As indicated, even if the Court finds an error of law, it must be material to the decision under appeal for relief to be granted. The Court is cautious, however, before accepting that it would be futile to remit on the basis that the outcome would be the same. That is particularly so here given the importance of the relationship of iwi and hapū with water evident in the NPSFM Preamble, and the fact that the Environment Court is the specialist tribunal best placed to assess the effects. Also, effects may be relevant to assessing appropriate conditions, not merely whether consent should be granted or declined.

Submissions on relief

[158] Mr Gardner-Hopkins, for TEPS and Ngāti Hē, submits the errors are material. He submits it cannot be assumed the Environment Court would reach the same decision and the matter should be referred back to it for reconsideration. He also submits that I should refuse the consent if I find the effects of the proposal are adverse

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247 *Gertrude's Saddlery Ltd v Queenstown Lakes District Council* [2020] NZHC 3387 at [112].
248 At [112].
249 *Carter Holt Harvey Ltd v Te Runanga o Tuwharetoa Ki Kawerau* [2003] 2 NZLR 349 at [69].
250 *Te Runanga o Ngāti Awa v Bay of Plenty Regional Council*, [2020] NZHC 3388.

in terms of Policy 15(a) of the NZCPS and Policies IW 2 and NH 4 of the RCEP and that Transpower has failed to demonstrate it is not practicable or possible to avoid those effects. It would only be if I definitively found that there are practicable alternatives that would avoid the adverse effects, and other errors, that I could quash the consents and not refer the matter back to the Environment Court.

[159] Mr Beatson, for Transpower, submits that the Environment Court has not made an error of law. Thus, the High Court is not able to interfere with a decision made on the merits where there is no error of law.

[160] Ms Hill, for the Councils, submits that it is not the role of the High Court to weigh the evidence or substitute its own assessment of the consistency of the proposal with a plan. If the Court finds the Environment Court erred in its approach to assessing effects, Ms Hill submits the matter should be remitted to the Environment Court to reconsider in light of this Court's directions.

Should the decision be remitted?

[161] In summary, I have concluded the Environment Court made errors of law in:

(a) its findings regarding the significant adverse effect of the proposal on an area of cultural significance to Ngāti Hē and on the Māori values of ONFL 3;

(b) its "overall judgment" approach and treatment of pt 2 of the RMA;

(c) interpreting and applying to the proposal the cultural bottom lines in the planning instruments; and

(d) its treatment of the practicability, or practicality and possibility of avoiding the adverse effects of the proposal.

[162] These are material errors. I have determined the true and only reasonable conclusion about the adverse effects of the proposal. I have indicated the correct approach to interpreting and applying the planning instruments. I have interpreted and

applied the meaning of Policy NH 11(1)(b) in light of the Environment Court's existing findings. But the Court's findings were not premised on the legal need for it to satisfy itself that the alternatives are not practicable, practical and possible in order to be able to consider agreeing to the proposal.

[163] I consider it is desirable for the Environment Court to further consider the issues of fact relating to whether the alternatives to the proposal are practicable, practical or possible in light of the legal framework and the questions about the alternatives that I have identified. It is likely that further evidence on that will be required from Transpower.

[164] The interpretation of "possible" in Policy NH 11(1)(b) in this judgment suggests that, if the proposal remains as it is and the Environment Court comes to the same conclusion as it did before on the basis of further evidence about alternatives, the proposal will not proceed as it is. But further consideration of alternatives with a narrower focus on the size, nature and location of Pole 33C might lead Transpower to amend its proposal. Evidence of Ngāti Hē's considered views of any such alternatives would be required in order to determine the adverse effects of any such amendments. With goodwill, and reasonable willingness to compromise on both sides, it may be possible for an operationally feasible proposal to be identified that does not have the adverse cultural effects of the current proposal.

[165] Furthermore, no issue has been taken with the part of the realignment proposal from Matapihi north. There are clear benefits to that part of the proposal, including to Ngāi Tūkairangi. If the realignment does not proceed over Rangataua Bay, it may still be able to proceed in relation to Matapihi. There is evidence that may be possible, but the implications are not clear to me. I leave that to the Environment Court as well.

Result

[166] I quash the Environment Court's decision and remit the application to it for further consideration, consistent with this judgment.

[167] Costs should be able to be worked out between counsel. If not, I give leave for the appellant to file and serve a memorandum of up to 10 pages on outstanding issues

regarding costs within 10 working days of the judgment and leave for the respondents to file and serve a memorandum of an equivalent length within 10 days of that. If that happens, the appellant then has five days to file and serve a memorandum in reply of up to five pages.

Palmer J

Annex: Relevant planning provisions

New Zealand Coastal Policy Statement 2010

Objective 2

To preserve the natural character of the coastal environment and protect natural features and landscape values through:

- recognising the characteristics and qualities that contribute to natural character, natural features and landscape values and their location and distribution;
- identifying those areas where various forms of subdivision, use, and development would be inappropriate and protecting them from such activities; and
- encouraging restoration of the coastal environment.

Objective 3

To take account of the principles of the Treaty, recognise the role of tāngata whenua as kaitiaki and provide for tāngata whenua involvement in management of the coastal environment by:

- recognising the ongoing and enduring relationship of tāngata whenua over their lands, rohe and resources;
- promoting meaningful relationships and interactions between tāngata whenua and persons exercising functions and powers under the Act;
- incorporating mātauranga Māori into sustainable management practices; and
- recognising and protecting characteristics of the coastal environment that are of special value to tāngata whenua.

…

Objective 6

To enable people and communities to provide for their social, economic, and cultural wellbeing and their health and safety, through subdivision, use and development, recognising that:

- the protection of the values of the coastal environment does not preclude use and development in appropriate places and forms, and within appropriate limits;
- some uses and developments which depend upon the use of natural and physical resources in the coastal environment are important to the social, economic and cultural wellbeing of people and communities;

- functionally some uses and developments can only be located on the coast or in the coastal marine area;

…

Policy 2 The Treaty of Waitangi, tāngata whenua and Māori heritage

In taking account of the principles of the Treaty of Waitangi (Te Tiriti o Waitangi), and kaitiakitanga, in relation to the coastal environment:

(a) recognise that tāngata whenua have traditional and continuing cultural relationships with areas of the coastal environment, including places where they have lived and fished for generations;

…

(c) with the consent of tāngata whenua and as far as practicable in accordance with tikanga Māori, incorporate matauranga Māori in regional policy statements, in plans, and in the consideration of applications for resource consents, notices of requirement for designation and private plan changes;

(d) provide opportunities in appropriate circumstances for Māori involvement in decision-making, for example when a consent application or notice of requirement is dealing with cultural localities or issues of cultural significance, and Māori experts, including pūkenga, may have knowledge not otherwise available;

(e) take into account any relevant iwi resource management plan and any other relevant planning document recognised by the appropriate iwi authority or hapū and lodged with the council, to the extent that its content has a bearing on resource management issues in the region or district; and

(i) where appropriate incorporate references to, or material from, iwi resource management plans in regional policy statements and in plans; …

(f) provide for opportunities for tāngata whenua to exercise kaitiakitanga over waters, forests, lands, and fisheries in the coastal environment, through such measures as:

(i) bringing cultural understanding to monitoring of natural resources;

(ii) providing appropriate methods for the management, maintenance and protection of the taonga of tāngata whenua;

(iii) …; and

(g) in consultation and collaboration with tāngata whenua, working as far as practicable in accordance with tikanga Māori, and recognising that tāngata whenua have the right to choose not to identify places or values of historic, cultural or spiritual significance or special value:

(i) recognise the importance of Māori cultural and heritage values through such methods as historic heritage, landscape and cultural impact assessments; and

(ii) provide for the identification, assessment, protection and management of areas or sites of significance or special value to Māori . . .

Policy 6 Activities in the coastal environment

(1) In relation to the coastal environment:

(a) recognise that the provision of infrastructure, the supply and transport of energy including the generation and transmission of electricity, . . . are activities important to the social, economic and cultural well-being of people and communities.

(b) consider the rate at which built development and the associated public infrastructure should be enabled to provide for the reasonably foreseeable needs of population growth without compromising the other values of the coastal environment;

…

(d) recognise tāngata whenua needs for papakainga, marae and associated developments and make appropriate provision for them;

…

(h) consider how adverse visual impacts of development can be avoided in areas sensitive to such effects, such as headlands and prominent ridgelines, and as far as practicable and reasonable apply controls or conditions to avoid those effects;

(i) set back development from the coastal marine area and other water bodies, where practicable and reasonable, to protect the natural character, open space, public access and amenity values of the coastal environment;

(2) Additionally, in relation to the coastal marine area:

…

(c) recognise that there are activities that have a functional need to be located in the coastal marine area, and provide for those activities in appropriate places;

(d) recognise that activities that do not have a functional need for location in the coastal marine area generally should not be located there

Policy 15 Natural features and natural landscapes

To protect the natural features and natural landscapes (including seascapes) of the coastal environment from inappropriate subdivision, use, and development:

(a) avoid adverse effects of activities on outstanding natural features and outstanding natural landscapes in the coastal environment; and

(b) avoid significant adverse effects and avoid, remedy or mitigate other adverse effects of activities on other natural features and natural landscapes in the coastal environment;

National Policy Statement on Electricity Transmission

5. Objective

To recognise the national significance of the electricity transmission network by facilitating the operation, maintenance and upgrade of the existing transmission network and the establishment of new transmission resources to meet the needs of present and future generations, while:

• managing the adverse environmental effects of the network; and

• managing the adverse effects of other activities on the network.

7. Managing the environmental effects of transmission

Policy 2

In achieving the purpose of the Act, decision-makers must recognise and provide for the effective operation, maintenance, upgrading and development of the electricity transmission network.

Policy 3

When considering measures to avoid, remedy or mitigate adverse environmental effects of transmission activities, decision-makers must consider the constraints imposed on achieving those measures by the technical and operational requirements of the network.

Policy 4

When considering the environmental effects of new transmission infrastructure or major upgrades of existing transmission infrastructure, decision-makers must have regard to the extent to which any adverse effects have been avoided, remedied or mitigated by the route, site and method selection.

Policy 5

When considering the environmental effects of transmission activities associated with transmission assets, decision-makers must enable the reasonable operational, maintenance and minor upgrade requirements of established electricity transmission assets.

Policy 6

Substantial upgrades of transmission infrastructure should be used as an opportunity to reduce existing adverse effects of transmission including such effects on sensitive activities where appropriate.

Policy 7

Planning and development of the transmission system should minimise adverse effects on urban amenity and avoid adverse effects on town centres and areas of high recreational value or amenity and existing sensitive activities.

Policy 8

In rural environments, planning and development of the transmission system should seek to avoid adverse effects on outstanding natural landscapes, areas of high natural character and areas of high recreation value and amenity and existing sensitive activities.

Bay of Plenty Regional Coastal Environment Plan

Issues of the RCEP

1.2 Natural Heritage

Issue 7 Māori cultural values, practices and mātauranga associated with natural character, natural features and landscapes and indigenous biodiversity are often not adequately recognised or provided for resulting in adverse effects on cultural values.

1.4 Iwi Resource Management

Issue 17 Ko te moana ko au, ko au ko te moana (I am the sea – the sea is me). Tangata whenua, as indigenous peoples, have rights protected by the Te Tiriti o Waitangi (the Treaty of Waitangi) and that consequently the RMA accords tangata whenua a status distinct from that of interest groups and members of the public.

Issue 19 Wāhi tapu and other sites of significance to tāngata whenua can be adversely affected by human activities and coastal erosion. Degradation of coastal resources and the lack of recognition of the role of tāngata whenua as kaitiaki of this resource can adversely affect the relationship of Māori and their ancestral lands, waters, sites, wāhi tapu and other taonga.

Issue 20 Māori have a world-view that is unique and that can be misunderstood, unrecognised and insufficiently provided for in the statutory decision-making process.

Issue 26 Policy 6 of the NZCPS recognises tangata whenua needs for papakainga, marae and associated developments in the coastal environment; but tangata whenua aspirations in relation to use, values

and development are not well understood, particularly in the coastal marine area.

1.8 Activities in the coastal marine area

Issue 40 The use and development of resources in the coastal marine area can promote social, cultural and economic wellbeing and provide significant social, cultural and economic benefits but may also cause adverse effects on the coastal environment.

Objectives of the RCEP

2.2 Natural Heritage

Objective 2 Protect the attributes and values of:

(a) Outstanding natural features and landscapes of the coastal environment; and

(b) Areas of high, very high and outstanding natural character in the coastal environment;

from inappropriate subdivision, use, and development, and restore or rehabilitate the natural character of the coastal environment where appropriate.

2.4 Iwi Resource Management

Objective 13 Take into account the principles of the Treaty of Waitangi and provide for partnerships with the active involvement of Tāngata whenua in management of the coastal environment when activities may affect their taonga, interests and values.

Objective 15 The recognition and protection of those taonga, sites, areas, features, resources, attributes or values of the coastal environment (including the Coastal Marine Area) which are either of significance or special value to tāngata whenua (where these are known).

Objective 16 The restoration or rehabilitation of areas of cultural significance, including significant cultural landscape features and culturally sensitive landforms, mahinga mātaitai, and the mauri of coastal waters, where customary activities or the ability to collect healthy kaimoana are restricted or compromised.

Objective 18 Appropriate mitigation or remediation is undertaken when activities have an adverse effect on the mauri of the coastal environment, areas of cultural significance to tāngata whenua or the relationship of tāngata whenua and their customs and traditions with the coastal environment.

2.8 Activities in the Coastal Marine Area

Objective 27 Activities and structures that depend upon the use of natural and physical resources in the coastal marine area, or have a functional need to be located in the coastal marine area are recognised and

provided for in appropriate locations, recognising the positional requirements of some activities.

Objective 28 The operation, maintenance and upgrade of existing regionally significant infrastructure, and transportation infrastructure that provides access to and from islands, is recognised and enabled in appropriate circumstances to meet the needs of future and present generations.

Policies of the RCEP

Natural Heritage (NH) Policies

Policy NH 4 Adverse effects must be avoided on the values and attributes of the following areas:

…

(b) Outstanding Natural Features and Landscapes (as identified in Schedule 3).

…

Policy NH 4A When assessing the extent and consequence of any adverse effects on the values and attributes of the areas listed in Policy NH 4 and identified in Schedules . . . 3 to this Plan . . :

(a) Recognise the existing activities that were occurring at the time that an area was assessed as having Outstanding Natural Character, being an Outstanding Natural Feature or Landscape . . .

(b) Recognise that a minor or transitory effect may not be an unacceptable adverse effect;

(c) Recognise the potential for cumulative effects that are more than minor;

(d) Have regard to any restoration and enhancement of the affected attributes and values, and

(e) Have regard to the effects on the tāngata whenua cultural and spiritual values of ONFLs, working, as far as practicable, in accordance with tikanga Māori.

Policy NH 5 Consider providing for … use and development proposals that will adversely affect the values and attributes associated with the areas listed in Policy NH 4 where:

…

(a) The proposal:

(ia) Relates to the construction, operation, maintenance, protection or upgrading of the National Grid;

Policy NH 9A Recognise and provide for Māori cultural values and traditions when assessing the effects of a proposal on natural heritage, including by:

(a) Avoiding, remedying or mitigating cumulative adverse effects on the cultural landscape;

(b) Assessing whether restoration of cultural landscape features can be enabled; and

(c) Applying the relevant Iwi Resource Management policies from this Plan and the RPS.

Policy NH 11

(1) An application for a proposal listed in Policy NH 5(a) must demonstrate that:

(b) There are no practical alternative locations available outside the areas listed in Policy NH 4; and

(b) The avoidance of effects required by Policy NH 4 is not possible; and

…

(d) Adverse effects are avoided to the extent practicable, having regard to the activity's technical and operational requirements; and

(e) Adverse effects which cannot be avoided are remedied or mitigated to the extent practicable.

Iwi Resource Management (IW) Policies

Policy IW 1 Proposals which may affect the relationship of Māori and their culture, traditions and taonga must recognise and provide for:

(a) Traditional Māori uses, practices and customary activities relating to natural and physical resources of the coastal environment such as mahinga kai, mahinga mātaitai, wāhi tapu, ngā toka taonga, tauranga waka, taunga ika and taiāpure in accordance with tikanga Māori;

(b) The role and mana of tāngata whenua as kaitiaki of the region's coastal environment and the practical demonstration and exercise of kaitiakitanga;

(c) The right of tāngata whenua to express their own preferences and exhibit mātauranga Māori in coastal management within their tribal boundaries and coastal waters; and

(d) Areas of significant cultural value identified in Schedule 6 and other areas or sites of significant cultural value identified by Statutory Acknowledgements, iwi and hapū resource management plans or by evidence produced by Tāngata whenua and substantiated by pūkenga, kuia and/or kaumatua; and.

(e) The importance of Māori cultural and heritage values through methods such as historic heritage, landscape and cultural impact assessments.

Policy IW 2 Avoid and where avoidance is not practicable remedy or mitigate adverse effects on resources or areas of spiritual, historical or cultural significance to tāngata whenua in the coastal environment identified using criteria consistent with those included in Appendix F set 4 to the RPS. Where adverse effects cannot be avoided, remedied or mitigated, it may be possible to provide positive effects that offset the effects of the activity.

Policy IW 5 Decision makers shall recognise that only tangata whenua can identify and evidentially substantiate their relationship and that of their culture and traditions with their ancestral lands, water, sites, wāhi tapu and other taonga. Those relationships must be substantiated for evidential purposes by pūkenga, kuia and/or kaumātua.

Policy IW 8 Tāngata whenua shall be involved in establishing appropriate mitigation, remediation and offsetting options for activities that have an adverse effect on areas of significant cultural value (identified in accordance with Policy IW 1(d)).

Structures and Occupation of Space (SO) Policies

Policy SO 1 Recognise that the following structures are appropriate in the coastal marine area, subject to the Natural Heritage (NH) Policies, Iwi Resource Management Policy IW 2 and an assessment of adverse effects on the location:

…

(c) Structures associated with new and existing regionally significant infrastructure…

Policy SO 2 Structures in the coastal marine area shall:

(a) Be consistent with the requirements of the NZCPS, in particular Policies 6(1)(a) and 6(2);

(b) Where relevant, be consistent with the National Policy Statement on Electricity Transmission;

Schedule 3 of the RCEP identifies areas of Outstanding Natural Features and Landscapes (ONFL) using the criteria of Policy 15(c) of the NZCPS and Appendix F, set 2 to the RPS.

Te Awanui Harbour, Waimapu Estuary & Welcome Bay – ONFL 3

Description:

Tauranga Harbour is a shallow tidal estuary of 224 km². At low tide, 93% of the seabed is exposed. The harbour and its estuarine margins comprise numerous bays,
estuaries, wetland and saltmarsh. The key attributes which drive the requirement for classification as ONFL, and require protection, relate to the high natural science
values associated with the margins and habitats; the high transient values associated with the tidal influences; and the high aesthetic and natural character values of the vegetation and harbour patterns.

Current uses:

Bridges, national grid infrastructure, wharves, moorings, residential development, boardwalks, stormwater and sewer infrastructure, boat ramps, reclamations,
recreational activities such as water skiing, fishing, boating, channel markers, navigational signs.

Evaluation of Māori values: Medium to High

Ancient pa, mahinga kai, wāhi tapu, kāinga, taunga ika.

Te Awanui is a significant area of traditional history and identity for the three Tauranga Moana Iwi – Ngāi Te Rangi, Ngāti Ranginui and Ngāti Pūkenga. Waitaha of Arawa also has strong ancestral connections to Te Awanui.

Te Awanui includes many cultural heritage sites, many of which are recorded in Iwi and Hapū Management Plans and other historical documents and files (including Treaty Settlement documents).

Schedule 6 of the RCEP identifies Te Awanui as an Area of Significant Cultural Value (ASCV 4):

Te Awanui and surrounding lands form the traditional rohe of Ngāi Te Rangi, Ngāti Ranginui and Ngāti Pūkenga, which extends from Wairakei in Pāpāmoa across the coastline to Ngā Kurī a Whārei at Otawhiwhi - known as "*Mai i ngā Kurī a Whārei ki Wairakei*." Te Awanui is a significant area of traditional history and identity for the three Tauranga Moana iwi – Ngāi Te Rangi, Ngāti Ranginui and Ngāti Pūkenga. Hapū of the Tauranga Moana iwi maintain strong local communities which are dependent on maintenance of the life-supporting capacity of the harbour and surrounding land.

Maintenance of kaimoana and coastal water quality is particularly important.

…

Te Awanui is rich in cultural heritage sites for Waitaha and the Tauranga Moana iwi. Many of these sites are recorded in Iwi and Hapū Management Plans and other historical documents and files. Treaty Settlement documents also contain areas of cultural significance to iwi and hapū. These iwi, along with their hapū, share Kaitiakitanga responsibilities of Te Awanui.

Traditionally, Tauranga Moana (harbour) was as significant, if not more so, than the land to tāngata whenua. It was the source of kaimoana and the means of access and communication among the various iwi, hapū and whānau around its shores. Today there are 24 marae in the Tauranga Moana district.

Bay of Plenty Regional Policy Statement (RPS)

Policy IW 2B: Recognising matters of significance to Māori

Proposals which may affect the relationship of Māori and their culture and traditions must:

(a) Recognise and provide for:

(i) Traditional Māori uses and practices relating to natural and physical resources such as mahinga mātaitai, waahi tapu, papakāinga and taonga raranga;

(ii) The role of tangata whenua as kaitiaki of the mauri of their resources;

(iii) The mana whenua relationship of tangata whenua with, and their role as kaitiaki of, the mauri of natural resources;

(iv) Sites of cultural significance identified in iwi and hapū resource management plans; and

(b) Recognise that only tangata whenua can identify and evidentially substantiate their relationship and that of their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga.

Policy IW 3B: Recognising the Treaty in the exercise of functions and powers under the Act

Exercise the functions and powers of local authorities in a manner that:

(a) Takes into account the principles of the Treaty of Waitangi;

(b) Recognises that the principles of the Treaty will continue to evolve and be defined;

(c) Promotes awareness and understanding of councils' obligations under the Act regarding the principles of the Treaty, tikanga Māori and

kaupapa Māori, among council decision makers, staff and the community;

(d) Recognises that tangata whenua, as indigenous peoples, have rights protected by the Treaty and that consequently the Act accords iwi a status distinct from that of interest groups and members of the public; and

(e) Recognises the right of each iwi to define their own preferences for the sustainable management of natural and physical resources, where this is not inconsistent with the Act.

Policy IW 4B: Taking into account iwi and hapū resource management plans

Ensure iwi and hapū resource management plans are taken into account in resource management decision making processes.

Policy IW 5B: Adverse effects on matters of significance to Māori

When considering proposals that may adversely affect any matter of significance to Māori recognise and provide for avoiding, remedying or mitigating adverse effects on:

(a) The exercise of kaitiakitanga;

(b) Mauri, particularly in relation to fresh, geothermal and coastal waters, land and air;

(c) Mahinga kai and areas of natural resources used for customary purposes;

(d) Places sites and areas with significant spiritual or cultural historic heritage value to tangata whenua; and

(e) Existing and zoned marae or papakāinga land.

Policy IW 6B: Encouraging tangata whenua to identify measures to avoid, remedy or mitigate adverse cultural effects

Encourage tangata whenua to recommend appropriate measures to avoid, remedy or mitigate adverse environmental effects on cultural values, resources or sites, from the use and development activities as part of consultation for resource consent applications and in their own resource management plans.

Tauranga City Plan (the District Plan)

Objectives

Objective 6A.1.3 The natural character of the City's coastal environment, wetlands, rivers and streams is preserved and protected from inappropriate subdivision, use and development.

Objective 6A.1.7 The landscape character values of the City's harbour environment is maintained and enhanced.

Objective 6A.1.8 The open space character of the coastal marine area and the factors, values and associations of outstanding natural features and landscapes and important amenity landscapes and their margins is maintained and enhanced.

Objective 10A.3.3 Construction, Operation and Maintenance of Network Utilities

a) The construction (and minor upgrading in relation to electric lines) of network utilities avoids or mitigates any potential adverse effects on amenity, landscape character, streetscape and heritage values;

b) The operation (and minor upgrading in relation to electric lines) and maintenance of network utilities mitigates any adverse effects on amenity, landscape character, streetscape and heritage values.

Policies

Policy 6A.1.7.1 By ensuring that subdivision, use and development along the margins of Tauranga Harbour does not adversely affect the landscape character values of that environment by:

…

g) Protecting areas of cultural value;

h) Avoiding built form of a scale that dominates the harbour's landscape character;

i) Siting buildings, structures, infrastructure and services to avoid or minimise visual impacts on the harbour margins environment;

…

m) Ensuring activities maintain and enhance the factors, values and associations of outstanding natural features and landscapes and/or important amenity landscapes.

Policy 6A.1.8.1 By ensuring that buildings, structures and activities along the margins of the coastal marine area, outstanding natural features and landscapes and important amenity landscapes do not compromise the natural character, factors, values and associations of those areas, through:

a) The impact of the bulk and scale of buildings, structures and activities on the amenity of the environment;

…

d) Buildings, structures and activities detracting from the existing open space character and the factors, values and associations of outstanding natural features and

landscapes and important amenity landscapes and their margins;

Policy 7C.4.3.1 By ensuring that subdivision, use and development maintains and enhances the remaining values and associations of Group 2 Significant Maori Areas by having regard to the following criteria:

a) The extent to which the degree of destruction, damage, loss or modification associated with the activity detracts from the recognised values and associations and the irreversibility of these effects;

b) The magnitude, scale and nature of effects in relation to the values and associations of the area;

c) The opportunities for remediation, mitigation or enhancement;

d) Where the avoidance of any adverse effects is not practicable, the opportunity to use alternative methods or designs that lessen any adverse effects on the area, including but not limited to the consideration of the costs and technical feasibility of these.

Policy 10A.3.3.1 Undergrounding of Infrastructure Associated with Network Utilities

By ensuring infrastructure associated with network utilities (including, but not limited to pipes, lines and cables) shall be placed underground, unless:

a) Alternative placement will reduce adverse effects on the amenity, landscape character, streetscape or heritage values of the surrounding area;

b) The existence of a natural or physical feature or structure makes underground placement impractical; c) The operational, technical requirements or cost of the network utility infrastructure dictate that it must be placed above ground;

d) It is existing infrastructure.

Policy 10A.3.3.2 Effects on the Environment

By ensuring that network utilities are designed, sited, operated and maintained to address the potential adverse effects:

a) On other network utilities;

b) Of emissions of noise, light or hazardous substances;

c) On the amenity of the surrounding environment, its landscape character and streetscape qualities;

d) On the amenity values of sites, buildings, places or areas of heritage, cultural and archaeological value.

Objective 10B.1.1 Electricity Transmission Network

The importance of the high-voltage transmission network to the City's, regions and nation's social and economic wellbeing is recognised and provided for.

Policy 10B.1.1.1 Electricity Transmission Network

By providing for the sustainable, secure and efficient use and development of the high-voltage transmission network within the City, while seeking that adverse effects on the environment are avoided, remedied or mitigated to the extent practicable, recognising the technical and operational requirements and constraints of the network.

The Tauranga City Plan identifies Te Ariki Pā/Maungatapu as a significant Māori area of Ngāti Hē (Area No M41). Its values are recorded as:

> Mauri: The mauri and mana of the place or resource holds special significance to Māori;
>
> Wāhi Tapu: The Place or resource is a Wāhi tapu of special, cultural, historic and or spiritual importance to the hapū;
>
> Kōrero Tuturu/Historical: The area has special historical and cultural significance to the hapū;
>
> Whakaaronui o te Wa/ Contemporary Esteem: The condition of the area is such that it continues to provide a visible reference point to the hapū that enables an understanding of its cultural, architectural, amenity or educational significance.

Iwi Management Plans

The Te Awanui Tauranga Harbour Iwi Management Plan 2008

> OBJECTIVE
>
> 1. To reduce the impacts on cultural values resulting from infrastructural development in, on or near Te Awanui.
>
> POLICIES
>
> 1. To restrict the placement of structures in, on or near Te Awanui, and to promote the efficient use of existing structures around Te Awanui.
>
> …
>
> 8. To avoid adverse effects on culturally important areas, including waterways and cultural important landscape features as a result of works, including the storage and or disposal of spoil as a product of works.

…

10.Iwi object to the development of power pylons in Te Awanui, appropriate alternative routes need to be investigated in conjunction with tāngata whenua.

The Tauranga Moana Iwi Management Plan 2016-2026

15.1 Oppose further placement of power pylons on the bed of Te Awanui (Tauranga Harbour).

15.2 Pylons are to be removed from Te Ariki Park and Opopoti (Maungatapu) and rerouted along the main Maungatapu road and bridge.

…

15.4 In relation to the placement, alteration or extension of structures, within Tauranga Moana:

(a) Ensure that:

(i) tāngata whenua values are recognised and provided for.

…

(b) Avoid adverse effects on sites and areas of cultural significance, wetlands or mahinga kai areas.

Ngāi Te Rangi Resource Management Plan

All environmental activities that take place within the rohe of Ngaiterangi must take into account the impact on the cultural, social, and economic survival of the Ngaiterangi hapu.

…

The cultural significance of Ngaiterangi's links to their lands and the values they hold in respect of land, whether still in customary title or not, should be acknowledged and respected in all resource management activities.

…

Marae provide the basis for the cultural richness of Tauranga Moana. The key role that they play in supporting the needs of their whanau, hapu, and wider communities – Maori and non Maori – shall be recognised in the development of resource management policies, rules and practices. The evolving nature of that role must also be accommodated.

…

Resource consents for the upgrading or provision of additional high tension power transmission lines, or other utilities, will not in general be supported.

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2017-404-2762
[2018] NZHC 1026

BETWEEN	TITIRANGI PROTECTION GROUP INCORPORATED, NATASHA BERMAN and DAVID AND JOLIE HUTCHINGS Appellants
AND	WATERCARE SERVICES LIMITED First Respondent
	AUCKLAND COUNCIL Second Respondent

Hearing: 8 May 2018

Appearances: D A Cowan and B J Matheson for Appellants
W S Loutit and K M Stubbing for First Respondent
R S Ward and M J L Dickey for Second Respondent

Judgment: 14 May 2018

JUDGMENT OF LANG J
[on appeal against a decision of Environment Court refusing to grant declaratory relief]

This judgment was delivered by me on 14 May 2018 at 3.30 pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date……

[1] This appeal follows the refusal of the Environment Court to make a declaration that a proposed water treatment plant to be constructed on land designated for water treatment purposes in West Auckland fell outside the purposes of the designation.[1]

The parties

[2] The Titirangi Protection Group Incorporated is an incorporated society having the principal purpose of protecting and supporting the natural and human environment of the Titirangi area.

[3] The remaining appellants, Mr and Mrs Hutchings and Ms Berman, are residents who live near the designated area in which the new plant would be constructed.

[4] The first respondent, Watercare Services Limited (Watercare), is a company now owned and controlled by the Auckland Council (the Council). It is responsible for administering the city's water supply and wastewater assets. It is also required to meet a number of statutory obligations. These include a requirement to act consistently with any Council plan or strategy to the extent directed by the governing body of the Council.[2]

[5] The Council is the local authority for the Auckland region and is responsible for the development, administration and application of the Auckland Unitary Plan.

Background

[6] For many years a significant proportion of Auckland's water supply has come from dams and catchment areas within the Waitakere Ranges. Water from four dams in that area has been processed at the Nihotupu Filter Station and the Huia Water Treatment Plant. Both are located near Titirangi on land acquired by the then Auckland City Council in 1926 and now owned by Watercare.

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1 *Titirangi Protection Group Inc v Watercare Services Ltd* [2017] NZEnvC 181.
2 Local Government (Auckland Council) Act 2009, s 58.

[7] The Nihotupu Filter Station was commissioned in 1928, whilst the Huia Plant was commissioned in 1929. Over the years the plants have been upgraded progressively to provide them with greater processing capacity to meet the city's increasing need for treated water for human use and consumption.

[8] During the 1990s, the Huia Plant was subject to a significant upgrade including automation. When this was completed the Nihotupu Station was decommissioned. Water formerly treated at that station was diverted to, and treated at, the Huia Plant. The Nihotupu Station is now only used for water storage. It plays no role in the water treatment process.

[9] The Huia Plant is now responsible for providing approximately 20 per cent of Auckland's water supply. It primarily services the western and northern suburbs of the city, but water from the station can also be distributed to all parts of the Auckland water network as required. It is currently the third largest water treatment plant within the Auckland region.

[10] Watercare has been planning to replace or significantly upgrade the Huia Plant since 2008. A recent independent high-level asset review has identified that it is not viable for Watercare to invest significant capital into the Huia Plant because it is nearing the end of its economic life. Even with careful ongoing maintenance it is unlikely that the Huia Plant will be able to perform its current role for more than five to ten years. Watercare has therefore concluded that traditional treatment processes used in the existing plant should be replaced by advanced processes now considered more appropriate for the treatment of water received from the dams that supply it.

[11] Watercare has also concluded that any new capital investment in this area should focus on the development of a modern water treatment plant rather than upgrading of the Huia Plant. Any new plant will not only incorporate more advanced processing systems but will also address seismic design requirements and other limitations faced by the existing facility.

[12] Watercare proposes to relocate the bulk of the water treatment processes currently carried out at the Huia Plant to a new plant to be built on a 4.2 hectare parcel

of land adjacent to the land on which the Huia Plant is now located. It intends to re-locate primary water treatment processes, chemical storage and administrative facilities to the new site. Other systems will remain on the existing Huia site. Surplus assets on the existing site that are not considered to be heritage assets will be demolished. Once the new plant has been completed, the three plants will operate together as a single water treatment facility.

Designation 9324

[13] The land on which the two existing plants are located is subject to a designation known as Designation 9324. The new plant will also be located on land having that designation. The designation is annexed to the judgment as an appendix for ease of reference.

[14] Under the heading "Purpose", the designation states "Water supply purposes – Huia and Nihotupu water treatment plants and associated structures".

[15] Designation 9324 is a legacy designation, having been in existence in one form or another since 1972. Prior to its incorporation in the Auckland Unitary Plan it comprised designation WSL4 under the former Waitakere District Plan. Designation 9324 is largely in the same terms as Designation WSL4, although the earlier designation did not include the words "and associated structures".

[16] The designation applies to three parcels of land encompassing in total 57 hectares. The first is a four hectare parcel of land on which the existing Huia Station and associated pipelines are located. The second is an adjoining 4.2 hectare parcel of land that is presently covered in regenerating bush. This is the land on which the new plant is to be built. The remaining parcel of land comprises 49 hectares. The decommissioned Nihotupu Filtration Station is located on one corner of this parcel of land, as is a pipeline network.

[17] The designation was incorporated into the Auckland Unitary Plan (AUP) after Watercare gave the Council notice of its requirement that the whole of the land was to

remain subject to a designation for water treatment purposes.[3] The rollover process occurred between 2013 and 2016.

[18] No submissions were received in opposition to the rollover of the designation. The appellants point out, however, that nothing in the rollover process provided any hint that Watercare proposed to construct a new plant on the designated land. By that stage the proposal must have been well advanced. The appellants say the lack of notice about the proposal meant they effectively lost the opportunity to make submissions about it at the time of the rollover.

[19] The designation is subject to three conditions. The first relates to matters that Watercare is required to address or include in any outline plan of work (OPW) it might submit to the Council. The second relates to sedimentation and erosion control measures for any earthworks to be carried out on the designated site. The third comprises a prohibition on future works that might adversely affect those elements of the Filter Stations that are identified as having heritage value.

The Environment Court's decision

[20] The appellants sought the following declarations in the Environment Court:

> (a) That "Designation 9324 Huia and Nihotupu Water Treatment Plants" at Woodlands Park Road, Manuka Road, and Exhibition Drive, Titirangi for "water supply purposes – water treatment plants and associated structures" in the partly Operative Unitary Plan of Auckland Council does not authorise the use of that property in terms of the RMA for the construction and operation of a new water treatment plant.
>
> (b) That the construction and operation of any new water treatment plant on the designated land would require a new or further designation.

[21] As the Environment Court noted, the question was whether the existing designation covered a new water treatment plant outside the existing footprint but within the designated area.[4] That issue turned on the correct interpretation of the

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3 The process to be used when designations are to be rolled over into subsequent district plans is prescribed by cl 4 to Schedule 1 to the Resource Management Act 1991. The public are entitled to make submissions once a designation has been incorporated in a proposed district plan: cl 5(2), Sch 1, Resource Management Act.

4 *Titirangi Protection Group Inc v Watercare Services Ltd,* above n 1, at [6].

purpose contained in the designation: "Water supply purposes – Huia and Nihotupu water treatment plants and associated structures".

[22] The Environment Court noted that the wording of the designation gave rise to two possible interpretations.[5] Which of these was correct depended on the meaning to be attributed to the hyphen between the words "water supply purposes" and "Huia and Nihotupu water treatment plants and associated structures". The first, and that for which the appellants contended, treats the hyphen as being synonymous with the words "being the". This would restrict the designated purpose to those water supply activities undertaken at the two named water treatment plants and their associated structures. It would not extend to an entirely new plant constructed in a new location.

[23] The second interpretation treats the hyphen as meaning "including the". This would not exclude water supply activities undertaken at other locations within the designated land from the designated purpose.

[24] The Environment Court preferred the latter interpretation for the following reasons:

> [20] I have reached the clear conclusion that the words "Huia and Nihotupu filter station" or "Huia and Nihotupu water treatment plants and associated structures" does not describe the full extent of the water supply purposes. There are several reasons for this:
>
> (a) major aspects of both the Huia and Nihotupu treatment stations are protected by condition 3. That is not for a water supply purpose but for a heritage purpose. At the time of the designation, Nihotupu was providing either no or limited water supply purposes. I conclude that the reservoir aspect of it would have been covered as part of the associated works in any event;
>
> (b) the WSL34 did not refer to associated works and structures, yet they are clearly part of the ongoing operation of this water supply purpose. Without them, the filtration plant could not operate. They have had to be upgraded and modified over the years. Accordingly, the full extent of the designation cannot simply be the water filtration plants themselves;
>
> (c) designation WSL4 (and in the AUP) conditions 1 and 2 make it clear that further works are anticipated on the site. If these were only minor, incremental changes within the existing footprint,

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5 At [19].

then it would seem unusual that full outline development plans would be required, with a full assessment of adverse effects;

(d) it appears to be contemplated that any new works required within the designation should avoid the Huia and Nihotupu heritage elements. If one looks at the explanation to condition 3, it notes:

> … works otherwise in accordance with the designation, but which adversely affect the items or elements of items identified as being of heritage significance, may only be carried out if the designation is altered to specifically alter (or remove) the condition.

Given that Nihotupu is not currently used as a water treatment plant, this would suggest that any construction of a replacement water treatment plant for that or Huia would be better on a new site than affecting heritage items within the existing sites.

[25] The Environment Court then observed:

A holistic approach

[21] Looking at the designation as a whole, the question is "How would a reasonable person understand that designation?" Looking at the relevant map, it is clear that the designation does not just cover the area around Woodlands Park or Manuka Drive, but the entire 57ha. Although it clearly includes the water treatment plants, it must also include the existing reservoir, roading, parking, pipelines, dams or reservoirs situated over the land.

[22] Given the generality of the purpose, a reasonable person would understand that there may be changes to the operation and process for water treatment in the Auckland region over decades. The controls in this case are not exercised through the land use control, but through the conditions on the designation and the requirement for regional consents. In this designation there are significant constraints that would avoid the possibility of the entire site being converted to a water treatment plant, for example. Even if only aspects of the activity are non-complying, or fully discretionary, it is clear that the regional consents would require considerable attention to the details of design.

[23] I conclude that a reasonable person would expect that the water treatment plants and processes could be replaced over time and new ones constructed.

[26] In addition, the Environment Court went on to say:

[28] Given my primary conclusion it is not, strictly speaking, necessary to discuss this issue further. Nevertheless, I conclude there is a further impediment to the applicant's position. Although it is correct that the Huia and Nihotupu treatment plants' buildings can currently be identified, I am not satisfied that this means that the designation would be limited to those buildings.

> [29] The treatment of water is, in fact, a process involving many stages and parts, as I have identified earlier in this decision. Over the years, the requirements for water quality have changed, and this has added elements such as testing laboratories, chemical additions and, more latterly, UV and microbiological treatment of waters through various means. New technology is being developed all the time, including membrane filtration and other similar methodologies.
>
> [30] I cannot accept that the description of the two areas as Huia and Nihotupu treatment plants means that they are constrained to the existing buildings or footprints. This position is strengthened by a reference to the identifiers. Huia and Nihotupu are references, not to these particular buildings, but to areas that are the sources of the water. In both cases the water supply dams Huia and Nihotupu are not within the designation, but are in different parts of the catchment. They may refer either to particular reservoirs and dams, or to catchments.
>
> [31] On that basis, the use of those names before the water treatment plant would simply identify the source of the water, not the footprint or structures associated with it. Thus, the Huia water treatment plant would be the treatment plant that treats the Huia water and similarly for the Nihotupu. At the current time, the so-called Huia treatment plant treats the water for both Nihotupu and Huia since the decommissioning of the Nihotupu water treatment plant.
>
> [32] Overall, I have concluded that the reason for the identification of the water treatment plants is to be descriptive of areas from which the water is sourced and the general nature of the activity on the site. Given that the Nihotupu plant never operated during the time of either the Waitakere District Plan or the Unitary Plan, it cannot be that the descriptor words [relate] to the water supply function of those particular two structures.

The approach on appeal

[27] Appeal to this Court from a decision of the Environment Court is only permitted on questions of law.[6] An error of law may occur in different ways. The appellants allege the Environment Court applied the wrong test, failed to take into account relevant factors and/or took into account irrelevant factors. I accept that these would constitute errors of law if established.[7] Relief would only be granted, however, if the errors materially affected the outcome of the Environment Court's decision.[8]

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6 Resource Management Act 1991, s 299(1).

7 See *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 (HC) at 153.

8 *Royal Forest and Bird Protection Society Inc v W A Habgood Ltd* (1987) 12 NZTPA 76 (HC) at 81-82.

Errors of law

[28] The appellants contend the Environment Court erred in law in three respects:

1. in concluding that the words "Huia and Nihotupu water treatment plants" did not constrain the application of the designation primarily to those facilities;[9]

2. in concluding that the designation authorises a new water treatment plant, reservoirs and associated structures; and

3. in taking into account or giving undue weight to several factors that were either irrelevant or of little relevance to the issue the Environment Court was required to determine.

[29] Before considering the alleged errors in greater detail it is necessary to have regard to the statutory scheme relating to designations and to the approach the courts have taken to interpretation of designations.

The statutory scheme relating to designations

[30] Part 8 of the Resource Management Act 1991 (the RMA) provides for designations. The Act defines the term "designation" as follows:[10]

> **designation** means a provision made in a district plan to give effect to a requirement made by a requiring authority under section 168 or section 168A or clause 4 of Schedule 1

[31] As will be evident from this definition, a designation gives effect to a requirement made by a requiring authority under s 168. The RMA defines "requiring authority" as follows:[11]

> **requiring authority** means—
>
> (a) a Minister of the Crown; or

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9 Counsel for the appellants used the words "meaning of the designation" rather than "application of the designation" but I consider the latter more aptly describes the issue on appeal.

10 Section 166.

11 Section 166.

(b) a local authority; or

(c) a network utility operator approved as a requiring authority under section 167.

[32] There is no dispute that Watercare is a network utility operator approved as a requiring authority under s 167 of the Act.

[33] Section 176 of the Act prescribes the effect of a designation as follows:

> **176 Effect of designation**
>
> (1) If a designation is included in a district plan, then—
>
> (a) section 9(3) does not apply to a public work or project or work undertaken by a requiring authority under the designation; and
>
> (b) no person may, without the prior written consent of that requiring authority, do anything in relation to the land that is subject to the designation that would prevent or hinder a public work or project or work to which the designation relates, including—
>
> (i) undertaking any use of the land; and
>
> (ii) subdividing the land; and
>
> (iii) changing the character, intensity, or scale of the use of the land.
>
> (2) The provisions of a district plan or proposed district plan shall apply in relation to any land that is subject to a designation only to the extent that the land is used for a purpose other than the designated purpose.
>
> …

[34] As s 176(1)(a) makes clear, land that is subject to a designation will no longer be subject to the requirements of s 9(3) of the RMA. That section prohibits land being used in a manner that contravenes a district rule unless the use is expressly allowed by either a resource consent or ss 10 or 10A of the RMA. Designations have been described as "notice to the world" of the use to which the land subject to a designation may be put.[12]

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12 *Waimairi County Council v Hogan* [1978] 2 NZLR 587 (CA) at 590.

[35] Although a proposed work that is covered by a designation does not require a resource consent in the form of a land use consent, it remains subject to other requirements. First, the requiring authority must comply with s 176A of the RMA before carrying out the work. This requires the requiring authority to provide the territorial authority, in this case the Council, with an outline plan of any works (OPW) the requiring authority proposes to carry out on the land subject to the designation. Section 176A relevantly provides as follows:

> **176A Outline plan**
>
> (1) Subject to subsection (2), an outline plan of the public work, project, or work to be constructed on designated land must be submitted by the requiring authority to the territorial authority to allow the territorial authority to request changes before construction is commenced.
>
> (2) An outline plan need not be submitted to the territorial authority if—
>
> (a) the proposed public work, project, or work has been otherwise approved under this Act; or
>
> (b) the details of the proposed public work, project, or work, as referred to in subsection (3), are incorporated into the designation; or
>
> (c) the territorial authority waives the requirement for an outline plan.
>
> (3) An outline plan must show—
>
> (a) the height, shape, and bulk of the public work, project, or work; and
>
> (b) the location on the site of the public work, project, or work; and
>
> (c) the likely finished contour of the site; and
>
> (d) the vehicular access, circulation, and the provision for parking; and
>
> (e) the landscaping proposed; and
>
> (f) any other matters to avoid, remedy, or mitigate any adverse effects on the environment.
>
> (4) Within 20 working days after receiving the outline plan, the territorial authority may request the requiring authority to make changes to the outline plan.
>
> (5) If the requiring authority decides not to make the changes requested under subsection (4), the territorial authority may, within 15 working

days after being notified of the requiring authority's decision, appeal against the decision to the Environment Court.

(6) In determining any such appeal, the Environment Court must consider whether the changes requested by the territorial authority will give effect to the purpose of this Act.

(7) This section applies, with all necessary modifications, to public works, projects, or works to be constructed on designated land by a territorial authority.

[36] As the section makes clear the Council has the ability to request changes to any OPW that might be submitted by a requiring authority. The Council also has a right of appeal to the Environment Court if the requiring authority does not make the changes requested. As the appellants point out, however, no party other than the territorial authority has the ability to have any input into the OPW process.

[37] In addition, the requiring authority must also seek any necessary resource consents under the regional plan components of the AUP.

[38] Before considering the alleged errors of law it is also appropriate to consider the approach the courts have taken to the interpretation of designations.

The interpretation of designations

[39] Historically, most designations were drafted in very broad terms. Many designations of this type, commonly known as legacy designations, remain in existence because they have been "rolled over" into successive district plans with or without modification. More recently, however, the trend has been to prescribe the activity or use to which a designation relates with some precision so that all persons who have cause to consider the designation can be left in no doubt as to its potential scope.

[40] As the present case demonstrates, broadly worded designations can raise issues as to whether a current or proposed use of the land in question is covered by or included within the designation. Often the designation will have been drafted at a time when a proposed use could not have been contemplated.

[41] There is no dispute regarding the test to be applied when interpreting the purpose of a broadly worded designation. As confirmed in numerous cases, the test is what an ordinary, reasonable member of the public who is considering a district scheme or plan would have taken from the designation.[13]

[42] There are numerous examples of the courts and planning authorities applying the test. It is worth referring to some of these because they provide practical examples of the approach the courts have taken.

[43] In *Concerned Citizens Group v Wanganui District Council*, the High Court was required to consider whether the Planning Tribunal had correctly concluded that the designation "Wanganui Base Hospital" included the construction and operation of a medium secure psychiatric unit within the land subject to the designation.[14] That type of facility would not have been foreseen when the designation was first included in the District Scheme. Neazor J concluded that the proposed development "should be regarded as one of the hospital services which may contribute to the totality of services provided by a base hospital".[15] This prompted his Honour to uphold the Planning Tribunal's decision that the proposed development fell within the designation.

[44] In *Hororata Concerned Citizens v Canterbury Gliding Club Inc*, a gliding club sought a declaration that gliding activities constituted a recreational activity so that it could be accommodated on an area designated as a recreation reserve.[16] The Environment Court concluded that the designated purpose of "recreation reserve" would cover all recreational activities.[17] It held that gliding was clearly a recreational activity and the existing designation was therefore sufficient to cover it.

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13 *Waimairi County Council v Hogan*, above n 12, at 590 applying *Maunsell v Olins* [1975] AC 373 (HL) at 391.

14 *Concerned Citizens Group v Wanganui District Council* HC Wellington AP19/92, 17 July 1992.

15 At 18.

16 *Hororata Concerned Citizens v Canterbury Gliding Club Inc* EnvC Christchurch C185/2004, 8 December 2004.

17 At [51].

[45] In *Ngataringa Bay 2000 Inc v Minister of Defence* the Planning Tribunal was required to decide whether the establishment of a Damage Control School fell within the purpose of the designation "defence purposes".[18] The Tribunal concluded:[19]

> In my opinion a thoughtful member of the public, considering the designation "Defence Purposes" in the context of a document listing the range of activities given in that paragraph (including Naval training), might reasonably expect that it would include a facility for training Naval personnel in damage control on ships. I hold that the use and development of part of the site so designated for the Royal New Zealand Navy Damage Control School is in accordance with the designation.

[46] In *Waimairi County Council v Hogan,* the Court of Appeal was required to determine whether a playcentre could be erected as of right on land designated as a "public recreation (play) area".[20] It held that the proposal was contrary to the designation because it would "exclude the public at large from a substantial part of the reserve".[21]

[47] In *Olsen v Minister of Social Welfare,* the Planning Tribunal dealt with both an appeal and an application for a declaration that the designation of the "Epuni Boys Home" did not authorise the use of the designated land for purposes including the custodial detention of young persons on remand from the courts.[22] The appeal was filed by persons living near the Epuni Boys Home after the Hutt City Council had accepted a requirement issued by the Minister of Education that an existing designation of "Boys Home" be altered to "Social Welfare purposes: residents (sic) for care and control (including detention) of children and young persons and related office accommodation".

[48] The Planning Tribunal held that the requiring authority that had originally obtained the designation "was intent upon using a name [Boys Home] for the purpose of pacifying the public".[23] It considered the Minister had adopted the same approach

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18 *Ngataringa Bay 2000 Inc v Minister of Defence (3)* (1992) 2 NZRMA 318 (PT).
19 At 325.
20 *Waimairi County Council v Hogan*, above n 12.
21 At 590.
22 *Olsen v Minister of Social Welfare* [1995] NZRMA 385 (PT).
23 At 389.

in seeking a new designation naming the facility as a "residential centre". The Tribunal observed:[24]

> Lastly we observe that despite the declarations the legality of the activity eventually becomes a matter of degree. A "Boys Home" may well contain one or two boys who are at the worse end of the offending scale and some type of mix is probably inevitable. The Epuni institution however was well past being accommodated by the expression "home" which is misleading to the general public. The closest description we can give to it is a young persons detention centre.

Decision

First alleged error: Did the Environment Court err in concluding that the words "Huia and Nihotupu water treatment plants" did not constrain the application of the designation primarily to those constructed facilities?

[49] I accept that the wording of the purpose of the designation can be interpreted in differing ways as identified by the Environment Court. It is common ground, however, that the purpose of the designation must be ascertained having regard to the whole of the designation and not just the words used in setting out the purpose.

[50] I agree with the Environment Court that the conditions are relevant in this context. They clearly anticipate that Watercare will carry out further works in reliance on the designation because they make provision for what will happen in that event. As I have already observed, Condition 1 prescribes matters Watercare must include or cover in any future OPW; Condition 2 deals with sedimentation and erosion control measures in relation to future works; and Condition 3 deals with future works that adversely affect elements of the treatment plants identified as having heritage values. The designation itself therefore contemplates further works within the scope of the designation being carried out in the future.

[51] The appellants do not take issue with this. They acknowledge Watercare will need to maintain and upgrade the Huia plant to ensure it maintains the ability to meet future water needs. They part company with Watercare and the Council in relation to the scope of works that may be carried out within the boundaries of the designation. The appellants acknowledge that the designation permits Watercare to maintain and if

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[24] At 390.

necessary replace the two existing plants without a resource consent or new designation, but only if the work is carried out within the footprint of the existing sites. They say the designation does not extend to the construction of a new plant on another site. They contend Watercare is required to obtain a new designation or resource consent if it wishes to take that step.

[52] As the Environment Court correctly observed, the ultimate test in the present context is what the ordinary, reasonable person would understand the designation to mean. That hypothetical person must be taken to have the level of knowledge about the factual context likely to be possessed by any ordinary and reasonable person who takes the trouble to examine a designation.

[53] I deal first with an argument by the appellants regarding the meaning an ordinary and reasonable person would take from the words "Given effect to (i.e. no lapse date)". These appear in the designation in response to the words "Lapse date". The appellants argue that these words would suggest to such a person that the effect of the designation is spent because the designated works have already been constructed. As a result, no reasonable person would interpret the designation as authorising substantial works in the future.

[54] This argument has several flaws. First, a designation of this breadth does not relate solely to construction works. Rather, it relates to the purpose for which the land has been designated. The land has been designated for water supply purposes. Although the plants may have been built, the conditions clearly anticipate that further works may be carried out in the future.

[55] More importantly, the hypothetical person must be taken as having a reasonable knowledge of the manner in which designations operate. Ordinarily a designation will lapse after five years if it is not given effect.[25] The words in the designation are designed to alert the reader to the fact that the designation has been given effect so that it will not lapse. This argument has no merit.

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[25] Resource Management Act 1991, s 184(1)(a).

[56] I deal next with an issue raised by the Environment Court in the passage set out above at [25]. In that passage the Environment Court noted, albeit as a subsidiary conclusion, that the two existing facilities take their names from the dams that supply them with water for processing.[26] The evidence from Watercare is certainly to that effect and it might also be within the knowledge of some persons who live in the area and/or who have an interest in water treatment activities. I would be surprised, however, if that fact was within the knowledge of most ordinary and reasonable persons. I suspect that few persons outside the immediate area would know the names of the dams that supply the two facilities.

[57] The hypothetical reasonable and ordinary person would, however, know that the treatment of water from its raw state to a product suitable for human use and consumption will require a number of steps to be taken. These will vary in nature and intensity as knowledge and technology advance, and as the demand for water rises with the steady increase in Auckland's population.

[58] That person would also know that, in common with plant used for most industrial and commercial purposes, the plant installed at Watercare's sites will have a finite working life. New and more advanced water treatment methods will inevitably emerge as time goes on. The hypothetical person may also know that the Nihotupu plant reached the end of its working life nearly twenty years ago, and has been decommissioned as a result. Even if the person is not aware of that fact, he or she will know that all water treatment plants eventually become obsolete or unable to process water in an appropriate or economic way. The ordinary and reasonable person would therefore anticipate the eventual construction of one or more new facilities to either replace the existing facility or, as is now proposed, to operate in conjunction with it.

[59] I do not consider the ordinary and reasonable person would conclude that any new or replacement facility would necessarily be located on the same site as the Huia or Nihotupu plants. That would be inherently unlikely in the case of the construction of an entirely new plant to operate in conjunction with the existing plant. The person would know that Watercare has required 57 hectares to be designated for water

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[26] At [31].

treatment purposes. He or she would therefore appreciate that Watercare is likely to build the new facility within that area and most probably in relatively close proximity to the two existing sites. This would enable the new facility to take advantage of the area's proximity to the sources from which water was to be drawn for the new plant. It would also enable the three sites to be operated in the most efficient way.

[60] I therefore consider the ordinary, reasonable person would understand the designation permitted the construction of a new water treatment facility within the area designated for that purpose but not in the same position as the two existing sites. This is the conclusion reached by the Environment Court for essentially the same reasons and applying the correct test. The Environment Court accordingly did not err in interpreting the wording of the designation as permitting water treatment activities beyond those carried on at the two existing plants.

Second alleged error: Did the Environment Court err in authorising a new water treatment plant, reservoirs and associated structures?

[61] Reading the decision of the Environment Court as a whole, I do not consider it amounted to authorisation of a new water treatment plant with reservoirs and associated structures. The Environment Court expressly declined to make a declaration in favour of the Council.[27] Having regard to the conclusions the Environment Court reached, however, it is implicit from the decision that it considered the construction of a new water treatment plant on a new site was covered by the designation. Having regard to my own conclusion in relation to the first alleged error, the Environment Court was entitled to reach that view.

[62] As argument developed, it became evident that the appellants' focus was directed to another issue. Mr Matheson for the appellants argued that the Environment Court had erred by failing to have regard to the fact that any new plant will inevitably add substantially to the scale and degree of the activity carried out on the designated land. He submitted this could place the new activity outside the scope of the designation. He also contended the Court needed to take into account the fact that the designated area falls within an ecologically important area. He contended it was

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[27] At [36]-[37].

essential that the public be given the opportunity to provide input into the proposal to build a new plant by making submissions in opposition to an application for resource consent or a new designation.

[63] The appellants rely for this ground on observations made by the Court of Appeal in *Hogan* and the Planning Tribunal in *Olsen*. As noted above,[28] the Court of Appeal in *Hogan* held that the proposed erection of a playcentre within an area designated as a public recreation reserve was not covered by the designation because it would exclude the public from using a substantial portion of the reserve. Mr Matheson for the appellants submits it can be inferred from this that the Court of Appeal may not have decided the case the same way if the proposed activity had only excluded the public from using a small or minor part of the reserve.

[64] I do not accept this submission. I consider the Court's decision was based on its conclusion that the reserve was designated for the use of the general public and the designation would not extend to any activity that excluded the general public. I do not consider the proportion of the reserve that might be affected by the proposed use could affect that proposition.

[65] Mr Matheson points out that in the passage from *Olsen* set out above[29] the Planning Tribunal referred to the fact that the legality of the activity "eventually becomes a matter of degree". He submits this supports his argument that an increase in scale or degree of an activity can remove it from or place it outside the scope of a designation. I do not accept this submission because I consider the Planning Tribunal in *Olsen* was referring to the fact that eventually an increase in a different type of activity will change the nature or character of the purpose for which designated land is being used. In that case the use of a property designated as a boys home altered to that of a facility for the custodial detention of young persons on remand from the courts. The nature of the use therefore altered rather than the degree.

[66] In general terms, and in the absence of any conditions in the designation limiting the scale or intensity of the use to which the land may be put, I do not see how

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28 At [46].
29 At [48].

an increase in the degree or scale of an activity falling within the purposes of a designation can result in the activity falling outside the designation. Either an activity is covered by a designation or it is not. For that reason the appellants' criticism that the Environment Court failed to set an "upper limit" for future development is without substance. This argument fails as a result.

Third alleged error: Did the Environment Court err by taking into account irrelevant considerations or giving undue weight to marginally relevant considerations?

[67] I begin by observing that it will be an error of law for a decision maker to take into account an irrelevant consideration but the weight to be given to relevant considerations will be for the decision maker to asses.

[68] The appellants' challenge under this ground relies on the Environment Court's observation that Watercare will still be required to obtain resource consents under the regional aspects of the AUP and it will also be required to file an OPW with the Council in respect of future work even if it is covered by the designation. These references appear in the following passage of the Environment Court's decision:[30]

> [22] Given the generality of the purpose, a reasonable person would understand that there may be changes to the operation and process for water treatment in the Auckland region over decades. The controls in this case are not exercised through the land use control, but through the conditions on the designation and the requirement for regional consents. In this designation there are significant constraints that would avoid the possibility of the entire site being converted to a water treatment plant, for example. Even if only aspects of the activity are non-complying, or fully discretionary, it is clear that the regional consents would require considerable attention to the details of design.

[69] I consider these issues were relevant to the Environment Court's reasoning process because they demonstrated that the designation, and in particular the conditions attached to the designation, contemplated future works being carried out within the designated area. Furthermore, I accept the submission for Watercare that the Environment Court may also have included these observations to provide the appellants with some assurance that Watercare would still be subject to some significant controls in relation to future construction works.

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30 *Titirangi Protection Group Inc v Watercare Services Ltd,* above n 1.

[70] Even if the observations were irrelevant, they can have no bearing on the outcome of the appeal because I have already concluded that the Environment Court's interpretation of the designation was correct using the established test.

[71] Before concluding, I acknowledge that the appeal does not, and cannot, address the appellants' primary concern. This is that they were effectively denied the opportunity to make submissions on the rollover of the designation because Watercare did not provide any hint at that time of its intention to construct a new plant on the designated land. The appeal does not, however, provide the appellants with a forum within which to ventilate that concern. Furthermore, they now have no means under the RMA by which they may challenge the incorporation of the designation within the AUP. It was partly for this reason that the Environment Court directed that costs were to lie where they fell.[31]

Result

[72] The appeal is dismissed.

Costs

[73] The respondents have succeeded and would ordinarily be entitled to an award of costs on a Category 2B basis together with disbursements as fixed by the Registrar. If counsel and the parties cannot reach agreement regarding costs the respondents are to file concise memoranda (no more than three pages in length) within 14 days. I will then give directions for the filing of submissions in response and reply.

Lang J

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[31] *Titirangi Protection Group Inc v Watercare Services Ltd* above n 1, at [39].

Waitakere City Council v Minister of Defence

Environment Court Auckland A 190/05
7, 8, 9, 29 November 2005
Judge Sheppard, Environment Commissioner Catchpole and Deputy Environment Commissioner Fookes

Declaration — Designation — Removal of structure within terms of the designation — Meaning of "construction" — Necessity for outline plan — Refusal of outline plan not permissible — Application of s 17 to designation — Operation of district plan — Resource Management Act 1991, ss 6(f), 17, 176, 176A, 311; Defence Act 1990.

Within the partially operative Waitakere city district plan, the Hobsonville Airbase (the base) was zoned Countryside Environment and designated for "Defence Purposes – RNZAF air bases and associated defence activities". St Mark's Chapel (the chapel), a heritage building, was located on the base. The district plan contained conditions relating to the designation and provided for the protection of the heritage buildings situated on the base. In particular, the plan stated that removal of the chapel was a discretionary activity. The Minister of Defence decided to close the base and submitted an outline plan to the Waitakere City Council (the council) proposing the removal of the chapel to the Papakura Military Camp. The council did not agree with this proposed course of action and suggested that the Minister should withdraw or amend the outline plan. The Minister refused. As a consequence, the council appealed to the Court pursuant to s 176A of the Resource Management Act 1991 (the Act) against the decision of the Minister. In addition, the council sought a declaration pursuant to s 311 of the Act that the removal of the chapel required a discretionary resource consent or, alternatively, that the removal would breach s 17 of the Act.

Held (dismissing the appeal and declining the application for a declaration)

1 In determining the meaning of the designation for defence purposes and associated defence activities, the Court did not need to refer to the Defence Act 1990. The test was what an "ordinary, reasonable member of the public" would understand the designation to mean (see paras [21], [22], [23], [24], [25]).

Waimairi County Council v Hogan [1978] NZLR 587 followed.

2 The defence personnel had used the chapel for many years and would continue to do so at the new base. Accordingly, the removal of the chapel was required for defence purposes and associated defence activities and thus came within the terms of the designation (see paras [31], [33], [34]).

3 The removal of the chapel did not constitute construction of a work or project within the terms of s 176A of the Act. Accordingly, the outline plan process was not available or necessary for the removal of a structure (see para [46], [47]).

4 If, contrary to the above, an outline plan was required, the council could request changes to a plan in accordance with s 176A(4) – (6) of the Act but could not refuse it outright (see paras [55], [56], [57]).

5 As the removal of the Chapel fell within the designation, the provisions of the district plan concerning resource consents did not apply (see para [61]).

6 Section 17 of the Act applies to activitied, even if they were carried out within the terms of a designation. However, on the facts of the case, the Minister's proposal in relation to the chapel did not breach the duty contained in s 17, nor was it contrary to s 6(f) of the Act (see para [85]).

Other cases mentioned in judgment

Ngataringa Bay 2000 (Inc) v Attorney-General (Planning Tribunal, Auckland A 10/95, 27 February 1995, Judge Sheppard).

Watercare Services v Minhinnick [1998] NZRMA 113 (CA).

Appeal and application for a declaration

This was an appeal against the decision of the Minister of Defence, and an application for a declaration that a resource consent was required to remove a chapel building from designated land.

R B Enright and *B E McDonald* for the Waitakere City Council.

B H Arthur for the Minister of Defence.

JUDGE SHEPPARD.

Introduction

[1] These proceedings concern the Minister of Defence's proposal to remove a chapel building from the air force base at Hobsonville (in the district of the Waitakere City Council), with a view to moving it to the Papakura Military Camp.

[2] There are two separate proceedings before the Court on this issue, and they were heard together. The council had requested that an outline plan for relocation of the building be withdrawn or changed, to allow retention of the chapel building on its original site. There is an appeal by the council under s 176A of the Resource Management Act 1991 (the Act) against a decision by the Minister declining that request. There is also an application by the council under s 311 of the Act for declarations that the removal of the chapel requires a discretionary resource consent; and alternatively that removing it would breach s 17 of the Act, and would be contrary to Part II of the Act. The council's case was founded on the building's heritage value at its original location.

[3] The outcome of the proceedings partly depends on questions over the application of provisions of the Act and of the partly operative district plan. Before we consider those questions, we give brief findings about the history of the building and the use that has been made of it; and relevant provisions of the partly operative Waitakere city district plan. We will state more detailed findings in the context of considering particular questions.

A brief history of the chapel

[4] The Hobsonville air force station was originally established in the 1920s, and was expanded in the later 1930s and in 1940. The chapel building for the station was provided by the National Patriotic Fund Board (as were chapels at other Air Force stations at about the same time), and was erected in 1942 on what had been a pony paddock, and near a large house (Mill House, later the base commander's house) then occupied by servicewomen of the Women's Auxiliary air force. The chapel building was transferred from the Patriotic Fund Board to the Air Ministry in 1946 or 1947.

[5] The chapel (known as St Mark's) was provided with altar, pews, a font, and other furniture, and has capacity for about 80 worshippers. A bell was donated for the chapel in 1966, and the building itself was extensively refurbished in about 1984.

[6] The chapel was used for regular services of worship and for occasional services (weddings, christenings and funerals) for Air Force and civilian personnel serving at the station and their families, and also by former service personnel and their families. When from 1991 to 2002 the Special Air Service (SAS) were stationed at the Hobsonville Air Force Base, their personnel and families also used the chapel.

[7] By 2002 the Minister of Defence had decided to close the Hobsonville air force base, and to dispose of the land. The chapel ceased to be used for regular services in December 2003, and was subsequently used by defence personnel and their families for weddings, baptisms and funerals until February 2005 when it was closed, in preparation for the intended removal to Papakura Military Camp (where the SAS are now stationed). The chapel is on land of the former air force base at Hobsonville that has since been transferred to Housing New Zealand; and some of it (including the chapel site) leased back to the Defence Force on terms that allow the Defence Force to remove some buildings (including the chapel).

The district plan

[8] The partly operative district plan was notified in October 1995. In that plan the land of the Whenuapai and Hobsonville Airbases is zoned Countryside Environment, and is designated "Defence Purposes – RNZAF air bases and associated defence activities". The plan contains conditions relating to the designation (which is identified as MD 1), including these:

1. To ensure that section 176A(3)(f) of the Resource Management Act 1991 has been adequately addressed, an outline plan shall include, as appropriate:

(a) a statement on the relevant District Plan objectives, policies and rules; and
(b) a statement on any adverse effects the works will have on the environment and the mitigation measures to be carried out.

. . .

4. Where an outline plan of works is submitted in accordance with s 176A of the Act in respect of a building or site within MD 1 and which is listed in the Heritage Appendix to this plan, that outline plan of works shall be accompanied by a heritage management plan generally in accordance with the NZDF heritage policy document.

[9] With reference to the mention in condition 4 of the NZDF heritage policy document, the Defence Force adopted a heritage policy (identified as DFO 32) in September 2002.

[10] The plan contains provisions about heritage. There is an objective of protecting the links between heritage objects and surrounding objects, and integrating the city's heritage with people's everyday life. There is a policy of avoiding demolition of listed heritage buildings. The plan lists items that are subject to heritage protection rules in three classes. The Hobsonville chapel is listed in category III. Removal of a heritage item in category III is a discretionary activity. The rules provide criteria for assessment of applications for consent to do so.

Proposed plan change 13

[11] The council has proposed a change to the district plan for management of the redevelopment of the Hobsonville Peninsula following closing of the airbase. The proposed change would create a new Hobsonville Base Village Special Area zone. The chapel site is within what is described by the proposed change as the Parade Ground Precinct, for which a comprehensive development plan complying with certain standards would be assessed as a limited discretionary activity. The development plan would have to provide details of retaining Mill House, the chapel, and associated land and gardens as heritage buildings and open space. The chapel would be identified as a notable building, and an area that includes the chapel site would be identified on a concept plan as open space.

[12] Additions or alterations to a building identified as a heritage building would be a discretionary activity, and change of use of a heritage building would be a limited discretionary activity.

[13] The time for lodging submissions on the proposed plan change has expired, but the council has not yet published a summary of submissions to allow the lodging of further submissions in support or opposition. A submission by the Auckland Regional Council sought some amendments on heritage buildings; but did not seek deletion of the references to retaining the chapel as a notable heritage building. No submission was lodged by the Minister of Defence, or by Housing New Zealand, relating to the provisions of the proposed change affecting the chapel building.

Legal questions

[14] There are some legal points on which the parties joined issue. We need to decide them before we can consider the main issues in the case.

Is the relevant aspect of the proposal relocation of the chapel or removal of it?

[15] The Minister's outline plan describes the proposal as "Relocation of St Mark's Chapel, Base Hobsonville, to Papakura". An accompanying letter to the council contained this explanation:

> RNZAF has relocated from its Hobsonville base and has no further use for much of the base infrastructure; specifically RNZAF have made St Mark's Chapel available to NZ Army. NZ Army intends to relocate and preserve the Hobsonville Chapel in its current form for use adjacent to the Special Air Service Memorial at Papakura Military Camp.

[16] Counsel for the city council submitted that the end use at Papakura is not relevant to whether the activity is covered by the Hobsonville designation.

[17] We accept that, for the purpose of deciding the legal questions on the status of the proposal, it is the removal of the building from its present site and from the airbase that is relevant. The intention to relocate the building at Papakura Military Camp will be relevant to forming any discretionary judgment.

Is removal of the chapel within the ambit of the designation?

[18] Counsel for the Minister contended that the proposed work (removal of the chapel building) is in accordance with the designation. Ms Arthur argued that the meaning of the designation for defence purposes and associated defence activities can be understood from the Defence Act 1990; and that includes removal and relocation of buildings both on and off a site that is designated.

[19] Counsel for the city council contended that relocation of the chapel falls outside the scope of the designation, and does not meet the defence purposes requirement of the designation, because the relocation is not to fulfil any defence purpose at Hobsonville. The building is being transferred for purposes associated with another designation. Mr Enright argued that to be within the designation, the site to which the building is to be relocated must also be within the designation footprint, being "the land" and "the site" referred to in s 176A.

[20] Mr Enright questioned whether the term "defence purposes" in the district plan should be defined by reference to the Defence Act. He also submitted that the phrase should be narrowly construed, given that where a requiring authority acts under a designation, it is not required to comply with the general duty imposed by s 9; and that in other litigation[1] the Minister had conceded that a designation for "defence purposes" was not adequate in terms of the Act.

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1 *Ngataringa Bay 2000 v Attorney-General* (Planning Tribunal, Auckland A10/95, 27 February 1995, Judge Jackson).

[21] In considering the meaning of the Hobsonville designation we apply the test stated by the Court of Appeal in *Waimairi County Council v Hogan*[2] at p 590:

> What would an ordinary, reasonable member of the public, examining the scheme, have taken from the designation?

[22] We also apply the test to be inferred from the judgment of Tipping J in *Watercare Services v Minhinnick*[3] at p 122. (cited by Mr Enright):

> The position might be different if the way in which Watercare intended to do the works implicitly authorised by the designation was outside anything reasonably contemplated by the designation.

[23] Although the designation falls short of describing with the desirable particularity the works and activities intended, the city council did not at the time challenge the Minister's notice requiring that the designation be included in the district plan in those terms. Despite the concession made on the Minister's behalf in other litigation, these proceedings do not provide an appropriate opportunity for the council to challenge the adequacy of the designation, and in them the Court has to construe the designation as it is.

[24] We do not accept Mr Enright's submission to the effect that the phrase "defence purposes" should be narrowly construed on the ground that where a requiring authority acts under a designation, it is not required to comply with the general duty imposed by s 9. Although that is indeed the effect of a designation on activity within its scope, the test in *Hogan* does not indicate that a strict construction is required.

[25] We do not consider that an ordinary member of the public would feel any need to consult the Defence Act to understand what is meant by the term "defence purposes", or the words "associated defence activities". In our opinion an ordinary, reasonable member of the public would have taken from those words that they might include buildings used as chapels for defence personnel when required; and would also include removal of buildings designed for and formerly used as chapels for defence personnel when no longer required – particularly when required for defence personnel elsewhere.

[26] We now come to Mr Enright's submission that to be within the designation, the site to which the building is to be relocated must also be within the designation footprint, being "the land" and "the site" referred to in s 176A. Counsel contended that as the relocation is not to fulfil any defence purposes at Hobsonville, but is for purposes associated with another designation (we took him to mean the designation of Papakura Military Camp).

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2 [1978] NZLR 587.
3 [1998] NZRMA 113 (CA).

[27] We quote s 176:

> **176. Effect of designation** — (1) If a designation is included in a district plan, then —
>
> (a) section 9(1) does not apply to a public work or project or work undertaken by a requiring authority under the designation; and
>
> (b) no person may, without the prior written consent of that requiring authority, do anything in relation to the land that is subject to the designation that would prevent or hinder a public work or project or work to which the designation relates, including —
>
> (i) undertaking any use of the land described in section 9(4); and
>
> (ii) subdividing the land; and
>
> (iii) changing the character, intensity, or scale of the use of the land.
>
> (2) The provisions of a district plan or proposed district plan shall apply in relation to any land that is subject to a designation only to the extent that the land is used for a purpose other than the designated purpose.
>
> (3) This section is subject to section 177.

[28] Evidently that section was written having in mind activities and works *on* the designated land; and its language does not expressly and directly apply to the removal of buildings or other works from designated land. When considering the application of those provisions to removal of a building *from* designated land, the provisions have to be applied with the necessary modifications.

[29] We hold that the modification to s 176 that is necessary to apply the section to the case of removal of a building from designated land is to consider whether the removal is "under" the designation in the sense that it does not prevent or hinder the public work, project or work to which the designation relates. Modified as necessary for application to removal of a building from the designated land, the section cannot be confined to relocation of a building from one part of the designated land to another. It has to allow for removal from the designated land altogether, provided that is "under" the designation.

[30] There is no scope for doubting that relocating the chapel building from Hobsonville Airbase to Whenuapai Airbase (to which the designation also applies) would be "under" the designation. But there is already a chapel at Whenuapai Airbase. It is Papakura Military Camp that lacks one.

[31] We see no room for doubt, either, that where a body of defence personnel are posted to another defence establishment, their taking with them their weapons, vehicles, training equipment and stores would be within the phrase "defence purposes", whether or not the destination is within the same or another designation, or none, and whether or not it is within the same territorial authority district. As the city council itself submitted, the focus is not on the destination, but on being under the designation applicable to the origin.

[32] It is our opinion that in the same way, an ordinary, reasonable member of the public would also take from the words "defence purposes" that where members of a body of defence personnel had been using a defence building as a chapel and there is no chapel at an establishment to

which they are posted, the phrase could include removing the building to take it with them.

[33] Finally we should test the proposal in the way put by Justice Tipping J in *Minhinnick*. Is the *way* in which the Minister intends to do work implicitly authorised by the designation (that is, remove the chapel building from the designated land) outside anything reasonably contemplated by the designation?

[34] The city council's contended that the Minister's outline plan did not comply with conditions of the designation. If on consideration we uphold that contention, then we should consider the implications by reference to *Minhinnick*. Subject to that, we hold that the proposed removal of the chapel is within the ambit of the designation; and proceed to consider the application of s 176A.

Was an outline plan available and necessary?

[35] The Minister adopted the procedure of submitting to the city council an outline plan describing the proposal. That process is the subject of s 176A, of which we quote material provisions:

> **176A. Outline plan** — (1) Subject to subsection (2), an outline plan of the public work, project, or work to be constructed on designated land must be submitted by the requiring authority to the territorial authority to allow the territorial authority to request changes before construction is commenced.
>
> (2) An outline plan need not be submitted to the territorial authority if —
>
> (a) the proposed public work, project, or work has been otherwise approved under this Act; or
>
> (b) the details of the proposed public work, project, or work, as referred to in subsection (3), are incorporated into the designation; or
>
> (c) the territorial authority waives the requirement for an outline plan.
>
> (3) An outline plan must show —
>
> (a) the height, shape, and bulk of the public work, project, or work; and
>
> (b) the location on the site of the public work, project, or work; and
>
> (c) the likely finished contour of the site; and
>
> (d) the vehicular access, circulation, and the provision for parking; and
>
> (e) the landscaping proposed; and
>
> (f) any other matters to avoid, remedy, or mitigate any adverse effects on the environment.
>
> . . .

[36] We have to consider whether that procedure was available to the Minister in respect of the removal of the chapel building from the designated land; and whether an outline plan was necessary in respect of the removal. There is no doubt that an outline plan was available and necessary in respect of the Minister's unchallenged proposals for rehabilitation of the site following removal, including erection of a seat and a plaque.

[37] Section 176A does not directly define the classes of case in which the requirement to submit an outline plan applies. It is to be inferred from the last four words of subs (1) that the requirement applies where a public work, project, or work is intended to be constructed on designated land, where "construction" is intended; and from subs (2) that

the requirement to do so does not apply in a case in any of the classes described by paras (a), (b) and (c). The removal of the chapel building is not in any of those classes, so we have to consider whether the removal is construction of a work or project within the meaning intended for that word in subs (1).

Is removal of the building "construction" within s 176A?

[38] Ms Arthur submitted that the outline plan process was the correct process for the Minister to have followed as removal of the chapel on behalf of the Minister as requiring authority is an aspect of the public work of defence purposes. Counsel did not accept that "constructed" in subs (1) should be given a narrow meaning, but submitted that if the meaning is limited to the act of building, the Minister did not need to submit an outline plan for the removal of the building at all.

[39] Mr Enright submitted that removal of a building is not "construction" within the meaning of s 176A, arguing that it is not within the ordinary meaning of the word, and that the meaning given to the word in the Building Act 1991 does not assist.

[40] Counsel submitted an extract from the *Concise Oxford Dictionary* in which the relevant meaning of "construct" is given:

> make by fitting parts together; build, form (something physical or abstract).

[41] We accept that the removal of a building is not within the ordinary meaning of the word "construct". We also accept that the content of the Building Act is a different code, not corresponding sufficiently closely to the Act that the defined meaning of "construct" in that Act could assist in understanding the intended meaning of construction in s 176A of the Act.

[42] In the ordinary use of words, removal of buildings may be a project or work, or part of one. Where a verb is used to describe the general act of implementing such a project or work, "carry out" or "undertake" may be chosen; but it strains the word "construct" beyond its normal meaning to use it in respect of removal of a building from its site. We consider that the choice of the word "construct" in subs (1) indicates an intention that the requirement for an outline plan applies where the project or work involves making by fitting parts together, building, or forming a physical thing. That is the opposite meaning from removing something.

[43] The matters that are required by paras (a) and (b) of subs (3) to be shown on an outline plan correspond with the subject of the outline plan being a structure that has height, shape, bulk and location. They cannot sensibly be required in respect of the removal of a structure.

[44] A designation can only be required by a requiring authority, which must be a Minister of the Crown, a local authority or a network utility operator.[4] A designation may be for a public work, project or work, or for a restriction necessary for the safe or efficient functioning or

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4 See the definition of "requiring authority" in s 166.

operation of a public work.[5] The subject of a designation is land use, construction or restriction; and that is the context of the outline plan requirement of s 176A. That process allows the territorial authority to consider the outline of the proposal in the respects listed in subs (3), and to request changes to them. By confining the requirement to construction, the legislature should be taken to have deliberately intended that it not extend even to the other topics of designation specifically identified by the Act: being land use and restrictions necessary for safe and efficient operating of public works, projects or works. We consider that giving the word "construct" a meaning that extends to removal of structures from designated land would be inconsistent with the evident intention.

[45] In summary, we find:

(a) that removal of a building is not within the ordinary meaning of the word "construct";
(b) that the context in which the word "construct" is used in s 176A does not indicate that a different meaning was intended; and
(c) that giving the word a meaning that extends to removal of a structure from designated land would be inconsistent with the evident intention.

[46] So we hold that removal of the building is not "construction" within the intent of s 176A.

[47] As s 176A only requires an outline plan where work is to be constructed, and as the removal of the chapel building is not construction within the meaning intended by that section, we hold that the outline plan process is not intended for the removal, and is not available or necessary for it.

[48] We can now return to the question whether the *way* in which the Minister intends to do the work authorised by the designation (that is, remove the chapel building from the designated land) is outside anything reasonably contemplated by the designation. As the removal is within the ambit of the designation, and (not being a construction) an outline plan is not required, any deficiency in compliance with conditions of an outline plan does not arise. So we hold that the question whether the outline plan process was available or necessary for removal of the chapel building should be answered in the negative.

Can a territorial authority seek that proposed work not proceed?

[49] Another question of law was whether a territorial authority can request changes to the extent that the construction not proceed at all.

[50] In response to the Minister's outline plan for removal of the chapel building, the city council requested that the outline plan be withdrawn or changed to allow for retention of the chapel on its present site. By its appeal the council sought that the outline plan be dismissed, or otherwise amended, to ensure that the chapel is retained on site.

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5 See s 168.

[51] The Minister contended that the council's request was not for a change to the outline plan, and was not valid; and that on the council's appeal, the Court does not have power to grant the relief sought. Ms Arthur submitted that the council's ability to request changes to the outline plan was limited to requesting changes to the proposed work. Counsel argued that the council was not entitled to request that the outline plan be withdrawn, or that the chapel remain on its current site, which would not change the proposal, but negate it; and would deny the Minister's authority to act in accordance with the designation.

[52] Mr Enright responded that there are no express fetters on the changes that a territorial authority may request to an outline plan, and that the sole guiding criterion on appeal is that the changes sought must "give effect to the purposes of Act". Counsel argued that the purpose of the Act allows for consideration of effects of implementing the outline plan, as well as impacts on relevant values identified by Part II, including s 6(f).

[53] Mr Enright conceded that any changes requested would have to relate fairly and reasonably to the outline plan, have a relevant resource management purpose, and not be unreasonable in the *Wednesbury* sense. He contended that the change sought by the council was within those limits, and argued that an inability to remove the chapel would not negate the designation.

[54] The provisions for a territorial authority to request changes to an outline plan, and to appeal to the Court, are contained in subss (4) – (6) of s 176A, which we now quote:

> (4) Within 20 working days after receiving the outline plan, the territorial authority may request the requiring authority to make changes to the outline plan.
>
> (5) If the requiring authority decides not to make the changes requested under subsection (4), the territorial authority may, within 15 working days after being notified of the requiring authority's decision, appeal against the decision to the Environment Court.
>
> (6) In determining any such appeal, the Environment Court must consider whether the changes requested by the territorial authority will give effect to the purpose of this Act.

[55] On an application for resource consent to construct a project or work, the consent authority generally[6] has authority to "grant or refuse the application"[7]; and on appeal the Court has the same power, duty and discretion[8]; and may confirm, amend, or cancel the decision to which an appeal relates.[9]

[56] Parliament has used different language to describe what territorial authorities and the Court can do in respect of outline plans. The territorial authority can request 'changes' to an outline plan; and on appeal the Court is to consider whether "the changes requested" will give effect to the purposes of the Act. Assuming that the different language indicates

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6 Except where the proposal is a consent authority.
7 See eg ss 104B(a) and 104C(b).
8 Section 290(1).
9 Section 290(2).

a different intention, we accept that the changes are not intended to extend to refusing outright the proposed construction described in the outline plan. Rather, they might (in the ordinary meaning of the word "change"[10]) make different, alter, or modify the proposed construction, without denying it altogether.

[57] So even if (contrary to our conclusion) the Minister was required to submit an outline plan to the council for removal of the chapel building, we hold that it was not open to the council, under the power to request changes, to request that the plan be withdrawn or that it be changed to allow for retention of the chapel on its present site. It follows that on the council's appeal, the Court would not have authority to grant the relief sought by the council that the outline plan be dismissed, or otherwise amended, to ensure that the chapel is retained on site.

Is resource consent required for removal of the chapel?

[58] The next question of law is whether resource consent is required for removal of the chapel from its site on the Hobsonville Airbase.

[59] The council contended the Minister is not entitled to remove the chapel building without having obtained resource consent, because doing so is not covered by the designation, and removal of a category III heritage item is a discretionary activity.

[60] The Minister contended that resource consent is not required, because the removal is covered by the designation.

[61] We have found that removal of the chapel is within the ambit of the designation. The provisions of the district plan only apply in relation to designated land to the extent that the land is used for a purpose other than the designated purpose.[11] The land on which the chapel building is located is designated for defence purposes, and is not used for a purpose other than the designated purpose. So we hold that the heritage provisions of the district plan (by which removal of the chapel building would be a discretionary activity) do not apply to the removal, and resource consent is not required for it.

Could removal of the chapel breach s 17?

[62] Finally we consider whether removal of the chapel building under the designation could be a breach of the Minister's duty under s 17.

[63] The council contended that it would, because it would remove a significant heritage building from Waitakere city, and such adverse effect would not be avoided, remedied or mitigated. It argued that the only practical means for the Minister to comply with the duty imposed by that section of avoiding adverse heritage effects would be by not relocating the chapel.

[64] The Minister acknowledged that the duty imposed by s 17 applies even to activity carried out in accordance with a designation, and

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10 See *Concise Oxford Dictionary*, *Collins Concise English Dictionary, Chambers Dictionary*: "change".

11 Section 176(2).

contended that as location of a heritage item is an aspect of its value, an adverse effect on the chapel's heritage value would be adversely affected by removing it from its original site to another district. The Minister contended that the loss of the locational value would be mitigated by ensuring that the chapel continues to be used for its historic purpose for defence personnel and at a defence base.

[65] We quote s 17[12]:

> **17. Duty to avoid, remedy, or mitigate adverse effects** — (1) Every person has a duty to avoid, remedy, or mitigate any adverse effect on the environment arising from an activity carried on by or on behalf of that person, whether or not the activity is in accordance with a rule in a plan, a resource consent, a designation, section 10, section 10A, or section 20A.
>
> (2) The duty referred to in subsection (1) is not of itself enforceable against any person, and no person is liable to any other person for a breach of that duty.
>
> (3) Notwithstanding subsection (2), an enforcement order or abatement notice may be made or served under Part 12 to —
>
> (a) require a person to cease, or prohibit a person from commencing, anything that, in the opinion of the Environment Court or an enforcement officer, is or is likely to be noxious, dangerous, offensive, or objectionable to such an extent that it has or is likely to have an adverse effect on the environment; or
>
> (b) Require a person to do something that, in the opinion of the Environment Court or an enforcement officer, is necessary in order to avoid, remedy, or mitigate any actual or likely adverse effect on the environment caused by, or on behalf of, that person.
>
> (4) Subsection (3) is subject to section 319(2) (which specifies when an Environment Court shall not make an enforcement order).

[66] The point of law is not disputed: although the Minister's proposed removal of the chapel is in accordance with a designation, s 17 could apply to the activity. Whether or not that activity would contravene the duty imposed by that section is a question of fact and judgment to be decided on consideration of evidence. So we have now to review the evidence and make a finding.

Would removal of the chapel breach s 17?

The issue

[67] The Minister acknowledged that in general, removal of heritage buildings from their sites may not be desirable; but contended that continuation of the original use of the building in question as a chapel for defence personnel is paramount. The Minister maintained that the proposed site rehabilitation works would satisfactorily remedy or mitigate the adverse effects on the environment of removing the building from its original site; and that the loss of locational value would be mitigated by continuing to use the building as a chapel for defence personnel, including members of a body who have had a recent association with use of the building as a chapel.

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12 As amended by the Resource Management Amendment Act 2003, s 7.

[68] The council maintained that the proposed removal of a significant heritage building from Waitakere city would have adverse effects of loss of amenity and social values that cannot be avoided, remedied or mitigated by any positive effects of relocation of the building at Papakura Military Camp. It asserted that the proximity of the chapel site and Mill House creates a precinct of heritage significance.

[69] There was no material conflict on the primary facts. The building was constructed in 1942 as a chapel to serve the Hobsonville Airbase. It was used primarily by defence personnel and their families until it was closed in February 2005 as part of the closing of the airbase. It is no longer required at Hobsonville (or at the Whenuapai Airbase nearby) for use by defence personnel. A chapel is needed at Papakura Military Camp, to which the SAS (who, with their families, had used the building as a chapel from 1991 to 2002) have returned. There are ex-service personnel and their families who have past associations with the chapel, and who would value it remaining on its present site. If the building is retained on its original site, it might be used for occasional services. However there is another heritage chapel building at Hobsonville (constructed in 1875, and recently refurbished) available for occasional services; and a chapel at Whenuapai Airbase which continues to serve defence personnel and their families, and former servicemen and women in the locality.

[70] The main difference between the parties on the evidence is a matter of opinion: whether the site rehabilitation works proposed by the Minister satisfactorily remedy or mitigate the adverse effect on the environment arising from removing the building from its original site.

The evidence

[71] Mrs L A Cooper, an elected member of the council, gave an account of her own association with the chapel, and those of others who had relayed their experiences to her; and gave her opinion that the chapel should remain in its current location to be restored to its former condition and to be enjoyed by future generations. She described the removal of the chapel as damage to the cultural heritage; and her expectation that if not removed, the chapel would have a future for community ceremonies and services well after the air force vacates the base.

[72] Mrs D Holman, an experienced heritage planning consultant, gave the opinion that removal of the chapel from its current location would create significant adverse effects on the environment, particularly in terms of the precinct in which the chapel is currently situated and in respect of the chapel's local significance for Waitakere city generally; and that those effects could not be avoided, remedied or mitigated. This witness explained that relocation of heritage buildings inevitably disrupts and reduces cultural heritage value. She considered that relocation of the chapel would have the effect that its history, and part of the history of the airbase, would disappear from that locality; and at the Papakura Military Camp would be camouflaged by new and different surroundings. Mrs Holman gave the opinion that the removal would be contrary to the

best heritage conservation practice and the wider interests of the community, Waitakere city and the Auckland region.

[73] Mr P D Reaburn, an experienced resource management planning consultant, accepted that maintaining the association of defence personnel with the chapel is relevant, and that the proposed site at Papakura Military Camp would be appropriate. He also acknowledged that relocating the chapel building would be cheaper than building a new one at Papakura. However he urged that these should be weighed against other matters, mentioning retaining the chapel in its original setting, where he thought it likely that the building would be used for religious and other services, and where the Hobsonville community could maintain an association with it. He too considered that the balance favours retaining the building at Hobsonville.

[74] Chaplain L E Lukin acknowledged that expediency of making use of a surplus resource was part of the reason for the proposed relocation of the chapel building. He added to that the long establishment the SAS already has with the chapel, the fact that many serving members have strong associations with it because they had been married in it, or had children dedicated there, or had departed on operational deployments from that chapel, gives them a strong heritage connection with it. Moving the building means that those personnel and their families would be able to maintain that connection.

[75] Chaplain R K Horton reported that although services at the chapel at Whenuapai airbase are for base personnel and their dependants, members of the public of the local community are permitted to attend Sunday services there too. He observed that they are generally people who have had past association with the air force. The chaplain expressed concern that if the chapel is not moved to another Defence Force establishment, it might not continue to be a "working" chapel (as he preferred), rather than remain in its current location as an unused and neglected monument, or used for purposes that do not represent the Christian faith and tradition, such as a cafe.

[76] Mr M P Kelly, an historic heritage management consultant, gave evidence that although internationally there is a generally established principle that moving built heritage is not desirable, the *ICOMOS New Zealand Charter for Conservation of Places of Cultural Heritage Value* acknowledges a tradition in this country of moving (predominantly timber) buildings. The charter states that relocation can be a legitimate part of the conservation process where the site is not of associated value, or relocation is the only means of saving the structure, or relocation provides continuity of cultural heritage value.

[77] Mr Kelly accepted that moving the Hobsonville chapel would sever historical connections with the base and associated buildings, and the wider community, in local residents who have had a relationship with it; and would end the long connection with Mill House. He observed that moving the chapel offers the opportunity to maintain its original purpose as a military chapel, and although originally erected for use by air force personnel, the SAS draws on all three armed services, including the air force. Mr Kelly gave the opinions that in this case the certainty of

continued use and care, and the maintenance of the building's traditional purpose and historical associations, are compelling reasons to support moving it to Papakura; and that ultimately this would maintain and enhance its heritage values more than leaving it at its present site.

[78] Mr C A Hansen, an experienced resource management planning consultant, gave the opinion that as the chapel has already been closed for services, any minor effect on those members of the defence service community that remain in the Hobsonville area would already have occurred. The witness also gave the opinion that if the building remains on its site, its future use is uncertain, and although resource consent would be required for a change of use, it may not be protected from inappropriate use and development, which would diminish its heritage value. Mr Hansen acknowledged that there may be positive benefits of retaining the building on site (which he would struggle to call significant), depending on what happens to it, but he considered that speculative. He gave the opinion that keeping the valued heritage supported relocation of the building to a place where that heritage is to continue.

Consideration

[79] In considering this issue, we are to recognise and provide for the protection of historic heritage from inappropriate use and development, as a matter of national importance.[13] We are also to have particular regard to the efficient use and development of natural and physical resources;[14] to the maintenance and enhancement of amenity values;[15] and to maintenance and enhancement of the quality of the environment.[16] In doing so, we bear in mind that the building has been classified in the district plan as a category III heritage item; and we accept that the *ICOMOS New Zealand Charter for Conservation of Places of Cultural Heritage Value* is an appropriate guide to accepted good practice in that respect.

[80] If the building is not removed from its original site, that would:

(a) respond to the general principle that heritage buildings should be kept on their original sites;
(b) retain the historic association of the building with the nearby Mill House; and
(c) allow people in the locality who have historic affinity with the building to continue their connection with it.

[81] In evaluating those advantages, we take into account that in this country, moving timber buildings can be acceptable in some circumstances, including where relocation provides continuity of cultural heritage value. Although traditionally finished in similar colours, and having some other superficial common features, we place little weight on the association of the chapel building with Mill House because the

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13 RMA s 6(f).
14 Section 7(b).
15 Section 7(c).
16 RMA s 7(f).

buildings have not been functionally linked, and the removal of one would not affect the significance of the other. Without belittling the connection that some people have with the building on its original site, the evidence does not establish that there are many who would miss it. The original connection of the chapel with the air force will be lost anyway, with the closing of the Hobsonville Airbase. Finally, the evidence does not give us any assurance that the building would be maintained and used in a way that would be appropriate and respectful of its history as a place of worship. Many secular uses would not be.

[82] If the Minister's proposal to remove the building from the site and relocate it at Papakura Military Camp is carried out, that would:

(a) provide continuity of the building's cultural heritage value;
(b) provide continuity with the building's purpose as a place of worship for defence personnel and their families;
(c) meet an existing need as a chapel for a body of defence personnel with recent association with the building; and
(d) disrupt the heritage value derived from the building standing on its original site.

[83] In evaluating those advantages, we accept that the building's heritage value would be marked by retention of the name (St Mark's Chapel), by appropriate signage recording its history, by reinstating of the chapel furniture temporarily stored pending relocation, and by restoration of the building and maintenance of it generally in its original condition. The continued use as a chapel there would represent an efficient use of the physical resource, would maintain and enhance its amenity value, and in that way contribute to the quality of the environment.

[84] The heritage experts Mrs Holman and Mr Kelly did not regard the proposed rehabilitation work at Hobsonville as significant mitigation of the adverse environmental effect of removing the building. Even so, in coming to a judgment on the issue whether it should be removed as proposed, we take into account that rehabilitation of the site, and the erection of a seat and plaque, would be appropriate. However inadequate to those who wish that the building remain on its original site, we treat those measures as some mitigation of the adverse effects of removing it.

[85] We have compared the advantages and disadvantages of leaving the building on its original site, with those of the proposed removal and relocation of it. We unanimously judge that the Minister's proposal for removing the building from its original site at the Hobsonville Airbase now being closed, for relocation at Papakura Military Camp as a chapel for defence personnel stationed there, is more consistent with the Minister's duty to avoid, remedy or mitigate adverse effects on the environment than would leaving the building on its site on the final closing of the airbase. In short, we do not accept that the Minister's proposal would contravene the duty described in s 17 of the Act, nor that it would be contrary to s 6(f) of it.

Conclusions and determinations

[86] In this decision we have given our reasoning for our findings:

(a) That the proposed removal of the St Mark's Chapel building from Hobsonville Airbase (with a view to relocating it at Papakura Military Camp) is within the ambit of the designation of the site for defence purposes and associated activities.
(b) That the proposal is not construction within the meaning of s 176A of the Act.
(c) That the outline plan process described in that section was not available or necessary in carrying out that proposal.
(d) That even if the outline plan process had been necessary, it was not open to the council in exercise of the power to request changes, to request that the plan be withdrawn or changed to allow for retention of the chapel on its present site.
(e) That on the council's appeal under s 176A, the Court did not have authority to grant the relief sought by the council that the outline plan be dismissed, or otherwise amended, to ensure that the chapel is retained on site.
(f) That the chapel site not being used for a purpose other than the designated purpose, the heritage provisions of the district plan do not apply to the removal of the building, and resource consent is not required for that activity.
(g) That s 17 could apply to the activity, but on balance in the circumstances of the case, the Minister's proposal would not contravene the duty described in that section, nor be contrary to s 6(f).

[87] From those findings the Court makes the following determinations:

(a) Appeal ENV A 0054/05 by the Waitakere City Council is dismissed.
(b) Application ENV A 0173/05 by the Waitakere City Council is declined.

Costs

[88] If either party seeks an order for payment by the other of costs, a written application is to be lodged and served within 20 working days of the date of this decision. A party against whom an order is sought may lodge and serve written submissions in reply within 15 working days of receiving such an application.

BEFORE THE ENVIRONMENT COURT

Decision No. [2017] NZEnvC 165

IN THE MATTER	of the Resource Management Act 1991
AND	of an appeal pursuant to s 120 of the Act
BETWEEN	YALDHURST QUARRIES JOINT ACTION GROUP
	(ENV-2016-CHC-049)
	Appellant
AND	CHRISTCHURCH CITY COUNCIL
	Respondent
AND	HAREWOOD GRAVELS LIMITED
	Applicant

Court:	Environment Judge J E Borthwick Environment Commissioner R M Dunlop Environment Commissioner J A Hodges
Hearing:	at Christchurch on 22 to 24 March 2017 and 23 to 25 May 2017
Appearances:	M Christensen for Yaldhurst Quarries Joint Action Group B Pizzey for Christchurch City Council E Chapman and J Robinson for Harewood Gravels Limited
Date of Decision:	10 October 2017
Date of Issue:	10 October 2017

DECISION OF THE ENVIRONMENT COURT

A: The appeal is upheld and the consent is refused.

B: Costs are reserved.

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REASONS

Introduction

[1] This is an appeal against the Christchurch City Council's decision to grant resource consent to establish a gravel quarry and to undertake associated earthworks at 21 Conservators Rd, McLeans Island.

[2] Over the last three years the Christchurch City and Canterbury Regional Councils have granted several applications for quarry activity which, if all developed, would encompass 300 hectares of land within a 2.5 km west-east arc of the proposed quarry site.

[3] The appellant, Yaldhurst Quarries Joint Action Group,[1] comprises ten persons all of whom own and occupy properties within the immediate locality. The appellant, who we shall refer to as "the residents", are concerned with the cumulative adverse effect of the quarrying on their health and their existing amenity.

[1] The Joint Action Group is comprised of T & T Ahern, B & D Guenole-Cummings, E Janssen, P Mahoney, M & T Musson and A & M Russell.

[4] The applicant, Harewood Gravels Ltd, while proffering changes to the conditions, opposes the appeal. The Christchurch City Council takes a neutral position.

Description of the proposal

[5] The key features of the proposal are set out in Attachment A to this decision.

Status of the activity

[6] The site is located within the Rural Waimakariri Zone. Within this zone quarrying is a discretionary activity 250m or more from a residential zone.[2] The status of the application overall is non-complying because the proposal exceeds the relevant noise standard at the site's southern boundary by more than 10 dB, where the predicted noise level is 76 dB L_{Aeq}.[3]

The law

[7] The proposal is a non-complying activity under the Christchurch District Plan.[4] Section 104D of the Resource Management Act 1991 (the **Act** or the **RMA**) applies, which provides a consent authority may grant a resource consent for a non-complying activity only if it is satisfied that either—

(a) the adverse effects of the activity on the environment (other than any effect to which s 104(3)(a)(ii) applies) will be minor; or
(b) the application is for an activity that will not be contrary to the objectives and policies of the relevant plan.

[8] If the proposal passes one of the above thresholds it falls to be considered on the same basis as a discretionary activity under s 104 of the Act. When considering an application for a resource consent and any submissions received, the consent authority pursuant to s 104 must, subject to Part 2, have regard (relevantly) to–

[2] Christchurch District Plan Chapter 17, rule 17.5.1.4. Unless otherwise stated, all plan references are to the Christchurch District Plan.
[3] Chapter 6, rule 6.1.5.1.
[4] At the time of notification, the application was a non-complying activity under the then operative City Plan. Since then the decisions on the Christchurch District Plan have been released. The rules of the District Plan are now operative and the status of the application remains non-complying.

(a) any actual and potential effects on the environment of allowing the activity; and

(b) any relevant provisions of—

- the Canterbury Regional Policy Statement;
- the Christchurch District Plan; and

(c) any other matter the consent authority considers relevant and reasonably necessary to determine the application.

Permitted baseline

[9] We may apply the permitted baseline and disregard an adverse effect of an activity,[5] however there being no evidence in support of this we decline to do so.

The City Council's decision

[10] As required under s 290A of the Act we have carefully considered the decision which is the subject of the appeal, and will come back to the relevant parts.

Key definitions

[11] This appeal is primarily concerned with the cumulative effects of a proposed quarry on the rural character of the area and the amenity values that derive from this character.

[12] "Amenity values" is defined in the Act and 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.

[13] The effects of the proposal when considered in isolation may well appear of no great moment. The primary issue for determination is whether the cumulative effects of the proposal achieve the objectives of the District Plan and thereby promote the sustainable management of natural and physical resources.

[5] See s 104(2) RMA.

[14] "Effect" is also defined in the Act and means:

> **3 Meaning of effect**
>
> In this Act, unless the context otherwise requires, the term **effect** includes—
>
> (a) any positive or adverse effect; and
>
> (b) any temporary or permanent effect; and
>
> (c) any past, present, or future effect; and
>
> (d) any cumulative effect which arises over time or in combination with other effects—
>
> regardless of the scale, intensity, duration, or frequency of the effect, and also includes—
>
> (e) any potential effect of high probability; and
>
> (f) any potential effect of low probability which has a high potential impact.

[15] Counsel seemed to be in broad agreement on the law as it applies to cumulative effects and we set out our approach below.

[16] As noted above, "cumulative effect" means "any cumulative effect which arises over time or in combination with other effects regardless of the scale, intensity, duration, or frequency of the effect ...".

[17] In *Dye v Auckland Regional Council*[6] the Court of Appeal differentiating a cumulative effect from a potential effect, appeared to confine the former to the effect of the activity itself on the environment. The following passage is often quoted but it is worth setting out again in the context of this discussion:[7]

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

[6] *Dye v Auckland Regional Council* [2002] 1 NZLR 337 (CA).
[7] *Dye v Auckland Regional Council* (CA) at [38]-[39].

[18] There has been considerable discussion on the general principles to be distilled from *Dye.* The discussion is summarised by Judge Thompson for the court in *Outstanding Landscape Protection Society Incorporated v Hastings District Council:*[8]

> [51] There is a passage in the Court of Appeal's judgment in *Dye v Auckland Regional Council* [2001] NZRMA 513 which, taken literally, appears to hold that *cumulative effect* can only be one that arises from the proposed activity: ... *All of these are effects which are going to happen as a result of the activity which is under consideration.* [para [38]]. The consequence of that would be that only adverse effects emanating from the proposal itself could be brought to account. There could be no cumulative effects [properly so called] created by combining existing or permitted effects with effects arising from the proposal. In turn, that would mean that so long as the adverse effects of the proposed activity are not of themselves more than minor a consent authority could never say ... *This site has reached saturation point; it can take no more.*
>
> [52] That interpretation would, we think, be contrary to the plain meaning of *effects* in s 3 and contrary to the purpose of the Act, as set out in s 5 — the sustainable management of natural and physical resources. If a consent authority could never refuse consent on the basis that the current proposal is ... *the straw that will break the camel's back*, sustainable management is immediately imperiled. It is to be remembered that all else in the Act is subservient to, and a means to, that overarching purpose.
>
> [53] Logically, it is an unavoidable conclusion that what must be considered is the impact of any adverse effects of the proposal on ... *the environment.* That environment is to be taken as it exists or, following *Hawthorn*, as it can be expected to be, with whatever strengths or frailties it may already have, which make it more, or less, able to absorb the effects of the proposal without a breach of the environmental *bottom line* — the principle of sustainable management.

[19] We respectfully agree with the court's observation on the literal application of *Dye* and adopt the same approach to cumulative effects as laid out in *Outstanding Landscape Protection Society Incorporated v Hastings District Council* above.

[8] *Outstanding Landscape Protection Society Incorporated v Hastings District Council* [2008] NZRMA 8 at [51]-[53]. See also discussion of the approach taken in *Outstanding Landscape Protection Society* Ltd in *R J Davidson v Marlborough District Council* [2016] NZEnvC 81 at [177]; *Harris v Central Otago District Council* [2016] NZEnvC 52 at [50]; *Clearwater Mussels v Marlborough District Council* [2016] NZEnvC 21 at [172]; *Meridian Energy & Ors v Wellington City Council* [2011] NZEnvC 232 at [26].

Structure of the decision

[20] We have structured the decision so that the evidence is grouped and evaluated under broad topics. The key issues for determination for each topic are noted at the commencement of the relevant section. The topics are:

(a) preliminary legal issues;
(b) receiving environment;
(c) overview of the planning context;
(d) the proposal's benefits;
(e) visual effects and the effect on amenity;
(f) effect on aural amenity;
(g) effects of dust (excluding silica dust);
(h) effects of traffic;
(i) effects of vibration; and
(j) determination.

Preliminary legal issues

[21] In January 2017 the High Court, in *R J Davidson Family Trust v Marlborough District Council,*[9] affirmed the partial extension of *King Salmon* to the consideration of resource consent applications. Justice Cull, rejecting the appellant's submission that the plain language of s 104 requires the decision-maker to have regard to the matters in Part 2, held the reasoning in *King Salmon* applied also to s 104(1). Cull J makes three key findings:[10]

(a) section 5 should not be treated as the primary operative decision-making provision;
(b) the application of the "overall judgment approach" to decision-making on resource consent applications is rejected; and
(c) the relevant provisions of the planning documents give substance to the principles in Part 2. There may be resort to Part 2, however, where there is invalidity, incomplete coverage or uncertainty of meaning within the planning documents.

[22] Leave has been granted to appeal *R J Davidson Family Trust* to the Court of Appeal. Prior to the commencement of the hearing we set out the court's understanding of the application of *R J Davidson* and invited the parties to respond. All parties responded and we are grateful for the City Council's detailed consideration of this matter.

[23] We propose to adopt the same approach taken by the Environment Court in *Blueskin Energy Limited v Dunedin City Council.*[11] *Blueskin Energy Limited* concerned an application for resource consent for a non-complying activity.

[24] The key decision-making steps under ss 104, 104B and 104D were outlined in *Blueskin Energy Limited* as follows:

> **Key decision-making steps under ss 104, 104B and 104D**
>
> [26] The High Court decision of *R J Davidson* is binding on us and in response our approach to decision making on this appeal follows:

[9] *R J Davidson Family Trust v Marlborough District Council* [2017] NZHC 52.
[10] *R J Davidson Family Trust v Marlborough District Council* (HC) at [74]-[76].
[11] *Blueskin Energy Limited v Dunedin City Council* [2017] NZEnvC 150.

(a) decide whether the proposal passes one or both of the threshold tests in s 104D;

(b) if it passes, consider the application and submissions, subject to Part 2, having regard to s 104(1):

- the actual and potential effects of the activity on the environment;
- any relevant plan; and
- any other relevant consideration

(c) decide the weight that should be given to the matters in subsections 104(1)(a), (b) and (c); and

(d) having regard to effects in the context of properly weighted objectives and policies under s 104(1) and any other relevant consideration, arrive at a judgment whether the proposal promotes the sustainable management of natural and physical resources and decide to grant or decline consent accordingly (s 104B).

[27] We have kept separate the decision-making process under ss 104 and 104D. While the content of the sections are similar, quite different considerations apply.[12]

[28] We do not suggest this approach should be applied as a formula to decision making; the facts of the case may lend itself to a different structure. Other provisions of the Act may apply and will also need to be taken into account.

"Subject to Part 2"

[29] It appears, following the High Court decision of *R J Davidson,* that s 104(1) provides for the consideration of Part 2 in a particular way. The consent authority may have recourse to Part 2 when considering the application and submissions under s 104(1); but not afterwards as a separate exercise as per the "overall judgment approach". We suggest [an] inherent risk under the overall judgment approach is that the decision-maker may take into account an irrelevant matter – or more likely fail to take into account a relevant matter – including in particular the weighted findings under s 104(1)(a), (b) and (c).

[30] The circumstances where there may be recourse to Part 2 is where there is invalidity, incomplete coverage or uncertainty of meaning within the planning instruments.[13] There is no need for recourse under Part 2 directly where that policy direction is provided in the higher order instruments; following *Southland Fish & Game New Zealand v Southland District Council & Ors*[14] and *Infinity Investment Group Holdings Ltd v Canterbury Regional Council.*[15]

[12] For example, the positive effects of the proposal are not considered under s 104D RMA.
[13] *R J Davidson Family Trust v Marlborough District Council* (HC) at [76].
[14] *Southland Fish & Game New Zealand v Southland District Council & Ors* at [2016] NZEnvC 220 at [24]-[25].
[15] *Infinity Investment Group Holdings Ltd v Canterbury Regional Council* [2017] NZEnvC 36 at [35].

[31] The exercise of any decision-making discretion is to be undertaken in a principled manner and for the purpose the discretion was conferred. Unless the context clearly indicates otherwise, under the RMA this will be for the purpose of promoting the sustainable management of natural and physical resources; per *Southland Fish & Game New Zealand v Southland District Council & Ors.*[16]

[32] Assuming the application for a non-complying activity passes one of the threshold tests under s 104D, the decision whether or not to grant consent is made under s 104B, taking into consideration the matters in s 104(1)(a), (b) and (c). Like s 104(1), s 104B does not draw any distinction between an application for a discretionary activity and an application for a non-complying activity.[17] The decision whether to exercise discretion and grant (or refuse) consent necessarily entails a judgment that is informed having regard to the matters under s 104.[18]

The weighting exercise

[33] The weighting of findings is critical to the determination of this appeal. The High Court in *Stirling v Christchurch City Council* made the following observation regarding weighting of findings under s 104(1):

> ... s 104(1) adopts an open-ended approach to the weight that is to be attached to the relevant matters. All that is required is that the decision-maker "shall have regard" to each of them. There is no statutory threshold or requirement for the provisions of a plan that are relevant to be approached in a particular way.[19]

[34] *Stirling v Christchurch City Council* precedes the High Court decision of *R J Davidson*[20] and the interpretation of "have regard to" in s 104 is now more nuanced. The direction "must, subject to Part 2, have regard to" includes having regard to any indication of the weight given to the relevant consideration in the planning instrument. Where there is no coverage of the relevant effect[21] under any plan or policy statement then Part 2 may provide guidance on the weight. We consider this approach is consistent with *Stirling* where the High Court held an effect may be proven but receives little weight if that is justified by policy considerations.[22]

Weight given to facts and effects and any other considerations

[35] We will determine the facts, including making predictions about the future effects of the proposal. How much weight is given to this evidence depends on a variety of factors including any policy direction on the fact or effect in issue and the materiality of them to the determination of the case.

[16] *Southland Fish & Game New Zealand v Southland District Council & Ors* at [20].
[17] *Stirling v Christchurch City Council* (2011) 16 ELRNZ 798 (HC) at [53].
[18] *Stirling v Christchurch City Council* (HC) at [53].
[19] *Stirling v Christchurch City Council* (HC) at [60].
[20] *R J Davidson Family Trust v Marlborough District Council* (HC).
[21] Alternatively, the instrument or its provisions are uncertain or invalid.
[22] *Stirling v Christchurch City Council* (HC) at [52]-[58].

...

> [37] Occasionally there may be conflict between different provisions within a plan or as between different policy statements or plans – but before the court will come to this conclusion there must be a "thoroughgoing attempt to find a way to reconcile them"; per *King Salmon*[23] at [131].

Higher order planning instruments

[25] We are satisfied that the District Plan has given effect to the relevant provisions of the higher order instruments and that being the case we have not referred to them in our decision. If follows from this that we have not had need to have resort directly to Part 2 when considering this proposal.

Christchurch District Plan

Introduction

[26] We commence by making some observations concerning what we regard as best practice when interpreting and applying planning instruments. It is not uncommon for a District Plan to present different but overlapping ways to achieve the objectives. When read as an integrated whole the objectives and policies inform and build upon and sometimes constrain each other. In *Blueskin Energy Ltd* the court observed:[24]

> ... The application of plan provisions discretely, and out of context, carries the real risk that integrated management of natural and physical resources will not be achieved.

[27] We consider it best practice to start with an understanding of the whole of the planning context. The purpose of an overview is to understand the relationship between the different provisions within the District Plan and whether these provisions align with and support each other in order to achieve the integrated management of natural and physical resources.[25]

[28] We next turn to the District Plan's strategic direction.

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[23] *Environmental Defence Society Incorporated v New Zealand King Salmon Company Limited* [2014] NZSC 38.
[24] [2017] NZEnvC 150 at [94].
[25] Section 31 RMA.

Strategic Directions of the District Plan

[29] Chapter 3 of the District Plan sets out the strategic direction for Christchurch. The directions set the context for all other chapters in the District Plan in order that they, amongst other matters, clearly articulate how decisions about resource use and values are to be made[26] and the outcomes that are intended for the Christchurch District.[27] This chapter has primacy over the other objectives and policies in the Plan which must be expressed and achieved in a manner that is consistent with the direction given in the Chapter 3.[28]

[30] The wording of the strategic directions is very general and their discrete application on a case-by-case basis is not intended. Rather, the strategic directions are given effect to by the objectives and policies in the balance of the District Plan and are to be interpreted and applied accordingly; per *Pickering v Christchurch City Council*.[29]

[31] The strategic directions are contained in 17 objectives. Two of those have overarching application,[30] including objective 3.3.1 which provides for the expedited recovery and future enhancement of Christchurch as a dynamic, prosperous and internationally competitive city, in a manner that:

> a. ...
>
> i. Meets the community's immediate and longer term needs for housing, economic development, community facilities, infrastructure, transport, and social and cultural wellbeing; and
>
> ii. Fosters investment certainty; and
>
> iii. Sustains the important qualities and values of the natural environment.

[32] The balance of the objectives which give strategic direction to Christchurch follow:

> Objective 3.3.5(a) – The critical importance of business and economic prosperity to Christchurch's recovery and to community wellbeing and resilience is recognised and a range of opportunities for business activities to establish and prosper.

[26] Chapter 3, 3.1 and 3.2.
[27] Chapter 3, 3.1(b).
[28] Chapter 3, 3.3 Interpretation.
[29] [2016] NZEnvC 237 at [102].
[30] Chapter 3, 3.3. The second overarching objective is not relevant to this appeal (objective 3.3.2).

Objective 3.3.14

(a) the location of activities is controlled, primarily by zoning, to minimise conflicts between incompatible activities; and

(b) conflicts between incompatible activities are avoided where there may be significant adverse effects on the health, safety and amenity of people and communities.

Objective 3.3.16

(a) a range of opportunities is enabled in the rural environment, primarily for rural productive activities, and also for other activities which use the rural resource efficiently and contribute positively to the economy.

(b) the contribution of rural land to maintaining the values of the natural and cultural environment, including Ngāi Tahu values, is recognised.

[33] We proceed on the basis that objective 3.3.15 is also relevant, albeit only in a peripheral way. This objective is to enable construction and related activities, including infrastructure recovery as a consequence of the Canterbury earthquakes by (relevantly) recognising the importance of aggregate extraction, associated processing (including concrete manufacturing) and transportation of extracted and processed product to support recovery. We note that this is a project quarry; the destination of the extracted aggregate is not solely for works related to recovery damaged infrastructure and a consent duration of 30 years is sought.

Objectives and policies

[34] In this section we discuss the material provisions in the District Plan including the objectives and policies for the rural environment and also noise and traffic.

Rural Environment

[35] There are seven rural zones in the District Plan. All rural zones have a common single objective and, with two exceptions, all rural zones have a common set of policies.[31] Thus the objective and related policies for the seven different zones are capable of being achieved by complying with multiple sets of rules. It appears to us that the outcomes for the District's rural zones are not clearly stated as Chapter 3 directs. It is the rules, and not the objective and policies, that have been used to drive

[31] The exceptions are 17.2.2.8 Policy – Rural Banks Peninsula and second 17.2.2.12 Policy – Location and management of quarrying activity and aggregates-processing activity. The second policy refers to the continuation of quarrying in the Rural Quarry Zone and separately provides for new quarrying in rural zones other than the Rural Quarry Zone and Rural Quarry Templeton Zone.

the outcomes for the different rural zones.[32] This begs the question as to what are the sustainable management outcomes for any given zone when a proposal is not permitted under the relevant zone?

[36] The single objective for all rural zones follows (relevantly):

> **Objective 17.2.1.1 – The rural environment**
>
> Subdivision, use and development of rural land that:
>
> i. supports, maintains and, where appropriate, enhances the function, character and amenity of the rural environment, and in particular, the potential contribution of rural productive activities to the economy and wellbeing of the district;
>
> ...

[37] This objective is to be achieved through 13 policies, and also through related policies dealing with noise and traffic. We found it helpful to consider the structure of the policy suite, as follows:

(a) overall outcomes for activities on rural land (policies 17.2.2.1 and 17.2.2.2);
(b) fact finding (policy 17.2.2.3); and
(c) attainment of specific outcomes identified (policies 17.2.2.4, 17.2.2.10, 17.2.2.12 and 17.2.2.13).

[38] The District Plan enables a range of activities on rural land that have a direct relationship with rural productive activity,[33] including quarrying (policy 17.2.2.1). This is not, however, an open-ended arrangement to establish these activities in the rural zones. Decision-makers are to ensure that the adverse effects of those activities on rural character and amenity values are avoided, remedied or mitigated (policy 17.2.2.2).[34] Policy 17.2.2.2 is to be interpreted in light of the overarching objective for the rural environment (objective 17.2.1) and the strategic directions for the District. If the adverse effects are not avoided or remedied (we suggest preferably in the first instance), the policy is tolerant of activities with adverse effects where the activity, circumscribed by any conditions mitigating effects, supports and maintains the function,

[32] Section 75(1) RMA.
[33] See definitions: "quarrying" is a "rural productive activity".
[34] The policy also addresses "significant adverse effects", which for reasons that we shall give do not arise in this case.

character and amenity values of the rural environment.

[39] Regarding the issue of "whose" amenity values are to be supported and maintained, we have interpreted "amenity" consistently with strategic objective 3.3.14. It is the "amenity of people and communities". We come back to this objective shortly, when considering the City Council's submission on the threshold of effects. For now we record that the objective and supporting policies are concerned with both the localised effect on neighbouring land-owners and the wider effect on the community.

[40] The District Plan makes the obvious but important point that rural character and amenity values vary across the district. This is the result of the different combination of natural and physical resources that are present. This variation is to be recognised by decision-makers (policy 17.2.2.3(a)).

[41] Whether the proposal does support and maintain the function, character and amenity of the rural environment (objective 17.2.1.1) depends on the combination of natural and physical resources present. On the one hand, decision-makers are to recognise the elements which characterise an area as rural, from which desired amenity is derived, include the predominance of:

> b. ...
>
> i. a landscape dominated by openness and vegetation;
>
> ii. the significant visual separation between residential buildings on neighbouring properties;
>
> iii. where appropriate, buildings integrated into a predominantly natural setting; and
>
> iv. natural character elements of waterways, water bodies, indigenous vegetation and natural landforms, including the coastal environment where relevant.[35]

[42] On the other, decision-makers are to recognise rural productive activities produce noticeable noise, odour, dust and traffic consistent with a rural working environment; quarrying is one of these activities that is specifically mentioned.[36]

[43] Thus, the same policy is concerned not only with the more pleasant aspects of the countryside and country life but with the reality that rural productive activities may

[35] Policy 17.2.2.3(b).
[36] Policy 17.2.2.3(c).

generate adverse effects which, while less pleasant, are nevertheless consistent with a rural working environment (policy 17.2.2.3(b) and (c)). Both are to be recognised.

[44] Not to be overlooked is the important qualification that the effects of rural productive activities are to be consistent with a rural working environment (policy 17.2.2.3(c)). A key issue in this proceeding is whether the adverse effects of the proposed quarry, either considered by itself or together with the other quarries in the locality, are consistent with this particular rural working environment.

[45] The fact that quarrying is a rural productive activity does not mean that it is necessarily appropriate at this location – the proposal is to be assessed on its merits in light of the objective.

[46] First, decision-makers are to ensure the nature, scale and intensity of use and development recognise the different natural and physical resources, character and amenity values of rural land, including other rural productive activities in the rural land surrounding Christchurch (policy 17.2.2.4(a)(ii)). "Ensure" means "to make certain".[37] On the first reading this is a somewhat strangely worded policy – the consent authority is to "ensure" use and development "recognise" other rural productive activities and certain listed attributes.[38] The interaction between the proposed rural productive activities and the receiving environment, however, lays the foundation for an enquiry whether the activity will support, maintain and, where appropriate, enhance the function, character and amenity of the rural environment (objective 17.2.1.1). On this appeal, we are particularly concerned with the existing character and amenity experienced and enjoyed by the residents and the wider community.

[47] Second, and building on the above policy, decision-makers are to ensure adequate separation distances between new quarrying and incompatible activities are maintained (policy 17.2.2.10(b)). Incompatible activities include the dwellings along Conservators and Savills Roads. There is no applicable standard in the District Plan and we come back later in the decision as to how we determined whether the separation distance is "adequate" in this case.

[37] The Concise Oxford Dictionary.
[38] We observe it is not the only provision that takes an "and/both" approach to both enabling rural productive activities and the attainment of environmental outcomes. See also objective 17.2.1.1 and policies 17.2.2.2 and 17.2.2.3. The whole of the provision must be considered.

[48] Third, there is a policy that is enabling of access to, and processing of, aggregate to provide for the recovery and development of the district. There are some constraints, however, on new quarrying where this is proposed outside of the Rural Quarry Zone. New quarries may "only" occur in certain circumstances (policy 17.2.2.12(a)(ii)) which are set out below. In practice the attainment of these outcomes are major determinators of the objective for the rural environment. The new quarry is provided for only where the activity (relevantly):

A. avoids areas of outstanding or significant landscape, ecological, cultural or historic heritage value;
B. avoids or mitigates effects on activities sensitive to quarrying activities;
C. internalises adverse environmental effects as far as practicable using industry best practice and management plans, including monitoring and self-reporting;
D. manages noise, vibration, access and lighting to maintain local rural amenity values;
E. avoids or mitigates any effects on surface water bodies and their margins; and
F. ensures the siting and scale of buildings and visual screening maintains local rural amenity values and character.

[49] Finally, all new proposals for quarrying activities are required to demonstrate through a site rehabilitation plan the objectives, methodology and timescales for achieving site rehabilitation and appropriate end use (policy 17.2.2.13). The final rehabilitated landform must be appropriate relative to the end use and other factors listed (policy 17.2.2.13).

Noise

[50] The objective for the rural environment is attained, in part, through managing the adverse effects of noise. The District Plan has a broad objective that the adverse noise effects on the amenity values, and health of people and communities are managed to levels consistent with the anticipated outcomes for the receiving environment. This is to be done by placing limitations on the sound level, location and duration of noisy activities (objective 6.1.2.1 and policy 6.1.2.1.1).

[51] The quarry will not operate at night and is therefore consistent with the policy for noise during night hours (6.1.2.1.2).

Traffic

[52] Finally, the objective for an integrated transport system that (amongst other matters:[39]

> (i) ... is safe and efficient for all transport modes;
>
> ...
>
> (iii) ... supports safe, healthy and liveable communities by maximising integration with land use.

[53] For high traffic generating activities, such as this proposal, this objective is achieved by a policy which requires such activities to manage their adverse effects on the transport system by assessing their location and design with regard to the extent that they do not compromise the safe, efficient and effective use of the transport system; provide patterns of development that optimise use of the existing transport system and mitigate other adverse transport effects, such as effects on communities, and the amenity of the surrounding environment (policy 7.2.1.2).

[54] In a separate objective we note that the transportation needs of people and freight is to be enabled at the same time "whilst" managing adverse effects from the transport system (objective 7.2.2). An important policy follows:

> Policy 7.2.2.3 – Effect on adjacent land uses to the Transport Zone
>
> a. Manage the adverse effect(s) of an activity within the Transport Zone so that the effects of the activity are consistent with the amenity values and activity of adjacent land uses, whilst providing for the transport network, in particular the strategic transport network to function efficiently and safely.

Threshold of effects

[55] The City Council submits the strategic directions establish a threshold of effects on rural character and amenity that is to be avoided; that threshold is set at the level of a significant adverse effect.[40] While counsel does not define "threshold", from the context we impute he means a level of severity. His submission would have the effect of reading down the implementing objectives and policies as being concerned only to

[39] Objective 7.2.1.
[40] Pizzey, closing at [65]-[71].

avoid significant adverse effects.

[56] In support of this submission the City Council relies on the strategic direction that "[c]onflicts between incompatible activities are avoided where there may be significant adverse effects on the health, safety and amenity of people and communities" (objective 3.3.14).

[57] This interpretation was not put to the planning witnesses.

Discussion

[58] Section 5 of the Interpretation Act 1999 provides that the meaning of an enactment must be ascertained from its text and in the light of its purpose. This principle has been applied and expanded on in relation to the interpretation of district plans *(Powell v Dunedin City Council)*[41] and we adopt this approach.

[59] In the context of objective 3.3.14 the meaning of "avoid" is plain; "avoid" means not allowing or preventing the occurrence of. The objectives and policies are to be interpreted and implemented to achieve this strategic direction; conflicts between incompatible activities are not to occur where there may be significant adverse effects on the health, safety and amenity of people and communities.

[60] The issue that arises under the City Council's interpretation is whether objectives and policies are to be interpreted and implemented in a way that is permissive of adverse effects which are not "significant adverse effects".

[61] The short answer is: that depends on what the District Plan says.

[62] In the context of the strategic directions as a whole, the direction to avoid "significant adverse effects" sits alongside another, overlapping direction, to recognise the contribution of rural land to maintaining the values of the natural and cultural environment, including Ngāi Tahu values (objective 3.3.16). Both directions are to achieve the overarching objective that, inter alia, Christchurch "sustains the important qualities and values of the natural environment" (objective 3.3.1).

[41] *Powell v Dunedin City Council* [2004] NZRMA 49 (HC).

[63] It may be helpful at this juncture to recall Gendall J's observation in *Rational Transport Society Inc v New Zealand Transport* 12 NZRMA 298 at [46] that:

> ....depending on the circumstances [there may be] more than one objective having different, and overlapping, ways of achieving sustainable management of natural and physical resources (the purpose of the Act). But objectives cannot be looked at in isolation, because "the extent" of each may depend upon inter relationships.

[64] Justice Gendall was considering an appeal on a plan change but the observations are of general application and we think are a useful reminder to interpret and apply the District Plan as a whole.

[65] The strategic directions are implemented by objectives and policies that are to achieve integrated management of the natural and physical resources (s 31 RMA).[42] We have tested the City Council's interpretation by applying it to the objective for the rural environment (objective 17.2.1.1) and policies on the overall outcome for activities on rural land. Policy is enabling of the development of rural land (policy 17.2.2.1) but this is subject to the constraint whereby decision-makers are to "ensure activities avoid significant adverse effects on an area of important natural resources" and "avoid, remedy or mitigate other adverse effects on rural character and amenity values" (policy 17.2.2.2).

[66] We put to one side "important natural resources". This is not a phrase that is defined in the District Plan, and was not applied by the planners to the environment under consideration.

[67] The City Council does not address these key policies and in particular, the distinction made between "significant adverse effects" and "other effects" in policy 17.2.2.2. Under the City Council's interpretation "other effects" means "all other significant adverse effects". The City Council does not address these distinctions and whether they are material to the interpretation and implementation of the District Plan.

[68] If an activity gives rise to an adverse effect which, as proposed to be mitigated, does not support and maintain the function, character and amenity values of the rural environment (objective 17.2.1.1) are these effects to be enabled through the granting of

[42] Section 31 provides more particularised direction to territorial authorities that it is the effects of the use, development, or protection of land and associated natural and physical resources.

consent? Under the City Council's interpretation, the answer to this is "yes".

[69] The better interpretation, and the one that fits with the strategic directions as a whole (including, in particular, objectives 3.3.1, 3.3.14 and 3.3.16), and the implementing objectives and policies, is that, regardless of scale, decision-makers are to avoid "significant adverse effects" on health, safety and amenity of people and communities (objective 3.3.14) and for all "other adverse effects", evaluate the activity in light of the outcomes for the rural environment. Where an effect cannot be avoided or remedied in the first instance, then the enquiry is whether the activity as proposed to be mitigated will support and maintain the function, character and amenity values of the rural environment. If not, the activity will not achieve the relevant objective of the District Plan.

The receiving environment

[70] The effects of the proposal will be experienced in an area centred around the intersection of Conservators, Savills and Guys Roads, approximately 2.4 kms north of Yaldhurst Village, a rural community on Christchurch's north-western periphery. The area's rural character derives from a mix of its natural and physical resources, and includes both the existing and future environment. The latter may emerge by the utilisation of rights to carry out activities that are permitted under the District Plan or modified by the implementation of resource consents which have been granted, and where it appears likely those consents will be implemented: per *Queenstown Lakes District Council v Hawthorn Estate Ltd*[43] at [84].

[71] We commence with the natural environment.

Landform and soil

[72] The prevailing landform parallels other parts of the Canterbury Plains which abut the City, being predominantly flat. Aerial photographs, and a trained eye, however, reveal subtle variations. The fluvial processes which fashioned the land are evident in a terrace formation along the southern boundary of the subject site and, in uncultivated locations to the south and north, there are suppressed linear undulations formed by past Waimakariri River braids.[44] More recently, this landform pattern has been modified in places by 2-3m high bunds created around the boundaries of existing quarries for visual screening purposes.

[73] We accept that the soils underlying at least some of the residents' properties are likely to be Waimakariri loam.[45]

Vegetation

[74] The predominant vegetation type in the area is pasture. To the north of the Harewood Gravels Ltd (**HGL**) site is a ready lawn cultivation business. Exotic shelterbelts have been planted in numerous locations along road frontages and internal boundaries and are a characteristic of the area, with some properties fully enclosed, or

[43] [2006] NZRMA 424.
[44] The Waimakariri River main channel is currently located some 4.5 km to the north of the subject site, confined within stopbanks.
[45] Transcript at 754 and 773.

nearly so. Deciduous amenity trees and plantations for timber production can also be found.

[75] On HGL's southern boundary an area owned by the Regional Council contains what Ms Smetham described as "dryland plains native vegetation".[46] This is recognised in the District Plan as a significant landscape area.[47] We were told that a relatively large area between the formed end of Conservators Rd and quarries on McLeans Island Rd are also in public ownership, being City Council land held as a natural area for park purposes.[48] We understand this to be the McLeans Grassland Park zoned in the District Plan as Open Space Natural with a Significant Feature or Rural Amenity Landscape overlay.[49] The Regional and City Council properties abut near Clarksons Rd north-west of the subject site. We recall no evidence on the fauna supported by the vegetation types described but expect it is habitat for (at least) bird species commonly found on the Plains, and possibly some dry land species.

Composition of the views

[76] A range of views are available from public roads and typically include dwellings and structures accessory to farming. There are long views between and over shelterbelts to the foothills on the western margin of the Plains. Similar views exist in the middle distance. In contrast, in places, short distance views are interrupted by shelterbelts – although they are generally on one side of the road only.

[77] Road entrances to commercial properties such as Frews Quarry, Grant Brothers' cleanfill and the ready lawn enterprise afford relatively uninterrupted views into these sites. An emerging feature of this area are the "elements" accessory to non-farming rural productive activities. These take the form of buildings for productive activities, signage, secure fences, gates and engineered accesses, in addition to bunds and screen planting.

[78] Two 220 kv national grid electricity transmission lines cross the area to the west of Conservators and Guys Roads generally on a north-south axis.[50] Although visually

[46] N Smetham, EiC at [37.2].
[47] N Smetham, EiC at [37.2].
[48] Transcript at 704 and 705.
[49] Refer District Plan Planning Maps 22A and 22C.
[50] Refer District Plan Map 22A.

conspicuous, there was no suggestion that they are incompatible with the area's rural landscape or natural character.

Existing land uses

[79] As intimated, the residents' small holdings are located in a confined "pocket" fronting Savills and Conservators Roads, north of Yaldhurst Village, which is accessed via Guys Rd. The Village has a school and other minor amenities used by the residents. Currently there are 11 households on Conservators Rd and, on our count, more than the two dwellings that were the subject matter of evidence along a 300m section of Savills Rd east of the Conservators/Savills/Guy Roads intersection.[51] The potential for additional dwellings in proximity to the HGL site is limited by the existing subdivision pattern and minimum site area for dwellings as a permitted activity.[52] The residents' sites are typically less than the 20 hectares permitted activity District Plan threshold (rule 17.4.2.1) and are used for a mix of rural productive activities, mostly pastoral based.

[80] 250m or so north of the formed section of Conservators Rd is the southern boundary of one of four existing quarries, aligned on an approximately 3 kilometre east-west axis, and fronting McLeans Island Rd. These are owned by Fulton Hogan Limited, KB Contracting and Quarries Limited, Harewood Gravels and Isaac Construction. To the west of Conservators Rd and adjoining the subject site is a recent quarry developed by SOL Quarries Limited. It has a light vehicle access to Conservators Rd and heavy goods vehicle (**HGV**) access to Guys Rd, located some 700m from the nearest existing dwelling.[53]

[81] To the north and east of Savills Rd adjacent to number 25, there is a recently consented quarry owned by Frews Quarry Limited. At the time of the hearing it was yet to commence production although an access to Savills Rd is formed and preliminary site works have been completed. On the southern side of Savills Rd opposite (in part) Frews Quarry is the disused Grant Brothers Quarry, now operated as a cleanfill site.

[51] Golder Associates Visual Effects Management Plan, April 2015 and C Taylor, EiC at [31].
[52] Transcript at 733-734; District Plan Rural Waimakariri Zone Permitted Activity Rule 17.6.1.1 P6 and Non-Complying Activity Rule 17.6.1.5 NC2.
[53] S Camp, EiC at [6.4].

[82] Other notable activities in the local environment are Pound Rd to the east, which Savills Rd joins, and Christchurch International Airport on the eastern side of Pound Rd. We return to these below.

Local road network and environment

[83] The traffic engineers' well-constructed Joint Witness Statement includes the following information on the local traffic environment:

(a) existing weekday daily traffic volumes (nominal 2015 base year) on Pound Rd south of Savills Rd are 5,421 vehicles, Pound Rd north of Savills Rd 5,400 vehicles, Savills Rd 250 vehicles, Conservators Rd 100 vehicles and Guys Rd 200 vehicles;[54]

(b) Pound Rd is classified as a minor arterial road in the City Council's road hierarchy. Such roads "provide connections between major arterial roads and the major rural, suburban and industrial areas and commercial centres [in the City]". At 5,400 vehicles per day usage is considered to be towards the lower end of what could be typically expected on a rural minor arterial road;

(c) Savills, Conservators and Guys Roads are classified as local roads whose function is "almost entirely for access purposes and [not] intended to act as through routes for motor vehicles"; and

(d) the daily traffic volumes carried by Conservators, Guys and Savills Roads are reportedly "very low such that the traffic environment can be considered to be very 'quiet'." The traffic engineers agreed that because afternoon peaks exceed those in the morning, the former should be used for assessment purposes.[55]

[84] Key transport-related aspects of the SOL and Frews consent conditions, which the engineers correctly understood to now form part of the receiving environment include:

(a) for SOL Quarry, up to 300 HGV movements/day off Guys Rd plus 30 light vehicle movements/day off Conservators Rd. From Guys Rd the assumed

[54] Transport JWS at [18] and [19].
[55] Transport JWS at [26].

distribution is 25% of movements north bound and 75% south bound;[56] and

(b) for Frews Quarry, up to 328 HGV movements/day plus 84 light vehicles off Savills Rd. The assumed distribution is via Savills Rd to the Pound Rd junction and then 20% north bound and 80% south bound.[57]

[85] The junction of Pound and Savills Roads is the critical intersection for HGL road network effects. The 85 percentile volume for all movements through the intersection at the existing weekday pm peak hour is 748 vehicles, with through movements on Pound Rd strongly dominant. The engineers noted that the assessed volume very closely corresponded to City Council count data.[58]

[86] The SOL and Frew consents both contain road upgrading conditions. On our reading of the traffic engineers' joint witness statement the SOL consent (marginally) requires the greater width of upgrading on Savills and Guys Rd, namely a sealed width of 7.2m (2m x 3.1m lanes plus 0.5m sealed shoulders) with 0.5m compacted edges.[59] This work had been undertaken in accordance with applicable City Council and New Zealand Standard design standards at the time of the hearing (subject to some outstanding maintenance work).[60] We record that the HGL proposal allows for upgrading of Conservators Rd to a very similar standard as applies to the SOL consent.

[87] From the court's site visit we are aware that the local roads generally have wide, mown, grass verges either side of the carriageway. Any gradient is barely perceptible. The residents told us that they value the roads as part of an environment in which they (at least until recently) cycle, horse ride, run and walk safely, including with dogs, while enjoying a high level of amenity. Some of this activity was said to involve trips as far as Yaldhurst village, including to the school.[61] Much of this usage was said to have now ceased, in response to the residents' perception to the change in the road environment. In part, their change in behaviour responds to concerns for their safety and in this regard, there was evidence before the court of gravel, that had fallen from quarry trucks, being flicked up and breaking car windscreens and headlights.[62]

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[56] Transport JWS at [30].
[57] Transport JWS at [32].
[58] Transport JWS at [29].
[59] Transport JWS at [48].
[60] Transport JWS at [50] and [51].
[61] I Cummings, EiC at [2]; B Cummings, EiC at [2] and [3], D Guenole-Cummings, EiC at [8], C Taylor, EiC at [14(b)] and [14(c)].
[62] E Janssen, EiC at [15] and [27(a)].

Noise environment

[88] Dr J W Trevathan, an acoustic engineer called by the respondent, deposed ambient noise in the locality is generated by traffic on local roads, including Pound Rd; distant industrial noise (source unspecified) and Airport operations both on the ground and airborne. He did not consider the locality to be a "secluded rural area" and found "the amenity in the vicinity of existing dwellings [to be] already affected by these sources".[63]

[89] Information on the existing noise environment when the HGL resource consent application was lodged is contained in the Assessment of Environmental Effects (**AEE**)[64] and, more particularly, Appendix D.[65] In the latter, Marshall Day Acoustics record it has previously undertaken noise surveys "in the area" on multiple occasions including 2009, 2012 and 2013. Supplementary measurements were taken for the HGL application around 0700 hours in January 2015. Table 1 gives measured dB L_{Aeq} and L_{A90} levels at six locations on Conservators, Guys and Savills Roads. Table 1 does not specify a L_{Aeq} time period. The two data sets in Table 1 closest to the subject site are those for Site C, which we interpret to be at or near 70 Conservators Rd and Site E, which we interpret to be on the road outside 15 Savills Rd. The table includes the following data:

Position	Date	Time	Noise Source	dB L_{Aeq}	dB L_{A90}
70 Conservators Rd	January 2015	0740 hours	Excluded aircraft; distant traffic dominant	40	37
15 Savills Rd	March 2013	0648 hours	Unidentified plant noise contributes	43	39

[90] The combined data set is said to "show that around 0700 hours, ambient noise levels are generally around 41 dB L_{Aeq} without aircraft noise" and that the "daytime ambient level will generally be higher and, based on [Marshall Day's] experience in [the] area, will typically be between 45 and 50 dB L_{Aeq}".

[91] Appendix D acknowledges that noise from HGL's proposal will be received in conjunction with that from two recently consented quarries close to the application

[63] J Trevathan, EiC at [16].
[64] Harewood Gravels Limited – Land use consent application and Assessment of Effects on the Environment: Proposed Quarry – 21 Conservators Road, McLeans Island dated April 2015 part B at [5.4].
[65] Exhibit 11: Conservators Road Quarry Noise Assessment dated 28 April 2015 at [3].

site,[66] namely the SOL and Frew quarries consented in January 2016 and August 2016 respectively.[67] The former is now operative and part of the existing environment. The latter was still to commence full operations at the time of our hearing but having been exercised, at least in part (for site works), can properly be viewed as part of the future environment.

[92] Mr Camp, an acoustic specialist was called by the applicant. In a supplementary statement, he presented tables for noise levels at dwellings "with and without the Harewood Gravels quarry in operation" measured at their notional boundary.[68] We understand the noise levels given under the heading 'Ambient' at 15 Savills Rd and 40 Conservators Rd are for the existing environment, inclusive of the SOL and Frews Quarries. Two measures are used. These are $L_{Aeq\ (1\ hr)}$ which we understand to be the time-averaged A-weighted sound pressure level and L_{A90} which we understand to be the level equalled or exceeded for 90% of the time.[69] At 15 Savills Rd the levels given are 53 dB $L_{Aeq\ (1\ hr)}$ and 43 dB L_{A90}. And at 40 Conservators Rd they are much the same, namely 50 dB $L_{Aeq\ (1\ hr)}$ and 43 dB L_{A90}.[70]

[93] The residents also gave us their views on existing noise levels. Mrs D Guenole-Cummings described the change in her existing aural amenity as HGV movements have increased, especially in response to SOL Quarry's use of Savills Rd between 7-9 am and 4-6 pm. Her home is 20m from the roadside behind a macrocarpa hedge. Every heavy truck "that hurtles by [is said to be] loud, intrusive and [to] vibrate [her] home like a mini earthquake". Mr I Cummings said he was unable to sleep in a front bedroom beyond 7.30 am on a weekday and that truck-induced vibrations rattle his home. Mr B Cummings advised that the noise from crushing machines is now part of the background sound.[71] Mr B Cummings can hear the crushers and Mr E J Janssen reported experiencing noise from quarries to the north of Conservators Rd and anticipated further noise from the SOL and Frews Quarries, although atmospheric conditions affect the audibility of noise from these distant sources.[72]

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[66] Exhibit 11: Conservators Road Quarry Noise Assessment dated 28 April 2015 at [6.2.4].
[67] Exhibit C and Transcript at 822. We assume the SOL and Frew proposals were proceeding through the consent process and known to Marshall Day when it prepared the HGL AEE noise section in April 2015.
[68] S Camp, supplementary statement, at [1.2] and [1.4].
[69] Exhibit 2: NZS 6802:2008 at Section 3: Definitions.
[70] Exhibit 2 at [2.2].
[71] Transcript at 748.
[72] Mr Mahoney referred to the same thing when observing that, on still mornings before the prevailing easterly gets up, noise can be heard from multiple distant sources. Cloud cover amplifies the received noise – Transcript at 836.

[94] Mr P J Mahoney stated the Airport is the "largest" noise that he hears at his Conservators Rd home but it does not intrude on outdoor conversation. Nor does he find it unsettling.[73] He also hears noise from various other rural productive activities, like farm tractors.[74] The noise from the crushers which he can hear operating at McLeans Island quarries evokes a different response; one related to his sense of uncertainty about the future. The concern is "not the actual noise itself [but] what it represents".[75] In particular, that quarries would ultimately "sandwich" his property. He takes no comfort from Mr Camp's evidence that they would not be heard because of truck noise.[76]

[95] In Dr Taylor's social assessment he had explored with residents their concerns about the potential change to their existing amenity, if consent were granted. His evidence, supported by the direct evidence inquiry, showed the residents to be concerned about an environment in which they need to shut windows during the day; face restrictions on outdoor activities; and experience disturbed sleep, particularly on Saturdays. Noise received in frequent, short, intensive "bursts" – such as the banging and clanking of machinery and acceleration/deceleration of vehicles – was viewed as an especially adverse element.

Dust environment

[96] The receiving environment is one that is already impacted by a number of sources of dust.

[97] These include farm activities such as bringing in crops and soil cultivation as well as forestry, especially during harvesting or when trees are pollinating. The Waimakariri River approximately 4 km to the north of the subject site is another source, especially in strong north-west winds.

[98] Mr Chilton, an air quality scientist called by the applicant, identified:

(a) the nearby SOL and Frew Quarries that could, when operating, "contribute to background dust levels in the wider receiving environment";[77] and

[73] Transcript at 826.
[74] Transcript at 832.
[75] Transcript at 835.
[76] Transcript at 827.
[77] R Chilton, EiC at [26].

(b) other quarries and cleanfill operations further afield, namely the Yaldhurst Quarry Zone approximately 4 km to the south and the previously described McLeans Island Rd quarries 1-2 km to the north of the subject site.[78]

[99] Mr Chilton, without attempting to quantify or otherwise characterise dust in the local environment, considered the area typical of many rural areas on the Canterbury Plains where "elevated" dust levels can be expected, especially during summer months. On this basis, it was his opinion "the rural land surrounding the site has a low to moderate sensitivity to dust impacts".

[100] Meteorological conditions are pertinent to the dust environment. Based on Christchurch Airport data, the prevailing winds are from the north-east for much of the year and to a lesser degree from the south-west. Rainfall and evaporation are also relevant factors. Mr Chilton provided data showing there are few dry days in winter and that late spring, summer and early autumn are the driest times locally. He gave literature references for the relationship between strong winds and the propensity for dust to be generated from dry surfaces and compiled a windrose for the Airport, which we accept as applicable to the local environment, depicting winds greater than 7m/s on dry days. The windrose shows the direction and frequency of winds that would create the greatest exposure to potential dust impacts. It was also said to "illustrate that strong winds on dry days mainly occur [locally] from the northeast, although they also occur for a small percentage of time from the south-southwest and northwest".[79]

[101] Mr Chilton predicts the percentage of time that six houses on Conservators and Savills Roads, in proximity to the subject site, "[are] expected to be" downwind of the proposed quarry during dry days and under relatively strong wind conditions. These predictions are that "the Mahoney, Public Trustee and Russell [properties at 90, 70 and 40 Conservators Rd respectively] could expect the highest exposure to these conditions (approximately 2.2-2.4% of the year, or eight days). The remaining dwellings are predicted to have exposures that are either at or below 1.6% of the year".[80] We include this evidence here because, although it has a predictive component, it is founded on salient aspects of the natural environment.

[78] R Chilton, EiC at [27].
[79] R Chilton, EiC at [34].
[80] R Chilton, EiC at [47].

[102] The residents imparted their experience with dust in the local environment. The uncontroverted evidence from all of the witnesses was that haul roads are the biggest source of quarry dust.[81] Mr Cummings told us of seeing dust billowing across McLeans Island Rd in a north westerly wind from the existing HGL quarry and being able to see dust rising off Fulton Hogan Quarry haul roads when out on the road (at Yaldhurst).[82] We heard that visible plumes are created by trucks on the unsealed section of the SOL Quarry access road, resulting in snow-like dust deposits on adjoining pine trees,[83] and in spite of its 80 m tar seal, of dust being caught up in the truck's wake and deposited onto the public road.[84] At Grant Brothers,[85] the access is unsealed and gravel is carried onto the roads and with it dust.[86] Mr Cummings said he experienced dust on Savills Rd, deposited with gravel by the Grants Brothers site, as a constant element. He also observed "incredible" dust when site preparation works were undertaken at Frews Quarry. His 1930's home readily admits the dust and boundary hedges provided ineffective mitigation.[87]

[103] Mrs D Guenole-Cummings described how the dust environment had altered with commencement of the SOL and Frew quarries.[88] Dust coats the outdoor furniture, windows, vehicle, a spa-cover and enters the inside of her home gathering into layers of gritty dust,[89] even getting into the cupboards.[90] Having lived at the property for 16 years,[91] she used to dust the house once a week and occasionally more frequently when a neighbouring farmer is ploughing, whereas now she dusts every day or every two days.[92] She corroborated her husband's evidence about the dust on local roads being mobilised by vehicles, as did Mr I Cummings,[93] and described following trucks "spewing clouds of dust behind them".[94] She has experienced severe asthma problems requiring preventative medication.[95] For her, the most frustrating part, has been the "the denial of experts and operators that [dust] would be a problem".[96]

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[81] Transcript at 742.
[82] Transcript at 743 and 757-758.
[83] Transcript at 753.
[84] Transcript at 758 and 759.
[85] A former quarry now operating as a cleanfill site.
[86] Transcript at 749.
[87] Transcript at 757 and 758.
[88] D Guenole-Cummings, EiC at [5] and [6].
[89] Transcript at 774, 776 and 839.
[90] Transcript at 776.
[91] D Guenole-Cummings, EiC at [1].
[92] Transcript at 776.
[93] I Cummings, EiC at [10].
[94] D Guenole-Cummings, EiC at [6].
[95] Transcript at 779; D Guenole-Cummings, EiC at [5].
[96] D Guenole-Cummings, EiC at [6].

[104] Mr Mahoney, in common with other witnesses for the appellant, was concerned that the environment may be contaminated by dust containing respirable crystalline silica.[97]

[105] Dr Taylor's social assessment inquiry showed that residents understand rural Canterbury can be dusty at times, but they experience multiple adverse effects in the local environment associated with quarrying, crushing, vehicle movements and dirt piles, including poorly vegetated bunds,[98] (primary elements of concern being dust on roads and dust entering houses, resulting in negative ambience, additional cleaning and health effects).[99] In this regard Dr Taylor's evidence very largely traversed similar aspects of the environment to those described by individual witnesses for the appellants, but included specific examples like:

(a) driving to school and back (past Grants Brothers site on Savills Rd) and the car being covered in dust in one trip;
(b) cars having to be washed every 2-3 days with dust present on the driveway and clothes;
(c) dust on house exteriors causing increased washing;
(d) dust causing people to close windows even on hot days; and
(e) dust noticed on an outdoor swimming pool.[100]

[97] P Mahoney, EiC at [6].
[98] C Taylor, EiC at [52] ff.
[99] C Taylor, EiC at [53].
[100] C Taylor, EiC at [55].

Benefits of proposed quarry

The issue

[106] In the City Council's decision granting consent, the Commissioners made no reference to positive effects, other than to record that Mr Bligh, the planning witness for the applicant, drawing on the conclusions of the technical experts, concluded that the proposal would have a number of positive effects.[101]

[107] The issues for the court are what are the positive effects of the proposed quarry, and what weight should be given to them under s 104(1)(a)?

The evidence

[108] Mr Francis gave evidence that the new quarry will assist not only with the rebuild of Christchurch, but will also contribute to other large projects that are taking place around the City, independent of the rebuild.[102] In quoting from the Independent Hearing Panel's decision on the rural zone,[103] he referred to a predicted shortfall of 45 million tonnes of aggregate between the demand forecast of 2041 and what is currently available.[104] His evidence is that the resource available at the site is approximately 3,600,000 tonnes of unprocessed aggregate.[105]

[109] He considers the proposed site is marginal because of its 28 hectare size, but viable as a quarry project.[106] The fact that quality aggregate can be sourced so close to the city is of enormous economic benefit to Christchurch and, "in short, the closer we can get that material to the market the cheaper it is for [the] end user".[107] Mr Francis gave evidence that the quality of the aggregate resource at the site is good, as it is clean and a lot easier to work with on large roading and overpass projects, compared to sources further from the Waimakariri River that contain a higher clay and silt content.[108]

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[101] Decision of Hearing Commissioners dated 16 July 2016 at [70].
[102] J Francis, EiC at [11].
[103] Decision 34, Chapter 17: Rural – Stage 2 of the Independent Hearings Panel, Christchurch District Plan dated 12 August 2016.
[104] Transcript at 160.
[105] J Francis, EiC at [43].
[106] J Francis, EiC at [16.1].
[107] Transcript at 161.
[108] Transcript at 176.

[110] Mr Bligh considered that:[109]

> In terms of section 104, the proposal has a number of positive effects, most notably those which relate to the efficient use and development of natural and physical resources, to provide additional supplies of aggregate important to the development and maintenance of buildings and infrastructure, including for the rebuild of Christchurch, and to provide a disposal option for cleanfill material.

and that positive effects – social and economic include:[110]

> ... providing aggregate for earthquake recovery activities, generating direct employment and indirect employment, and providing an alternative waste disposal option for cleanfill material as opposed to other disposal sources currently available.

[111] Mr Bligh acknowledged there are other sources that can supply demand but when considering the implications of one less aggregate source, he stated that he was not familiar enough with quarry economics to "go much further than that".[111]

Evaluation

[112] The proposed quarry would provide approximately 8% of the anticipated shortfall in aggregate supply to 2041. This is clearly a positive benefit, but one that needs to be considered alongside actual or potential adverse effects, taking into account the extent to which the quarry would address the anticipated shortfall, and recognising that other supply options could be available.

[113] We do not presume that all of the aggregate is destined for earthquake recovery projects, although this was impressed upon us by more than one witness. Nor do we consider the view expressed by Mr Bligh that the proposal offers an alternative disposal option for cleanfill, which he considers a positive effect, to be valid. The issue appears to us to be one of a likely shortage of cleanfill to satisfy rehabilitation requirements within a reasonable timeframe, which should be seen as negative rather than positive.

[114] We were presented with no evidence of other positive effects. Given the relatively small size of the site, we give the benefits of the proposal no more than moderate weight.

[109] K Bligh, EiC at [18].
[110] K Bligh, EiC at [30].
[111] Transcript at 511.

Rural character and amenity

Introduction

[115] "Amenity values" are those natural and physical qualities and characteristics of an area that contribute to peoples' appreciation of its pleasantness, aesthetic coherence, cultural and recreational attributes.[112]

[116] Amenity values are not solely concerned with visual amenity, although in this proceeding visual amenity is an important consideration. We are also concerned here with the effect on amenity of any change in background levels of noise, dust, vibration and the increase in volume of heavy goods vehicles. That there will be further change in the environment if the land use consent were confirmed is certain. That said, change *per se* does not mean that there is an adverse effect on rural character or an effect on amenity values. To test the proposition that the scale and intensity of effects will be adverse, experts need first to establish the baseline environment against which the effects are evaluated.

[117] With that in mind, our approach when assessing "values" evidence, is to:

(a) identify the values of people and communities. Based on the topics above[113] this will include the attributes and characteristics of the existing landscape, soundscape and air quality that are valued by them. [We expect the experts will explain how they ascertained the values of people and communities];

(b) ascertain whether the District Plan identifies any valued attributes or characteristics for the relevant zone, landscape or more broadly the receiving environment. These elements may also be identified from other documentation such as a Conservation Management Strategy;

(c) determine whether the amenity values are reasonably held. In that regard we expect the experts to objectively test the basis of the values that are derived from the environment. This is necessary because the residents' views on their existing amenity is subjective and influenced by personal feelings or opinions, including the strength of their attachment to this place;

[112] Section 2 RMA.
[113] At [20].

(d) assess whether the proposal gives rise to adverse effect on the relevant attribute or characteristic;

(e) if it does, then to consider whether, in this case, rural character is maintained and second, whether there are any consequential effects on the existing amenity values; and

(f) finally, to assess those effects in light of the outcomes for the relevant resources and values under the District Plans.

For further guidance see *Schofield v Auckland Council*[114] and *Port Gore Marine Farms v Marlborough District Council.*[115]

The issues

[118] The Commissioners appointed by the City Council to hear and decide the application concluded "all amenity-related effects are able to be avoided or mitigated to the point of being minor or less, we are satisfied that the application is consistent with these general rural objectives and policies".[116] Addressing the landscape and cumulative visual effect, the Commissioners were satisfied that the proposed bunds and shelterbelts would not look greatly different from "numerous rural properties in the local area" and on that basis decided these were minor.[117]

[119] Arising from their assessment the issues for determination are as follows:

(a) will the proposed bunds and shelterbelts look like numerous rural properties in the local area?

(b) what is the cumulative visual effect of proposed bunds and shelterbelts on the existing rural character of the area?

(c) what is the cumulative visual effect of the rehabilitated quarry?

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[114] [2012] NZEnvC 68 at [42] and [51].
[115] [2012] NZEnvC 72 at [213]-[217].
[116] Decision dated July 2016 at [179]. We note that the Commissioners considered the application under the (then) operative former Christchurch City Plan and the proposed District Plan. Relevant rural amenity objective (13.4) under the Christchurch City Plan stated:
That over the rural area as a whole, rural amenity values, including visual character, heritage values, cultural and recreational opportunities are maintained and whenever possible enhanced and adverse effects of activities are controlled.
[117] Decision dated July 2016 at [173]-[174].

The residents' amenity values

[120] When the residents purchased their respective properties some 10-15 years ago, the predominant land use was pastoral and horticultural farming. Although the land is bisected by fences and hedges, and there are stopbanks close to the Waimakariri River, the area retained a sense of open space and the residents valued the rural outlook.[118]

[121] Low levels of traffic meant adults and children could walk, cycle and ride their horses along roads and on wide grassy berms. Dogs could be exercised off the lead. The farm land supported diverse wildlife including pheasants, turkey and quail.[119]

[122] From time to time there was noise and dust associated with farming activities. While the properties are not under the Airport's runway flight paths, the residents experience occasional noise from the aeroclub and helicopter operations.[120] Apart from farming and airport activities, there were no other noticeable sources of local noise. Conservators Rd is not a through-road, and its low volume of road traffic is predominantly local.[121]

[123] That was then and the existing "environment" now encompasses the future environment as it may be modified by consented activities and by the effects of consented quarries that are not yet fully expressed. Given the rapidity of change the residents, who were not represented by a landscape architect, described their existing amenity. They focused on how the character of the area had changed since the Canterbury earthquakes, particularly in response to the recent expansion of quarrying over the last three to four years.

[124] The residents' experience of the actual effects of the consented quarries does not accord with the experts' opinions that the effects on them will be minor. The rural character of the area has changed, and these changes have adversely affected the amenity they previously enjoyed. They are concerned that the effects will intensify if consent for this proposed quarry is confirmed.

[118] Taylor, EiC at [93].
[119] B Cummings EiC at [2].
[120] Taylor, EiC at [39].
[121] Guenole-Cummings, EiC at [2]; Taylor EiC at [35].

[125] We do not know whether all the changes are a consequence solely of the quarry activities; for example, there may have been a gradual but imperceptible increase in traffic prior to the first quarry establishing three years ago. That said, the residents are clear; the effects of quarry operations on them are adverse and a consequence of quarry associated activities is that they are no longer able to occupy and use the environment as they once used to.[122]

The District Plan

[126] The District Plan does not identify the attributes of the landscape which give this area its particular character.

[127] Accepting that rural character and amenity values will vary, persons deciding resource consent applications are to recognise also those elements which characterise an area as "rural" and from which amenity is derived (policy 17.2.2.3).

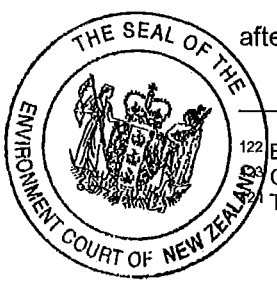
[128] This necessarily entails a comprehensive assessment of the existing landscape and so we turn next to the evidence of the landscape experts.

Assessment of rural character and amenity values

[129] We heard from three landscape architects; Mr A Craig called on behalf of the applicant; Ms N Smetham for the City Council and Ms J Dray who provided a copy of a report tabled under s 42 RMA to the City Council hearing and was summoned to attend the hearing by the residents.

[130] We are not aware that the landscape experts made any inquiry of the residents, or community generally, as to the qualities and characteristics that contribute to their appreciation of the area.

[131] The site of the proposed quarry is a pastoral farm. In keeping with its present day use the level of naturalness of the site is moderate.[123] Mr Craig advised this level of naturalness will reduce to "moderately low" during the operation of the quarry and after the site's rehabilitated.[124] There will be significant alteration to the landform; even



[122] B Cummings, EiC at [3] and Transcript at 757.
[123] Craig, EiC at [31].
[124] Transcript at 290.

after rehabilitation the quarry will be viewed as a large depression which will appear anomalous within the context of the generally flat character of the Plains.[125] Nevertheless, in Mr Craig's opinion, the depression will appear pleasant when returned to pastoral farming or some other rural activity.[126]

[132] While the quarry's temporary bunds[127] are "artificial by virtue of their formal linear geometry and uniformity" they are not, in his view, anomalous within the existing geometric landscape pattern.[128] The bunds and shelterbelt are at a sufficient distance from existing dwellings so as not to visually dominate those dwellings.[129] Uninterrupted views into the site will be afforded through the quarry's access off Conservators Rd, but any visual effects and the effect on amenity are confined to the presence of trucks entering and exiting the same.[130] He assumes once the pit is excavated all quarry operations will not be visible beyond the site.[131]

[133] In Mr Craig's opinion the area's rural amenity derives from the combination of open space, vegetation and reasonably consistent patterns within the landscape.[132] He attached significant weight to the geometric patterning which is the product of land ownership and current farming practices, including the planting of shelterbelts.[133] The geometric patterns are reinforced by pylons and roads. The proposed quarry will retain what he refers to as a "specific" rural character as its bunds, shelterbelts and boundaries are consistent with this patterning.[134] The quarry will also retain the area's "generic" rural character which derives from the high proportion of open space to buildings.[135] If rural character remains essentially unchanged, there will be no effect on existing amenity values.

[134] In Mr Craig's view there is no difference in the rural character of a quarry zone and a rural zone because under the District Plan quarrying can occur in both.[136] People's expectations should be informed by the primary function of the rural zone which is "given over to production;" pointing out that a quarry is an enterprise that is

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[125] Craig, EiC at [56]-[57].
[126] Craig, EiC at [58].
[127] The bunds will be progressively removed after 30 years.
[128] Craig, EiC at [60].
[129] Craig, EiC at [68].
[130] Craig, EiC at [64].
[131] Craig, EiC at [64].
[132] Craig, EiC at [92].
[133] Craig, EiC at [87]-[90].
[134] Craig, EiC at [86]-[92].
[135] Craig, EiC at [83]-[84].
[136] Transcript at 281.

clearly productive. The presence of many quarries in this area and north-west of the City informs the existing environment and therefore people's expectations of the same. In short, people will not be surprised to encounter a quarry at this location.[137]

[135] He concludes the factors contributing to the landscape character will remain unchanged even though there is an increase in the proportion of quarrying relative to other activities in the area.[138]

[136] Ms Smetham, for the City Council, expands on the above description by adding to the elements of rural character a sense of spaciousness. In her opinion the residents' amenity is derived from "rural character with an aesthetic coherence and pleasant outlook". Amenity is variable because of the diverse outlook and land cover.[139] The rural amenity of the site, including views into and over the site, is moderate. This amenity derives from a high proportion of rural open space and dominated by vegetation (pasture, shelterbelts and amenity tree planting around buildings).[140] She notes that while the site is visible from parts of Conservators Rd and from the Savills and Guys Rd intersection, it is screened off by existing shelterbelts along Guys Rd.[141]

[137] Ms Smetham evaluated the proposal under a single policy (17.2.2.3) concluding that it is consistent with this and other policies cited (although she does not discuss the latter). The proposal does not introduce new buildings and will retain openness commensurate with "a" rural character and provides appropriate visual screening.[142] In common with other rural productive activities in the rural area she expects this quarry will produce noise, odour, dust and traffic which may be noticeable to residents and visitors. Evidently these "elements of a rural working character are well established in the vicinity by several existing or consented quarries".[143]

[138] While the bund and shelterbelts will remove views across this pastoral scene this is consistent with the sequence of open and enclosed views found elsewhere in the

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[137] Transcript at 281-282; Craig at [71].
[138] Craig, EiC at [93].
[139] Smetham, EiC at [37.7] and [39].
[140] Smetham, EiC at [40].
[141] Smetham, EiC at [37.10].
[142] Smetham, EiC at [44]-[46]. Transcript at 273 Mr Craig gave similar evidence – if you cannot see the quarry there is no visual effect.
[143] Smetham, EiC at [18].

receiving environment.[144] The change to visual amenity as a result of direct views into the quarry from its accessway are dismissed as being fleeting or brief and in any event will reduce over time as the quarry progresses through its stages.[145] The cumulative effect of the seven other quarries and one cleanfill disposal site on visual amenity is negligible and "are scarcely appreciated and have very little effect on the scene".[146]

[139] Ms Dray, a senior landscape architect employed by the City Council, has a conflicting opinion to that of Mr Craig and Ms Smetham. Being summoned by the residents, she produced a short report that she tabled at the City Council hearing; regrettably we did not have the benefit of a full brief of evidence. In her report Ms Dray does, however, reference the submissions made by the residents and their concerns that the proposed quarry will result in a significant change to rural character and amenity because of the cumulative traffic, noise, dust and visual effects.[147] She helpfully distinguishes landscape effects from visual effects. The former being those that bring about change to the landscape and the latter are those that can be seen arising from the proposal or from various vantage points.[148]

[140] Ms Dray considered the effect on landscape under two scenarios: the quarry when operating and second, the rehabilitated quarry. In respect of the latter it is her view that the capacity of the landscape to absorb change is being tested by this proposal; the landscape's legibility is being affected to a degree that may well be irreversible given that there may not be enough cleanfill to restore the site. Were this to occur the cumulative adverse effect on landscape character would be more than minor.[149]

[141] In respect of the operational quarry, if the view into the site from the accessway is of the working quarry, including trucks moving in and out of the site, heavy machinery and stockpiles, this too would be an adverse effect on visual amenity particularly for people who live in the area.[150]

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[144] Smetham, EiC at [77].
[145] Smetham, EiC at [83]. Transcript at 660.
[146] Smetham, EiC at [74].
[147] Dray, Appendix A at [23].
[148] Dray, Appendix A at [26].
[149] Dray, Appendix A at [40].
[150] Transcript at 698.

[142] In isolation, the above effects are minor but, when considered together with the views of the other quarries, there is an adverse effect on landscape and visual amenity and these effects may have reached a tipping point.[151]

[143] Ms Dray had considered the proposal under the former District Plan, but not the District Plan (presumably because it had not been notified at the time she wrote her report).

Evaluation

[144] Like the residents, the landscape experts faced a difficult task of having to assess the visual effect and effect on amenity values in a landscape that has changed rapidly over the last three years.

[145] If no new building is proposed then, regardless of the nature, scale and intensity of the cumulative quarrying activities in the area, in Mr Craig's opinion, the "generic" rural character of the area will not change.[152]

[146] It appears to us that this key opinion proceeds from errors in the interpretation of the District Plan. Namely, the objective 17.2.1.1 and associated policies are implemented exclusively through building density and subdivision rules.[153] Mr Craig overlooked the fact that quarries within this rural zone are discretionary activities and that the application is a non-complying activity overall.

[147] This error has proven inimical to an assessment of the cumulative effect of the use and development in this area of up to 300 ha for quarrying. Under his approach the scale and intensity of the quarrying activity in the locality is not recognised[154] nor is the effect on the amenity of residents who, in his own words, will be sandwiched or encircled by quarries.[155] In his view, provided the quarry is screened from view by a bund the change to rural character and amenity is always acceptable in a rural zone.[156]

[151] Transcript at 698-699.
[152] Transcript at 274 ff.
[153] Transcript at 286-288.
[154] Policy 17.2.2.4.
[155] Transcript at 278.
[156] Transcript at 279.

[148] Mr Craig erroneously equated "openness" – being an element that characterises this landscape, with "built space". The fact that the proposal does not increase the built space does not necessarily mean the "openness" of the landscape is retained. This second error meant that he did not consider whether enclosing the pastoral view would have an effect on the visual amenity of the residents.[157]

[149] We did not find it helpful to consider the rural character of this area differentiating between a generic character (based on built form) and a specific character (land use and landcover). We doubt attributes and characteristics of any given landscape should be compartmentalised in this way as these elements interact and inform the whole of the landscape. Further, we could not find support for this approach under the District Plan.

[150] For the City Council Ms Smetham posed herself a question: whether the addition of this quarry will result in the breach of a threshold of acceptable effects on rural character and visual amenity.[158] While that is a good question she does not address where the threshold lies. It appears that she has considered the environment as if it were delimited by policy 17.2.2.3. It seems probable that she has misinterpreted policy 17.2.2.3 as saying something about the stated outcomes for the area, whereas the sustainable management outcomes are contained in policies 17.2.2.1 and 17.2.2.2 in particular. As we have noted, policy 17.2.2.3 is a fact-finding provision.

[151] In fairness to her she advised the court that she had a narrow brief; specifically, she was asked to consider the evidence of Mr Craig and Ms Dray and to focus on their differences. She was to do so "without going into a longwinded assessment of [her] own".[159] Had she undertaken a full assessment of the rural character and made inquiry into the residents' amenity values she may have arrived at a conclusion on where the threshold of acceptable effects lies. We think it prudent in the circumstance to treat her evidence with caution, as we do with Ms Dray who has not had the opportunity to provide a full brief of evidence or to consider the proposal under the District Plan.

[157] Transcript at 291.
[158] Smetham, EiC at [75].
[159] Transcript at 693.

Findings

[152] Ordinarily we would expect the quality of the landscape – including one modified by farming activity – to contribute to peoples' appreciation of its pleasantness or aesthetic coherence. This is so even though rural productive activities can have effects which, in other contexts, may be considered adverse.

[153] The rural character of this area depends on pastoral farming, and on the shelterbelts and hedgerows which crosshatch the landscape resulting in a haphazard pattern of lines. As Ms Smetham says, this has created a series of open and enclosed views. The view towards this pastoral landscape is an amenity that is valued by the residents. While the views are broken by shelterbelts, hedgerows and, more recently, by bunds the landscape's particular rural character nevertheless retains a degree of open spaciousness which residents also value.

Visual effect and effect on visual amenity

[154] The visual effect of the proposed quarry (being the change in the composition of the view) is sensitive to the location of the viewer. We have considered the scale and magnitude of the proposal's visual effects by itself; cumulatively with other quarries in the area and together with the existing shelterbelt on the eastern side of Conservators Rd.

[155] Bearing in mind that the purpose of the bund is to exclude views into the quarry, the bund and shelterbelt will reduce the visual amenity that derives from the contribution this site makes to the pastoral landscape. There are extensive views afforded of the landscape along Conservators Rd and Guys Rd although towards the intersection these views are interrupted by an internal shelterbelt. The foreclosing of the view will reduce the openness of the landscape and reinforce the perception that quarrying is or is becoming a predominant activity. This will shift rural character of the area towards one that is underpinned by quarrying, not pastoral, activity.

[156] This change in rural character will have a moderate adverse effect on the visual amenity west of Conservators Rd. The bunds will reduce the present-day visual amenity afforded by the open pastoral character of the generally expansive views of the

landscape. This will be so from Guys Rd looking towards the north and from Conservators Rd across the site.

[157] Adjacent to the site, along Conservators Rd, the 700m (plus) bund reinforced by the proposed shelterbelt, will become the visually dominant element within the local landscape. The accessway will allow uninterrupted views into the site from Conservators Rd. While the quarry is operating, the view from the access will be of land that is substantially reduced in natural character. Up to 12 ha of workings (including open pit); will be visible; together with gravel stockpiles above natural ground level although these elements will recede towards the west over time.[160] This view, coupled with vehicles entering and leaving the site, will have a moderate adverse effect on the existing amenity (including visual amenity) enjoyed by residents using Conservators Rd.[161]

Rehabilitation of the site

[158] The naturalness of the area will be reduced through the stripping of land and extraction of aggregate. The site will (at least) be partially restored after quarrying ceases. Ms Dray has concerns with the cumulative visual effect of a series of shallow basins from partially restored sites within this locality. The Commissioners gave this matter scant consideration.[162]

[159] We have a more fundamental concern; namely the applicant has not demonstrated site rehabilitation and appropriate end use through a quarry rehabilitation plan, even though this plan is required for a new proposal under the policy (17.1.1.13(b)). Instead, a new condition is proffered that the plan will be produced after consent is granted for certification by the City Council.[163] More generally, the conditions do not identify the end use of the site or whether the final rehabilitated landform is appropriate having regard to the matters set out in (17.1.1.13(c)).

Cumulative effect of quarrying

[160] We have insufficient evidence to conclude that the cumulative visual effect of all

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[160] Draft Quarry Management Plan at [42]. Stockpiles may be up to 3m in height above the natural ground level.
[161] While not offered by the applicant this effect could have been addressed through conditions of consent preventing a direct view into the quarry.
[162] Decision of the City Council at [110], [113] and [178].
[163] Condition 84.

of the quarries has changed the rural character as a whole. That said, we agree with Mr Craig that quarrying is now a predominant rural productive activity in the general locality.[164] With quarrying has come the progressive enclosure of the rural land behind bunds. These bunds, together with their associated shelterbelts, follow property boundaries.

Overall conclusion on visual effects and effects on visual amenity

[161] Considered by itself we find the proposal will have an adverse visual effect and an adverse effect on visual amenity. It will reduce the visual permeability of the landscape and with it the attribute of open spaciousness that is valued by residents and anticipated under the District Plan.

[162] The first issue we posed was whether the proposed bunds and shelterbelts look like numerous rural properties in the local area. If "rural properties" means pastoral farms we answer the first issue in the negative – the bunds and shelterbelts look like the site of a quarry.

[163] The second issue is more difficult as it concerns the cumulative visual effect of bund and shelterbelt mitigation treatment on the existing rural character of the area. We tend to Ms Dray's view that, considered together with the other quarries in the area, there will be an adverse effect on landscape and visual amenity and these effects too may have reached a tipping point.[165] However, given the limitations in the landscape evidence, we are unable to reach any settled view on the cumulative effect of this proposal on the capacity of this landscape to accommodate further change without altering or comprising its existing character and the values that attach to the same.

[164] On the final issue we have insufficient evidence to make a finding on the effect on landform of this proposal considered by itself or together with other quarrying activities in the area that have ceased. This depends on the intended end use of the neighbouring quarrying activities and whether, as in this case, what is proposed is to partially fill in the pit and oversow the top soil with grass.

[164] Transcript at 282.
[165] Transcript at 698-699.

Noise

[165] We described earlier the receiving environment against which the effects of this proposal are to be considered. When assessing the effects of noise, we considered the effects of noise from the quarry and from traffic associated with the quarry and cumulatively with other noise sources in the locality.

[166] On this topic we heard from local residents and from two noise experts; namely Mr S Camp called on behalf of the applicant; and Dr J Trevathan for the City Council.

[167] For clarity, we note that throughout this section of our decision we have used "dB" to mean the $L_{Aeq(1\ hour)}$ value, and as broadly equivalent to the $L_{Aeq(15\ min)}$ value referred to in NZS 6802 for the purposes of our decision, based on responses to questions from the court by Dr Trevathan.[166]

The effects of existing noise on residents

[168] In their written evidence, the residents identified a number of concerns they had relating to noise, including:

(a) wildlife having been driven off by the effects of noise, amongst other contributing factors including, dust, traffic, and lack of habitat;[167]
(b) inability to sleep beyond 7.30 a.m. on a weekday;[168]
(c) the noise from heavy trucks is loud and intrusive now;[169]
(d) the noise from crushers and the loading of trucks is audible. The noise produced by a crusher was likened to a jar full of marbles being shaken;[170] and
(e) the noise of braking and accelerating trucks as they negotiate the Guys Rd/Savills Rd intersection.[171]

[169] The current level of noise from quarry traffic is such that the residents at one location have adapted the use of their dwelling, including changing bedrooms to move

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[166] Transcript at 654 and 655.
[167] B Cummings, EiC at [3].
[168] I Cummings, EiC at [7].
[169] D Guenole-Cummings, EiC at [7].
[170] Transcript at 748 and 804.
[171] Transcript at 773.

further away from the road.[172] They are concerned that the effects of noise will intensify as Frews and SOL become fully operational and they report some people have already left the area in response to quarrying activities.[173]

[170] Mr Camp gave evidence that his modelling for the HGL site confirms a 250m setback distance from all dwellings is appropriate to address noise from the processing plant, but a much smaller setback is suitable to address noise from gravel extraction activities. In his experience on other projects gravel extraction can comply with a 50 dB L_{Aeq} noise limit at a distance of 20m from the edge of the pit. Other noise sources such as on-site truck movements and the processing plant have determined the overall separation distance required on this site. This evidence was not challenged by Dr Trevathan, and we accept it for the purposes of our decision.

[171] He considered a noise limit of 50 dB L_{Aeq} (daytime) to be the appropriate noise limit at dwellings, noting this is consistent with the District Plan noise limits for the notional boundary of dwellings and that the Plan also includes a daytime quarry site boundary noise limit of 55 dB L_{Aeq}.[174] These limits would generally be met as result of quarry operations, as outlined below. This is a convenient place to note the District Plan definition of national boundary, namely:

> ... a line 20 metres from any wall of a residential; unit or a building occupied by a sensitive activity, or the site boundary where this is closer to the residential unit or sensitive activity.

The issues

[172] While noting the occasional exceedance by 3 dB in the daytime noise standard[175] in the vicinity of the Savills and Conservators Roads residences, the first instance hearing Commissioners found this effect to be "no more than minor" and therefore acceptable.[176] They considered the cumulative effect of noise of heavy goods vehicles from the proposed quarry and SOL (but not Frews) and were satisfied this noise would not exceed 50 dB and that any adverse traffic effects would be minor.[177] It is not evident from the Commissioners' decision whether this level was for the façade or notional boundary of potentially affected dwellings.

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[172] Transcript at 783.
[173] P Mahoney, EiC at [27].
[174] S Camp, EiC at [4.2].
[175] The then operative City Plan.
[176] Decision of the Council at [142]-[147].
[177] Decision of the Council at [160] and [161].

[173] The noise issues arising from this appeal are as follows:

(a) what is the existing noise environment?
(b) what levels of noise will be generated by HGL on-site operations?
(c) what is the additive noise from HGL quarry traffic?
(d) given the above, to what extent will HGL operations change the existing noise environment and what is the effect of any change on rural amenity?

Methodology

[174] In his evidence-in-chief Mr Camp set out reasons why he considered the predicted noise levels to be a very conservative worst case scenario, although no evidence was initially provided to verify these predictions. Those predictions are contained in the Marshall Day Conservators Road Quarry Noise Assessment ("the noise report"), which was produced on the direction of the court.

[175] We consider the methodology adopted in the report to be appropriate, and generally in accordance with the provisions of NZS 6802. We accept that the predicted noise levels are likely to be conservative as actual numbers of heavy vehicle movements will be less than the numbers used in the predictions for the majority of the time. This, however, is only one consideration in terms of overall noise effect.

[176] As a general observation, it is clear that the local noise environment is complex, and while the experts were in general agreement on noise effects, they appeared to differ on noise levels at the notional boundaries of 15 and 25 Savills Rd, as we discuss later.

[177] Regrettably, the expert evidence was not presented in a way that enabled us to easily understand the significance of the effect of change to the noise environment that will result from the HGL quarry. It is the effect of change that is fundamental to our decision and is the focus of our evaluation. We have not traversed the expert evidence in detail in the decision, but focused on the key predictions in terms of the existing noise environment, HGL quarry operations, associated quarry traffic and cumulative effects.

[178] Our evaluation addresses daytime noise effects only, as noted above the proposed quarry will not operate at night.

[179] As the District Plan standard applies at the notional boundary of a residential dwelling and not the building façade, we considered this should be the measuring point for assessment. We note the experts did not always specify the measuring points used, which we found most unhelpful when evaluating their evidence.

[180] The District Plan daytime noise standards are 55 dB at the HGL quarry site boundary[178] and 50 dB at the notional boundary of existing dwellings.[179] Mr Camp referred to the noise report, which concludes that a noise limit of 50 dB at existing dwellings is appropriate to ensure no more than minor adverse effects. This level reflects the residential amenity value recommended by the World Health Organisation and is 5 dB below the upper daytime limit recommended by NZS 6802. Dr Trevathan's evidence is, having considered the source, nature and the level of the noise, the effects of noise will be "no more than minor" at a level of 50 dB.[180]

[181] Based on that evidence, we understand there to be consistency of view between the District Plan and the noise experts that at a level of 50 dB at a notional dwelling's boundary, noise will be reasonable and not give rise to effects of concern. We generally agree, subject to consideration of the cumulative nature of different sources of noise.

Issue: What is the existing noise environment?

[182] As is evident from the residents' description of their receiving environment, the expert evidence and from our site visit, this rural area has multiple sources of noise. Apart from the quarries, other noise sources include non-quarry light and heavy vehicles on Conservators, Savills and Guys Roads, distant industrial noise, distant traffic noise (primarily Pound Rd), light, jet and turboprop aircraft from the airport in the air and on the ground and helicopters.[181]

[183] We discuss next "ambient noise". The noise report relied on by Mr Camp defines ambient noise as the noise level measured **in the absence of the intrusive noise or the noise requiring control**, and frequently measured to determine the

[178] Rule 6.1.5.2.1, Table 1 g.
[179] Rule 6.1.5.2.1, Table 1 b.
[180] Transcript at 647.
[181] J Trevathan, EiC at [34].

situation **prior to the addition of the new source**. (Emphasis added). For the avoidance of doubt, we have used the noise report definition, as that appears to be consistent with the evidence in preference to the definition in the NZS 6802.[182]

[184] The noise report[183] indicates the ambient noise level in the general area will be typically between 45 and 50 dB, "based on our experience of this area". However, Mr Camp stated that the ambient noise level in the area generally is likely to exceed the consented noise limits for the HGL quarry (50 dB at the notional boundary of neighbouring dwellings), even without the quarry.[184] He also predicted ambient levels at the notional boundaries 15 Savills Rd and 40 Conservators Rd as 53 dB and 50 dB respectively.[185] For Savills Rd Dr Trevathan advised these levels applied to at the house façade, and if measured at the southern notional boundary, actual ambient levels of noise would be 10 dB higher at 63 dB excluding HGL traffic.[186] We accept the evidence of Dr Trevathan on this matter as it was not challenged and is broadly consistent with the court's understanding of road traffic noise reduction over distance. This is a significant difference in the expert evidence, as it is our understanding that a 10 dB increase represents a doubling of the noise received.

[185] The existing noise environment includes traffic noise from trucks associated with consented SOL and Frews quarry operations. Dr Trevathan advised that based on traffic numbers in the Traffic JWS, the ambient noise level outside 15 Savills Rd, excluding SOL and HGL traffic is 58 dB.[187] Mr Camp considered that the ambient noise level on Conservators Rd might be 55 dB[188] and typically 55 dB or thereabouts through the day at different times on Savills Rd.[189]

[186] Based on the above the existing ambient noise levels in the Conservators Rd/Savills Rd area are already close to or exceed the 50 dB level anticipated in the District Plan for significant periods during the day, without any contribution from the proposed quarry. Further, with traffic noise included, the existing ambient level on Conservators Rd could be 55 dB, and at the southern notional boundary of 15 and 25

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[182] The NZS 6802 has a term "ambient sound" which refers to total sound, which it defines as "The totally encompassing sound in a given situation at a given time from all sources near and far and including the specific sound".
[183] At 3.0.
[184] S Camp, EiC at [3.9].
[185] Supplementary evidence at [2.2].
[186] Transcript at 630-636.
[187] Transcript at 634.
[188] Transcript at 225.
[189] Transcript at 227.

Savills Rd (including SOL) is likely to be at least 55 dB and possibly in the order of 58 to 63 dB, depending on which of the noise experts is correct.

Issue: What levels of noise will be generated by HGL on–site operations?

[187] Trucks exiting the site will result in non-compliance at a small portion of the boundary of the property directly opposite the quarry site entrance, but otherwise compliance with the notional boundary limit is achieved by on-site operations. The operations will generate noise that does not comply with the relevant standard at the boundary of the Regional Council land to the south of the quarry. We accept the experts' opinion that the surrounding farmland is not particularly sensitive to noise, and that no adverse effects are anticipated from this non-compliance.[190] Otherwise noise from the quarry operations is predicted to be at or below 50 dB at the notional boundary of neighbouring dwellings.

[188] Based on Mr Camp's evidence, with the quarry operating at the District Plan limit of 55 dB at the site boundary, there could be an increase of 10 dB in the background noise level at the Conservators Rd boundary, which he considered would be a significant change. However, he noted that with traffic noise sitting above the background level, the overall noise level would not change by anything like that, and if you hear the quarry at all, it will be between traffic movements.[191] On questioning Mr Camp, we understand he was using "background" interchangeably with "ambient" in this context.[192]

[189] In view of the above, we consider noise levels arising from on-site operations will be reasonable.

Issue: What is the additive noise from HGL quarry traffic?

[190] Mr Camp worked on the basis that traffic volumes would approximately double on Savills Rd as a result of the HGL Quarry. While he indicated this would result in a less than 3 dB increase in noise levels, possibly 2.5 dB,[193] his overall prediction in the

[190] S Camp, EiC at [4.3]-[4.6].
[191] Transcript at 238.
[192] Transcript at 229.
[193] Transcript at 231 and supplementary evidence at 2.2.

increase in noise levels was 3 dB.[194] He predicted a similar level of increase of 3 dB at 40 Conservators Rd.[195]

[191] Dr Trevathan calculated the expected traffic noise levels at the closest dwellings based on traffic numbers in the traffic JWS. He found that the change in peak hour noise level would be 2 dB compared to the existing level with SOL operating, and he considered this was unrealistic as both SOL and HGL would not be operating at maximum capacity at the same time. The court cannot rely on this assumption: especially given the proposed 30 year consent duration. Dr Trevathan did not see the 24-hour noise levels often used as a basis of assessing road noise effects as a concern.[196]

[192] It could be inferred from Dr Trevathan's evidence that there will be no noticeable change in traffic noise as a result of the proposed HGL quarry. We do not accept this as realistic, with up to an extra 400 HGV/d and an average of an extra 250 HGV/d, and we prefer and accept Mr Camp's predicted 3 dB as the increase that would occur. We are mindful in making this finding that the preferred dB value is a $L_{Aeq(1\ hour)}$ measure and that truck movements would not necessarily occur at constant intervals in any given hour.

[193] When on-site operational and traffic noise effects on residential properties from the proposed HGL quarry are considered together, Mr Camp predicted that the noise level at 40 Conservators Rd would increase from 50 to 53 dB, but the evidence was unclear as to whether this was at the building façade or the notional boundary.[197] Second, he predicted the noise level at 15 Savills Rd would increase from 53 to 56 dB,[198] which is broadly equivalent to the 3 dB traffic noise increase referred to above. From Dr Trevathan's evidence, this is at the southern façade of the dwelling, and the noise level at the southern notional boundary is 66 dB.[199] Dr Trevathan independently predicted a noise level of 56 dB at the façade with the HGL quarry operating.[200]

[194] Given the above, the cumulative noise level at the southern notional boundaries of 15 and 25 Savills Rd could increase from 63 to 66 dB, with levels at the façades

[194] Supplementary evidence at 2.2.
[195] Supplementary evidence at 2.2.
[196] J Trevathan, EiC at 42 and 43.
[197] Supplementary evidence at [2.2].
[198] Supplementary evidence at [2.2].
[199] Transcript at 630.
[200] J Trevathan, EiC at 53.

being 10 dB less. We accept that these levels are predicted maximum levels that are unlikely to be reached in practice, and if they are, it would be for short periods. The evidence did not provide a basis for us to refine these levels. However, we consider it reasonable to work on the basis that there would be a 3 dB increase in noise level as a result of the HGL quarry, and that the resulting cumulative noise level at the southern notional boundaries of 15 and 25 Savills Rd could range between 60 and 65 dB for some undefined periods of time, depending on which expert's evidence is adopted, and probably towards the lower end of the range. We have adopted a value of 60-61 dB for the purposes of our analysis.

[195] We accept Dr Trevathan's evidence that a 3 dB noise increase is a just audible change and 5 dB is a clearly noticeable change.[201]

Issue: To what extent will HGL operations change the existing noise environment and what is the effect of any change on rural amenity?

[196] While the experts have presented their noise assessments differently, in essence they agree that:

(a) the existing ambient noise levels in the locality of the Conservators Rd/Savills Rd/Guys Rd intersection are at or above District Plan standards at the notional boundaries of existing dwellings in the locality;

(b) the cumulative effects of on-site noise generated by SOL, Frews and HGJ quarries, of themselves, will not result in District Plan standards at the notional boundaries of existing dwellings in the locality being exceeded; and

(c) there will be an increase in traffic noise as a result of the HGL quarry of possibly 3 dB above existing ambient noise levels outside 40 Conservators Rd and 15 and 25 Savills Rd.

[197] Accepting this, the key issue, therefore, is not whether HGL will comply with the noise standard in the plan assessed at the notional boundary of the neighbouring residential dwellings. Rather, it is whether HGL noise, when considered together with all noise sources, changes the ambient noise levels and if it does what is the effect on amenity of that change. Second, and what is partly addressed elsewhere, what are the

[201] J Trevathan, EiC at 38.

characteristics of noise from heavy vehicles and, in combination with the increased volume of vehicles on the road, will this have an effect on existing rural amenity?

[198] Mr Camp advised there are no rules that apply to traffic noise and that he assessed the effects of traffic noise by looking at what change there might be to the existing traffic noise environment. More specifically in terms of his method of assessing noise effects he ignored where the noise is measured "in this case because to me the effect of traffic from this application will be a function of the increase in traffic more or less," which he considered would result in "a minor change"[202] in noise levels.

[199] Dr Trevathan considered that given the ambient noise level people are likely now to use the area of their property nearest the road not for their main outdoor living but for other activities. If the noise levels associated with quarry vehicles do not exceed 55 dB at the façade of dwellings during peak hour, then in Dr Trevathan's opinion noise effects will be only "minor".[203] He stated that the average levels remain below 50 dB and peak hours remain below 55 dB. Accordingly, he considered the noise effects from heavy vehicles associated with the proposed quarry will be only minor for those Savills Rd dwellings[204] west of Frews Quarry.[205]

[200] Mr Camp was of a similar view to Dr Trevathan. He concludes "that overall traffic noise levels will remain below accepted guidance on traffic noise, such as NZS 6806:2010 Acoustics—Road-traffic noise—New and altered roads." However, in response to questions from the court,[206] he later said that this standard does not apply to smaller roads like Savills Rd, and "so we just accept that traffic can be a bit noisier without having the same adverse effect than in a quarry (*sic*)." While there will likely be a noticeable increase in traffic on the local road network, he is satisfied that the change in traffic noise level will be acceptable, and that the amenity of residents will not be adversely affected.[207]

Discussion

[201] In undertaking our evaluation, we have taken into account rule 6.1.5.2.1 which is:

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[202] Transcript at 231.
[203] J Trevathan, EiC at [40].
[204] 15 and 25 Savills Rd.
[205] J Trevathan, EiC at [12].
[206] Transcript at 237.
[207] S Camp, EiC at [5.9].

> Any activity that generates noise shall meet a noise limit of 50 dB in "All rural zones, except Quarry Rural Zone, assessed at any point within a notional boundary" between 7 a.m. and 10 p.m.

We note that this is what HGL proffered by way of condition 35 for on-site quarrying operations at the notional boundary of existing dwellings.

[202] In accordance with rule 6.1.4.2(a)(i), the above noise limits do not apply to traffic noise generated within a Transport Zone. The Transport Zone includes roads.[208] Rule 6.1.4.1(a) requires that noise is assessed "... in accordance with NZS 6802:2008 "Acoustics Environmental noise", except that provisions in NZS 6802 referring to Special Audible Characteristics shall not be applied".

[203] We note, however, Advice Note 1 to the preceding rule that reads "Although these noise sources are exempted from meeting the rules, any potential and actual adverse effects shall be considered for any discretionary or non-complying activity". Policy 7.2.2.3(a) is also relevant:

> (a) Manage the adverse effect(s) of an activity within the Transport Zone so that the effects of the activity are consistent with the amenity, values and activity of adjacent land uses, whilst providing for the transport network, in particular the strategic transport network to function efficiently and safely.

[204] Notwithstanding rule 6.1.4.2(a)(i) we are required to consider the effects of traffic noise as part of our assessment against sections 104(1)(a) and (b) of the Act.

[205] As set out above the applicable noise limit for the zone is 50 dB at the notional boundary of existing dwellings. This is less than the "generally not to be exceeded" guideline value of 55 dB in NZS 6802[209] as a "guideline for the reasonable protection of health and amenity associated with the use of land for residential purposes...".[210] We note that section 8.6.1 of the Standard identifies that: "... communities may wish to make these more or less stringent to suit their particular circumstances". This indicates to us that when considering the anticipated noise outcome in the context of "the function, character and amenity values of the rural environment" referred to in objective

[208] Transcript at 220.
[209] Recalling that NZS 6808 is referred to in rule 6.1.4.1.
[210] New Zealand Standard NZS 6802:2008 Acoustics–Environmental Noise, section 8.6.2.

17.2.1.1(a)(i), there is an expectation that noise levels in the locality are sufficiently important to require them to be managed at a level of 5 dB less than that recommended in the relevant New Zealand Standard.

[206] We accept the evidence of both noise experts that noise from the on-site operations considered both individually and cumulatively with the SOL and Frews quarries, can comply with the relevant district plan rule, with two exceptions, which we do not consider will result in adverse effects on sensitive receivers. The exceedances of noise limits at the site boundary (at the site access and on land to the south of the site) are not material to our decision. However, the evidence is that the proposed quarry will increase ambient sound levels to some extent.

[207] In terms of the wider environment, the proposed quarry will introduce new noise sources into the local environment which, while not being unreasonable in themselves, will add to existing noise and detract from existing amenity values. Taking an holistic view, the existing residential properties within a few hundred metres of the Savills/Guys/Conservators Road intersection will be affected by noise from most points of the compass, with some sources having different characteristics to other existing noise sources in the locality.

[208] We explored the significance of a 3 dB increase in traffic noise levels with Mr Camp. He said that a 2 or 3 dB change was minor but that 5 dB is noticeable.[211] We are aware that this is a subjective matter, where different noise experts can have different views, and that from our own experience, a change in noise of less than 3 dB is imperceptible to most people, but that a change of 3 to 5 dB is usually noticeable. For the purposes of our determinations, we have considered a 3 dB change will be noticeable to most people. The fact that noise is audible or even noticeable does not mean the effect of noise is necessarily adverse. Whether it is adverse in this case requires careful consideration of its characteristics and overall cumulative effect.

[209] The permitted noise standard in the District Plan provides guidance on the noise setting within the rural environment. Given this, we found Mr Camp's evidence that "... we just accept that traffic can be a bit noisier without having the same adverse effect than in a quarry"[212] to be of little assistance. It is clear to us that future cumulative noise

[211] Transcript at 237.
[212] Transcript at 237.

levels at the notional boundaries of some dwellings affected by HGL traffic noise will, at times, be in excess of the District Plan standard and could reach 55 dB at the dwelling facades based on the evidence of Dr Trevathan.[213]

[210] While we were told the predicted levels are unlikely to be reached, there is nothing in the application or the proposed conditions to prevent this. These noise levels could occur at any time over the next 30 years, meaning there is no certainty as to when they will occur or for how long at a time. The proximity of the properties at 15 and 25 Savills Rd to its intersection with Guys Rd and Conservators Rd, and to the entrance to Frews Quarry, will result in a distinctly different noise environment in terms of noise characteristics from accelerating and decelerating trucks compared to the noise environment now.

[211] We are satisfied from the evidence that the increase in noise will be noticeable and will have an adverse effect on local residents, particularly the noise from increased heavy vehicles. This noise will not be experienced as a distant hum that fades into the background, as in the case of traffic on Pound Rd for example, but will occur in very close proximity to, at least, two existing dwellings in particular, and will be noticeable by people moving about and occupying the area in general. The noise will be variable as a result of the need to decelerate and accelerate into and out of the Savills/Guys/Conservators Road intersection, meaning it will be less likely to be perceived as part of the background noise. We could not satisfy ourselves that the noise measurements included deceleration and acceleration of heavy good vehicles or even that experts had turned their minds to the potential that traffic noise would have this characteristic.

[212] We consider these effects will be significant in terms of any remaining rural amenity, particularly when the effects of increased traffic numbers themselves are taken into account, and will not maintain aural amenity of the area, and is a matter to which we give significant weight.

Postscript

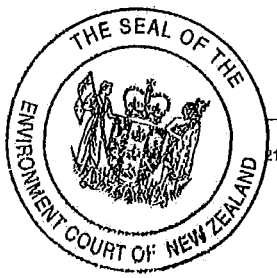
[213] We have noted that the noise environment in the locality of the Harewood Gravels site is relatively complex, with a number of different existing noise sources,

[213] Transcript at 636.

some of which have only been introduced within the last five or so years. Noise is perceived and responded to differently by different people and can be affected significantly by wind direction.[214] Predictions as to the effects of noise are often made by experts based solely on compliance with a specified noise limit from which consideration of traffic noise is sometimes excluded, with no guidelines for assessing traffic noise in this proceeding. There is often little if any consideration of the effects of noise characteristics or variability, as in this case.

[214] We found the scant information provided in the applicant's original noise evidence and Mr Camp's reliance on documents that were not before us was frustrating. In saying that he may have been briefed on the basis that his noise assessment was accepted by the residents (or at least they were not calling opposing evidence). Even so, there still needs to be a sufficient evidential context so that the court may understand the basis for and any significance of the noise predictions.

[215] This seems an opportune time to remind noise experts that the court is best assisted if their evidence includes a full glossary of technical terms. We cannot assume that terms are being used consistently by noise experts, as our experience is that is not always the case. Although, as we have said, this may reflect the experts' brief, we found the lack of definitions particularly unsatisfactory, particularly (for example) it was not apparent on the face of the evidence whether the critical noise predictions were being made at the dwelling façade or the notional boundary.



[214] Transcript at 658.

Dust

[216] We described earlier the receiving environment against which the effects of this proposal are to be considered.

The issues

[217] Conscious of the fact that there were residences as close as 74m to the site, the Commissioners delegated to hear and decide the application gave careful consideration to the dust mitigation measures. In doing so they relied on the description of the receiving environment set out in the AEE. While neighbours will be exposed to dust from time to time (e.g. bund formation and stripping of soil in preparation) subject to additional controls, they found adverse dust effects can be "adequately avoided and mitigated".[215]

[218] The issues that arise are as follows:

(i) what are the background levels of dust?

(ii) relative to other sources of dust in the environment, is it likely that the existing quarries are contributing to background dust levels?

(iii) is the emission and deposition of dust having an effect on amenity now, including soiling and reduction of visibility? If so, are these effects commensurate with the amenity of this rural environment?

(iv) will dust emissions from the proposed quarry, subject to the proposed conditions of consent, have an additive effect? If so, what is the scale and significance of that effect?

Before we turn to the evidence we address a preliminary legal issue.

Issue: Can the court consider the amenity effects of dust on a land use consent?

[219] The applicant submitted the effects of dust are comprehensively addressed in the air discharge permit granted by the Regional Council. As the grant of this permit has not been appealed, the Environment Court has no jurisdiction to consider the effect

[215] Decision of the City Council at [113]-[141].

of dust on air quality and while the court may consider land use activities it cannot consider the effect of dust on rural amenity.[216]

[220] Dust gives rise to a range of effects, aside from the effects that arise in its contaminant form. As a contaminant, dust may have a deleterious effect on human health and on the amenity associated with access to clean air. The City Council contends, correctly in our view, that there is overlapping jurisdiction under the RMA when dealing with the effects of dust and that the City Council has jurisdiction under s 31 RMA to manage the effect of dust on amenity.[217] This includes visual and nuisance effects and associated effect on amenity.

[221] Regional councils, and not territorial authorities, have the function of controlling discharges of contaminants (s 30(f)). Section 30(f) states:

> (1) Every regional council shall have the following functions for the purpose of giving effect to this Act in its region:
>
> ...
>
> (f) The control of discharges of contaminants into or onto land, air, or water and discharges of water into water:

[222] "Contaminant" is defined and includes:

> ...any substance (including gases, odorous compounds, liquids, solids, and micro-organisms) or energy (excluding noise) or heat, that either by itself or in combination with the same, similar, or other substances, energy, or heat—
>
> (a) When discharged into water, changes or is likely to change the physical, chemical, or biological condition of water; or
>
> (b) When discharged onto or into land or into air, changes or is likely to change the physical, chemical, or biological condition of the land or air onto or into which it is discharged.

[223] Section 31 broadly describes the functions of a territorial authority in the following terms:

> (1) Every territorial authority shall have the following functions for the purpose of giving effect to this Act in its district:

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[216] Chapman, opening at [17]-[29].

[217] The amenity effect of dust is a significant issue in this case. We note that Mr M McCauley, principal consents planner for the Regional Council, acknowledged that the two Councils control dust for different reasons. See EiC at [14].

> (a) The establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the effects of the use, development, or protection of land and associated natural and physical resources of the district:

[224] Sub-sections (1)(aa)-(f) lists other functions, none of which include control of discharges of contaminants.

[225] The territorial authority has jurisdiction under s 31 RMA in relation to the effects of use and development of land and associated natural and physical resources of emissions. The section does not preclude the City Council from managing effects of emissions, aside from their quality as a contaminant.

[226] We were not assisted by the High Court decision of *Manos v Waitakere District Council,*[218] relied on by the applicant to support its interpretation. The appeal before the High Court was from a decision by the former Planning Tribunal concerning a land use consent. The High Court found the Tribunal had wrongly considered the effects of the discharge of contaminants into the environment from stormwater and sewerage. This was in circumstances where consents for those activities had yet to be sought from the Regional Council. The High Court held the discharge of contaminants was a matter for the Regional Council and that "the consent authority in relation to the land use must confine itself to considerations relating to the land use".[219] The case is distinguishable on its facts, as we will not be concerned with the discharge of contaminants.

[227] The City Council referred us to *Pokeno Farm Family Trust v Franklin District Council,*[220] which is more helpful in terms of illustrating the overlapping jurisdiction of Regional and District Councils. *Pokeno* concerned an appeal against a land use consent only; the permit to discharge contaminant to air (namely fertiliser dust) was not appealed. In *Pokeno* the Environment Court, acknowledging the appeal was limited to land use consent, held the effect of fertiliser dust on neighbouring properties was a matter which it could properly consider. It found that consideration of the land use aspect inevitably involved elements of consideration bordering on issues arising under the Regional Council's permit applications.[221] *Pokeno* was referred to in *Beadle v Minister of Corrections* where Judge Sheppard held the court may have regard to the

[218] [1994] NZRMA 353.
[219] At 8.
[220] Decision No A37/97.
[221] At 3-4.

consequential effects of granting a consent, particularly environmental effects for which there is no other forum, within the limits of nexus and remoteness.[222]

[228] While these decisions are not binding on us, we consider their approach correct when considering the effects of dust, other than as a contaminant, emanating from the proposed quarry. Finally, it is a matter of fact that the City Council imposed conditions on the land use consent to address the amenity effect of dust emissions, conditions which were not appealed by the applicant.

General comments on the dust evidence

[229] On the topic of dust we heard from two air quality experts; namely Mr Chilton called on behalf of the applicant; and Mr McCauley for the City Council.

[230] We record that neither the assessment of effects on the environment, nor the evidence of the applicant or the respondent, provides a comprehensive description of existing dust environment near the proposed HGL quarry. We do not consider the identification of sensitive receptors (i.e residents) and sources of dust in the locality sufficient in this case to establish the background level of dust.[223]

[231] Second, we were left with considerable uncertainty as to the time that will be required to rehabilitate each stage after quarrying is completed. Condition 11 of ECan consent CRC 157162 requires that "[c]leanfill shall be deposited to ensure there is, in total, not less than three metres of clean fill and/or undisturbed material above the highest recorded groundwater level before rehabilitation commences". In response to questions from the court, Mr Dixon, the General Manager of Issac Construction Ltd, a partner in this venture, stated that the time required to place clean fill in each stage would be "entirely down to demand". He acknowledged he did not know how long it would take but could be "a year or six months" or it could take ten years.[224] In contrast Mr Francis, a Director of Harewood Gravels Ltd, said that "... the unknown factor for us is how much cleanfill will be coming back to the quarry" and that a period of six months to two years might be needed to cleanfill a stage.[225]

[222] *Beadle v Minister of Corrections* A74/02 at [75]-[85].
[223] Chilton, EiC at [20]-[28].
[224] Transcript at 96.
[225] Transcript at 178.

[232] As the hearing progressed it became clear that the area of quarry with exposed earthworks could be up to 12 hectares. Mr Francis, acknowledging this was possible said that it was unlikely, and that "[f]or us as an operator, the bigger the area we have the more difficult it is to manage [dust]". While we accept that it would be HGL's desire to cleanfill and rehabilitate the quarried areas as quickly as possible, we cannot assume that will be the case, and must consider the possibility that the area of exposed earthworks could be in the range five to ten hectares for extended periods of time.

[233] We note this was a matter addressed in the Frews Quarry consent, as recorded by Mr Chilton,[226] although the condition number in the consent order is 38, not 9 as stated. Mr Chilton advised:

> Condition 9, which among other things limits the total area of topsoil stripping, excavation and cleanfilling activities to a maximum of five hectares at any time, thereby minimising the overall area of exposed surfaces that dust can be generated from.

[234] In contrast, the applicant proposes:

> The quarry shall be limited to an open area of 12 hectares. For guidance, it is anticipated that this will be made up of a 'working' area of 5 ha, with an additional 5 ha open behind quarrying operations for rehabilitation purposes, and stripping slightly ahead of quarrying operations where the activity will move into.

[235] Third, on the topic of respirable silica, this is a discharge of a contaminant to air. Given the outcome of the decision on other matters we decline to make any findings on whether we have jurisdiction to consider the effects of respirable silica on general amenity.

[236] We note the advice of Mr McCauley that in response to health risks from respirable silica, the Regional Council's principal consents planner has a new requirement that all existing quarries ensure no visible dust beyond their site boundary. We heard no evidence as to how this will be achieved. Despite its objection in principle to the court considering dust emissions, the applicant responsibly offered this as a condition on the land use consent.

[226] R Chilton, EiC at [53.1].

[237] Fourth, the dust control measures proposed for the HGL site are particularly important in terms of our assessment of effects on the environment. A range of measures was proposed by the applicant at the time of application and, as the application process has progressed, significant further controls were either required by the City Council hearing commissioners or offered by the applicant, including:

(a) the 150m of the access road nearest to Conservators Rd will be sealed;
(b) a vehicle speed limit of 15 km/hour will apply on unsealed trafficked routes within the site and they will be sprayed with water as necessary, using a water cart kept permanently on site;
(c) the mobile crusher will be located no closer than either 250m or 500m to the curtilages of residential properties on Conservators Rd subject to our findings on the health risk of respirable silica;
(d) an automated water sprinkler system will apply water to all exposed soil surfaces located within 250m of any dwelling beyond the property boundary under specified hydrological conditions when there would be an increased risk of dust affecting residential properties; and
(e) all activities (except dust mitigation measures) will be ceased within 250m of an inhabited dwelling not on the site in the event that monitored dust concentrations exceed defined trigger levels.

[238] Taking these preliminary matters into account, we consider next the change to the receiving environment and its consequential effect on its function, character and amenity values (objective 17.2.1.1).

The evidence

The residents

[239] The residents' experience of dust is set out in the description of the receiving environment.

The experts

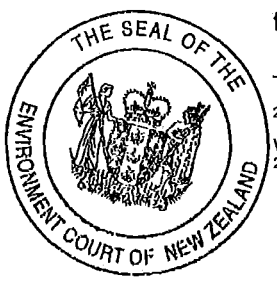
[240] Mr Chilton identified the main sources of dust; described the generic effects of dust and without providing any locality specific detail, set out the results of a qualitative assessment that considered the frequency, intensity, duration, offensiveness and location of dust effects and identified six sensitive receivers that have the potential to be

exposed to higher frequency and duration dust events. Sensitive receivers were identified as dwellings within 250m of the proposed quarry. Without referencing the residents' description of the level and effects of dust, he discussed proposed conditions of consent and concluded that adverse effects on air quality arising from the proposed quarry are likely to be "no more than minor". He also considered the cumulative effects of the quarry in combination with other nearby dust generating activities, concluding they too should be "no more than minor".

[241] Mr McCauley, on behalf of the respondent, is also a principal consents planner for the Regional Council. His evidence addresses cumulative effects, setback distances and whether the requirements for bunding and shelterbelts along Conservators Rd are adequate to address amenity effects, which include dust effects. He summarised his evidence on these matters as follows:

(a) all cumulative effects have been satisfactorily addressed through the resource consent processes and the conditions attached to the consents as granted;
(b) the shelterbelts and bunds required by the resource consent conditions are adequate as part of a wider dust mitigation approach;
(c) the resource consent conditions serve to avoid, mitigate or remedy dust effects from the site;
(d) the existing setbacks from quarrying activities to dwellings are suitable for an activity of this type given the monitoring and mitigation practices required by the resource consents as granted; and
(e) while, in his opinion there is no dust-related effects-based argument to justify the amended setback distances sought by the residents, if those conditions were imposed then the potential adverse effects resulting from the discharges, would be likely to further decrease.

[242] He identified the effects of dust discharge as primarily one of nuisance.[227] He agreed with Mr Chilton that the majority of dust particles are in a size fraction coarser than 20 microns and too coarse to enter the human respiratory tract. He considered that "[w]hile some respirable particulate matter will be discharged from a site of this type, the effects of it are generally held to be negligible".[228] Mr McCauley stated that



[227] Nuisance effects including soiling visual soiling of clean surfaces, such as cars, window ledges and washing. Dust deposits on domestic landscaping. Visual effects being reduction of visibility.
[228] McCauley, EiC at [22].

"[i]t is generally impossible for a quarry site to economically internalise its dust impacts by providing a full buffer to its site boundaries. Instead, the aim of mitigation is to ensure that offensive or objectionable effects do not occur beyond the site boundary. This is not the same as "no dust effect" and allows for some "acceptable" level of impact to occur".[229] His concluding paragraph is that:[230]

> In my opinion, the proposed management, monitoring and mitigation practices as embodied in the existing consent conditions represent the best practicable option and are consistent with what I would expect in the case of any site of this type and context".

Evaluation

[243] We view the residents' evidence concerning their existing amenity as subjective, as they may be influenced by personal feelings or opinions, including the strength of their attachment to this area.

[244] That said, for expert evidence to be persuasive in the context where the residents say their amenity has been impacted by quarrying activity, requires consideration of the actual levels of background dust; the effect on amenity relative to the background levels and the change (if any) that would be attributable to dust emissions from the proposal. Regrettably, the experts did not engage with the residents' views that their amenity is adversely impacted by quarrying activity taking place within the locality.

[245] The baseline environment was not established. Instead the experts carried out a desk top analysis of the likely fall-out of dust at two dwellings located between 70m-217m of the site. On the basis that most dust emissions fall out of suspension within 100m of source, given the frequency and duration of strong up-winds relative to the dwellings, and with the on-site mitigation measures proposed, the experts predicted that at these locations the dust effects would be "no more than minor" and having reviewed the consents for two neighbouring quarries confirmed these quarries are unlikely to be contributing "in an appreciable manner" to background dust levels.[231]

[246] Dust is a common occurrence within rural environments. In addition to quarrying, sources of dust include the Waimakariri River (some 4 kms away), a nearby

[229] McCauley, EiC at [25].
[230] McCauley, EiC at [64].
[231] McCauley EiC at [30]-[34] considering also the proposed mitigation. Chilton, EiC at [35]-[59].

pine plantation and seasonal farming activities.[232] Given this, it was important that the expert evidence address whether the residents 'lived experience' of dust is or is not 'normal.' The experts did not suggest that the residents were exaggerating when they record dust billowing up from the quarries in a north-west wind; visible plumes of dust behind trucks; snow-like deposits of dust on pine trees adjacent to quarries; "gritty" deposits inside household cupboards and more generally, the frequent[233] soiling of clean surfaces, such as cars, window ledges and washing.

[247] We are satisfied from the residents' evidence that there has been a marked increase in dust, including dust on roads, following the development of quarrying. We assume the receiving environment has changed even though the existing quarries are assumed to be complying with conditions of their resource consent. What we do not know is the experts' opinions on whether this is the level of emission anticipated in a receiving environment where quarrying activity is taking place; are these the effects of dust which, in their opinion, are "no more than minor" and if so, will the additive dust emissions be acceptable for this rural environment?

[248] Were there no other sources of dust emissions from quarrying in this area, we would be inclined to the view that the conditions as proposed to be amended by the applicant would likely maintain amenity. In saying that we have reservations as to whether dust suppression measures are adequately developed for up to 12 hectares of earthworks. Given that there are multiple sources of dust in the area, we have reached the view that we have insufficient evidence to reach a firm conclusion on the additive effect of dust from this proposed quarry. With large areas of exposed earthworks, it is probable that the residents will be exposed to a range of dust effects ranging from minor to adverse (the latter depending on wind strength and direction).

[232] McCauley at [27]. Chilton EiC at [23]-[25]. Apart from quarries, there is a strong seasonal correlation to levels of dust in the environment.
[233] By "frequent", Mrs Guenole-Cummings reports having to dust household surfaces every day or second day. Transcript at 776.

Traffic

The issues

[249] In the City Council's decision granting consent, the Commissioners were plainly aware of the synergistic nature of the effects and did not compartmentalise them in their assessment. They recognised that the increase in traffic does not only give rise to potential safety concerns for other road users, but that the volume and type of traffic may also cause the public to feel anxious or annoyed and, in addition, traffic noise may reduce amenity. They concluded that the level of heavy traffic associated with the proposed quarry would not cause unacceptable levels of effect.

[250] The issues that arise are as follows:

(a) are the local roads of an appropriate standard to accept the increase in traffic without causing adverse effects?
(b) will the increase in traffic present an unacceptable risk to road users and the local community?
(c) will the increased traffic result in unacceptable level of noise and other effects? [We deal with these effects in other parts of our decision].

[251] We described earlier the receiving environment against which the effects of this proposal are to be considered. We heard from three traffic experts, namely: Mr Edwards for the appellant, Mr Carr for the applicant and Mr Calvert for the City Council, who also contributed to the s 42 RMA report to the Council hearing. Conferencing between the experts took place on 16 November 2016 and 2 February 2017, which resulted in the preparation of a comprehensive Joint Witness Statement (**Transport JWS**). The experts took into account the fact that resource consents have been granted for a number of other quarries in the vicinity of the current application site, including SOL and Frews. The Transport JWS records that apart from a minor point of difference in relation to the intersection of Savills and Pound Roads, there were no areas of disagreement between experts on the relevant transport evidence.[234] This difference was resolved during the hearing and all experts were in agreement on transport and traffic issues.

[234] Transport JWS, at [6].

[252] We record that the expert traffic evidence focused primarily on compliance with standards and codes of practice. We accept that is an important part of an overall assessment of effects on the environment, but does not necessarily address the effects on individual properties. In the court's view, any assessment of traffic effects on the local environment, and consequent traffic noise and dust effects, should consider the need to assess effects at a localised and generic level of detail, including at an individual property level in a number of circumstances.

The Joint Witness Statement

[253] The experts agreed at conferencing that the appropriate approach for the purposes of the assessment of transport effects is to consider the cumulative transportation effects of all three quarries operating at consented capacity, although this worst case scenario is unlikely to occur in reality.[235]

[254] The consented SOL quarry is permitted to generate up to 300 HGV movements per day plus 30 'other' light vehicle movements per day to/from its site. For the majority of the day the SOL quarry will predominantly generate traffic towards the south and access Pound Rd via the Ryans Rd intersection. During the road network peak hours, heavy traffic generated by SOL quarry is required to access Pound Rd via the Savills Rd intersection.[236]

[255] The consented Frews Quarry is permitted to generate up to 328 HGV/d plus up to 84 'other' light vehicle movements per day to/from its site. All of this traffic will use Savills Rd to access Pound Rd.[237]

[256] The proposal would generate up to 400 HGV/d plus a small number of 'other' movements per day to/from their site. During the hearing, the applicant changed this to a maximum of 400 and an average of 250 HGV/d. This traffic will use Conservators Rd and then Savills Rd to access Pound Rd.[238] The number of HGV is the total number of vehicles into and out of the site, including those carrying cleanfill.[239]

[235] Transport JWS at [8].
[236] Traffic JWS at [9].
[237] Traffic JWS at [10].
[238] Traffic JWS at [11].
[239] Transcript at 115.

[257] While the predicted future mid-block HGV flow component will be significantly higher than what is 'normal' for rural local roads, the required road upgrades mean that the affected roads will be able to accommodate the increased traffic volumes and maximum number of heavy vehicles with less than minor adverse road safety effects arising.[240] In this context we have assumed "less than minor" to mean that accepted road safety standards in New Zealand will not be compromised. The experts agreed that conditions of consent ensured that the design requirements of relevant City Council standards are met, and noted that they also exceeded the provisions of New Zealand Standard NZS 4404:2010.[241] This standard is a national standard that encourages sustainable development and modern design of land development and subdivision infrastructure.

[258] The experts agreed that the critical Pound Rd/Savills Rd intersection is able to accommodate the maximum cumulative levels of traffic associated with all three quarries operating simultaneously.[242]

[259] Finally, and as noted earlier in our decision, the experts also agreed that the daily traffic volumes carried by Conservators Rd (100 vpd), the northern end of Guys Rd (200 vpd) and Savills Rd (250 vpd) (prior to any of SOL, Frews or HGL quarries becoming operational) were very low such that the traffic environment could be considered very 'quiet'.[243]

The evidence

The residents

[260] The evidence of the residents is that:

(a) heavy vehicles at the Guys Rd/Savills Rd intersection block the view of oncoming traffic;[244]

(b) heavy vehicles drop or flick up stones that damage other peoples' vehicles, resulting in a need to replace windscreens on more than one occasion;[245] and

[240] Transport JWS at [14].
[241] Transport JWS at [50].
[242] Transport JWS at [15].
[243] Transport JWS at [24].
[244] Mahoney, EiC at [30]-[34].
[245] I Cummings, EiC at [3]; E J Janssen, EiC at [15]; P J Mahoney, EiC at [36]; Dr C N Taylor, EiC at [65], [68], [69] and [90].

(c) heavy vehicles stir up dust on the road, which can diminish visibility.[246]

[261] Their evidence also outlines concerns about their ability to safely use local roads in their cars and for walking cycling and horse riding, and describes how these concerns have changed their use of the roads to the detriment of their ability to enjoy their local environment.

The experts

[262] We have not repeated expert evidence related to matters agreed in the JWS.

[263] Mr Carr concluded that the proposed site access is of an appropriate layout and the sight distances provided in each direction are appropriate for the speeds of approaching vehicles. His evidence is that the bund is located such that it cannot interfere with sight distances for emerging vehicles.[247] He also recorded that "assuming all quarries operate at maximum capacity results in traffic effects that are less than minor and these effects would arise for a short period of time. Adopting a more realistic scenario of the quarries operating at a lower capacity means that the duration of effects is longer, but the traffic effects are also reduced". In reaching this conclusion he referred to the advice of Mr Francis that if the HGL quarry operated at maximum capacity it would be worked out in two years rather than the 30 years proposed.[248]

[264] In discussing the Conservators Rd/Savills Rd intersection, Mr Carr stated that the present geometry of the intersection is somewhat limited with regard to the ability to accommodate the turning circle of a truck and trailer unit and that the City Council imposed a condition of consent requiring localised widening of the intersection. Sight distances at the intersection are excellent and so with this upgrade, he does not anticipate that any adverse efficiency or safety effects will arise.[249]

[265] Likewise, Mr Calvert does not consider the use of an access from the HGL quarry onto Guys Rd as suggested by the residents, is necessary to avoid traffic safety effects as there are no such effects, and his evidence is that such a change could result in a less safe environment compared to the Conservators Rd access option.[250] There is

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[246] I Cummings, EiC at [10]; D Guenole-Cummings, EiC at [6]; Dr C N Taylor, EiC at [53]-[56].
[247] A Carr, EiC at [13c] and [28].
[248] A Carr, EiC at [23] and [24].
[249] A Carr, EiC at [33] and [34].
[250] M Calvert, EiC at [35].

adequate space on the verges of Conservators, Guys and Savills Roads for walkers at an appropriate level of safety, but agreed with Dr Taylor that with increased vehicle numbers, the roads are potentially less safe for young cyclists.[251] He acknowledged the safety concerns of residents arising from more trucks on the road; that higher vehicle numbers means that statistically there is an increase in the possibility of an accident occurring as well as the severity of a crash involving a truck as opposed to a car.[252] We note these acknowledgements need to be considered in his and other experts' agreement that with the maximum number of heavy vehicles, adverse road safety effects arising will be less than minor. Once again, we have assumed "less than minor" to mean accepted road safety standards in New Zealand will not be compromised.

[266] Mr Edwards, on behalf of the residents, focused on alternative access from the HGL quarry onto Guys Rd.

[267] We explored with the experts the extent to which the configuration of the Conservators Rd/Savills Rd intersection might contribute to traffic noise levels. Mr Carr quite correctly pointed out that he was not a noise expert, and we acknowledge that this is also the case for the other traffic experts. However, we do expect a traffic expert to be aware of the consequences of road design choices on noise levels, as part of an integrated noise management process, particularly where the noise could have potentially significant adverse effects on existing residential dwellings.

[268] Mr Carr's view is that the primary source of noise would be the vehicle braking to go round the corner as it is going from Conservators Rd to the left onto Savills Rd, and the vehicle as it is braking on Savills Rd to turn right onto Conservators Rd, and then once it has braked it is then the acceleration of the vehicle again. He understood those are the noisiest parts of the journey and that if the vehicle was to be travelling at a constant speed on a gradual curve, that the noise levels would be less. He did not know whether that difference would be sufficiently significant to be noticeable or whether it would be perceived as being different by someone who is listening to it and if so at what distance that would be a significant change.[253]

[269] Mr Edwards' opinion is that engine brakes are very noisy when the truck is on deceleration because of the way engine compression is used to slow the truck down.

[251] M Calvert, rebuttal evidence at [9].
[252] M Calvert, rebuttal evidence at [12].
[253] Transcript at 120 and 121.

We understand this is a consideration when the trucks are required to go around a 90 degree bend, but Mr Edwards did not provide any quantitative information on noise levels, which we did not expect from him.

Evaluation

[270] The proposed HGL quarry could increase traffic volumes on Conservators Rd from around an existing 100 vpd to 530 vpd, and from around 10 to around 410 HGV movements per day (HGV/d).[254] Although a more realistic scenario, based on the condition[255] offered by HGL at the end of the hearing, is an increase from around 10 to around 260 HGV/d.

[271] The number of additional heavy vehicles going past 15 and 25 Savills Rd as a result of the HGL quarry will be up to 400, or on average 250 HGV/d, based on the condition offered by HGL at the end of the hearing. This will result in an approximate doubling of heavy vehicles affecting the two properties.

[272] Conservatively, the number of heavy vehicles using Conservators Rd with the HGL quarry operating will increase from an average of less than one an hour to one every two or three minutes, based on an indicative 12-hour working day. On the same basis, the number of heavy vehicles passing 15 and 25 Savills Rd will increase from one every four minutes to one every one and a half to two minutes.

Issue: Are the local roads of an appropriate standard to accept the increase in traffic without causing unreasonable adverse effects?

[273] We are satisfied that with the proposed road upgrading required by conditions, the future road network will meet the relevant council design standards and the requirements of NZS 4404:2010. The safe and efficient use of the transport network will not be compromised, and that the provisions of policy 7.2.1.2 of the operative District Plan relating to the management of adverse effects on local roads from high trip generating activities on the transport network will be satisfied.

[254] Transport JWS, at [12(b)].
[255] Condition 56.

Issue: Will the increase in traffic present an unacceptable risk to road users and to the local community?

[274] We have given particularly careful consideration to community concerns about the safety of pedestrians, cyclists and horse riders. Messrs Carr, Calvert and Edwards all confirmed in response to questions from the court and/or in the JWS that the upgraded road will be safe for the predicted maximum traffic volumes from the three quarries.[256] All three experts identified the 100 km/hour speed limit in the locality as a reason why people would not want to cycle on the roads.[257] We note that this situation applies on any road with a 100km speed limit and is not unique to the locality around the three quarries. Mr Edwards and Mr Calvert considered the wide grass berms safely accommodate walking, and horse riding, and possibly mountain bike riding.[258] While we quite understand the residents anxiety, Savills and Guys Roads are no longer quiet rural roads. The expert evidence does not support a conclusion that the increase of traffic presents an unacceptable risk to the local community.

[275] Based on the evidence of the residents and our own observations during our site visits, it seems very likely that loose metal along Savills Rd and Guys Rd does create a risk to motorists' safety and to the safety of other road users. Accepting on face value that HGL quarry drivers will comply with the relevant loading regulations we consider the only potential for additional gravel to be tracked out on to the roads would be on the wheels of vehicles exiting the site. We received no evidence to assist us in determining whether this is a significant issue or not, but note that the applicant offered to sweep from the carriageway any gravel that might come from trucks, which would appear to address the issue.

[257] Transcript at 115, 144 and 436.
[258] Transcript at 144 and 436.

Vibration

[276] Mr B Cummings and Mrs Guenole-Cummings, the owners of 25 Savills Rd gave evidence of experiencing vibration within their dwelling from HGVs travelling along Savills Rd.

[277] Mr Camp, an acoustic engineer, gave evidence that soils underlying the appellants' homes comprise uniform gravels that are fairly typical for the Canterbury plains. He does not substantiate this statement by referring to publicly available information, such as Landcare's Soil Maps. Nevertheless, he goes on to infer the soil was not conducive to the transmission of vibrations generated by HGV's.[259]

[278] Mr Camp's evidence was challenged by the residents' direct experience of vibration from vehicles travelling along Savills Rd.[260] Mr Cummings told us that the soils (at least to fence post depth) are a Waimakariri loam. This soil transmits truck vibrations felt indoors, their chimney rattles when trucks go by.[261] Mr B Cummings explained that the soil has good water retention properties, is used for horticultural purposes – this being the reason for the local nucleus of small holding farms.[262]

[279] On this topic we prefer the evidence of Mr B Cummings and Mrs Guenole-Cummings, who have lived on and worked their farm for 16 years. We accept their evidence that the soil transmits truck vibrations and that they may be concerned that vibration could have an effect on the structural integrity of their home. We also accept that the effects would likely increase were consent to be granted.

[280] Were we minded to grant consent we would have required further evidence on the effects and explored whether it was possible to remediate the vibration.

[259] Transcript at 244-245.
[260] Transcript at 754.
[261] Transcript at 754.
[262] Transcript at 754.

Evaluation of the proposal

[281] We begin with a recap on the law: a consent authority may grant resource consent for a non-complying activity only if it is satisfied that the activity passes one of the two threshold tests in s 104D RMA.

Issue: Are the adverse effects of the proposed quarry on the environment minor?

[282] The activity does not satisfy the first limb of s 104D(1)(a) as we are not satisfied that the effects of the proposed quarry will be minor. For those adverse effects on the environment in respect of which we were satisfied on the evidence that we can properly reach a view on the level of additive effect, in each case we find the effect will be "more than minor", and in relation to the direct effect of traffic noise on residents located at 15 and 25 Savills Rd, the effects will be significant.

[283] In the absence of any baseline assessment of the existing dust environment we were unable to reach a view on whether the additive dust effect will be minor. We acknowledge, in response to the risk of respirable silica emissions, the applicant proffered a condition that there will be no visible dust emissions beyond the boundary of the site. We were not satisfied that the conditions of consent will secure this outcome. The conditions were designed with the purpose of minimising dust emissions, and not preventing their occurrence. It is likely there will be visible dust emissions from the site, but the baseline is not sufficiently well described for us to make a judgment about the scale and significance of any additive effect.

[284] A similar issue arises in relation to the cumulative effect on rural character and in particular, the visual amenity derived from that rural character. We are satisfied that for residents in the locality (at least) the proposed quarry will have an adverse visual effect and an adverse effect on visual amenity. The expert evidence was that the residents of Conservators and Savills Roads will be "sandwiched" between the quarries; the extensive bunding and shelterbelts will close them out of the surrounding landscape. This together with the views into the quarry at the accessway, coupled with the volume of heavy goods vehicles entering and exiting the site, will have a moderate adverse visual effect.

[285] The more difficult issue concerns whether the proposed quarry, when considered in the wider context of up to 300 hectares consented quarrying activities,

maintains the rural character of the area. The seven existing quarries are not contiguous, being separated by the McLeans Grassland Park.

[286] Both Ms Smetham and Ms Dray noted there is a threshold of acceptable visual effects.[263] But as Ms Dray records, rightly in our view, where that threshold lies can be difficult to determine, particularly in the absence of any specific study to determine the level of quarrying which is acceptable within this zone.[264] We do not have reliable evidence to reach any conclusion about where this threshold may lie.

[287] Consequently, we have inadequate evidence to determine the significance of the additive effect on visual amenity. We record our findings that the issue of the cumulative effects on the rural character of the landscape were not properly canvassed by Mr Craig whose evidence proceeded on the basis that if no new buildings are proposed then the "generic" rural character of the area will not change. This is regardless of the nature, scale and intensity of the cumulative quarrying activities in the area.[265] Indeed, he saw no difference in the rural character of a quarry zone and any other rural zone because under the District Plan quarrying can occur in both.[266]

Issue: Is the application contrary to the objectives and policies of the District Plan?

[288] The applicant has not discharged its persuasive burden and provide us evidence which we can, with any level of confidence, reliably make predictions about the future dust environment and the rural character. For the purposes of s 104D we are unable to determine whether the application is contrary to the objectives and policies. We considered directing further evidence on the topic of dust and cumulative visual effect, but decided against this having considered the appeal under s 104 (including the benefits of the proposal) and s 104B, determining we would refuse consent because of the scale of localised effects (including a significant adverse effect arising from road noise).

[289] We are not satisfied the evidence establishes to the required standard that the use and development of rural land will support and maintain the amenity values of the rural environment (objective 17.2.1.1). Before turning to the policies that talk to the

[263] Smetham, EiC at [75].
[264] Dray, EiC, Appendix A at [36]-[37].
[265] Transcript at 274 ff.
[266] Transcript at 281.

outcomes for the rural zone – specifically policies 17.2.2.1 and 17.2.2.2 – we comment on the evaluative provisions.

[290] We recognise quarrying is a rural productive activity that is most suitably located on rural land. Even so, every decision-maker is to "ensure" the nature, scale and intensity of this activity recognise the character and amenity values of the receiving environment (policy 17.2.2.4). This could be achieved, in part, by ensuring an adequate separation distance between the quarrying activity and incompatible activities (policy 17.2.2.10). If separation distance means the set-back from a sensitive activity, then a separation distance was not proposed. Rather the applicant proffered conditions to manage the adverse effects of dust on residents living within 250m of the site. We are not satisfied that the applicant has demonstrated that the "separation distance" is adequate to address the cumulative effect of off-site dust emissions at least to the standard which we can conclude that the character and amenity of the rural environment will be supported and maintained (objective 17.2.1.1(a)(i)). This finding is important in that, a related policy (17.2.2.12(a)(ii)(B)) is enabling of new quarrying outside of the Rural Quarry Zone only where the activity avoids or mitigates effects on activities sensitive to quarrying activities. And, only where the activity "manages noise, vibration, access...to maintain local rural amenity values" (policy 17.2.2.12(a)(ii)(D)). We are not satisfied the proposal does achieve these provisions, and this is a finding which we give significant weight.

[291] Before turning to the outcomes for the rural environment we address the proposed rehabilitation of the site. The District Plan provisions on the topic of site rehabilitation are clear as to what must be achieved. This is an important policy as the rehabilitation of former quarry land is to enable subsequent use for permitted or another consented activity. In this way, the use and development of rural land will support and maintain the function of the rural environment (objective 17.2.1.1(a)(i)).

[292] It is worth setting out the District Plan's requirements for site rehabilitation about which decision-makers are to satisfy themselves. Policy 17.2.2.13 sets out the requirements for site rehabilitation as follows:

(a) ensure sites of quarrying activities, and sites of aggregates-processing activities, are rehabilitated to enable subsequent use of the land for another permitted or consented activity;

(b) require proposals for new quarrying activities, aggregates-processing activities and changes of use on existing quarry sites to demonstrate through a quarry site rehabilitation plan the objectives, methodology and timescales for achieving site rehabilitation and appropriate end use; and

(c) ensure the final rehabilitated landform is appropriate having particular regard to:
   (i) the intended end use;
   (ii) the location, gradient and depth of excavation;
   (iii) the availability of cleanfill material, including top soil, and consequent timeframes for rehabilitation;
   (iv) the surrounding landform and drainage pattern;
   (v) the ability to establish complete vegetation cover;
   (vi) the outcomes of any consultation undertaken with Manawhenua; and
   (vii) any adverse effects associated with rehabilitation.

Proposed conditions

[293] Condition 31 of the CRC regional land use consent CRC157162 states:

> Within one month following the completion of deposition of cleanfill in each stage the following rehabilitation shall take place: Spreading of soil and organic material (as long as the volume of organic material is not more than five percent of the total material spread) across the entire cleanfill surface to a minimum thickness of 0.3 metres. Sowing the final landform with a suitable low seed producing grass and managing it in a way to minimise seed production and long term dust issues from the site.

[294] Proposed condition 83 of the CCC land use consent RMA92030745 provides:

> The rehabilitation of the site shall be undertaken in stages, in accordance with the Harewood Gravels plan, dated 25/02/16 so that any land on which extraction and cleanfilling is completed is rehabilitated within 6 months of completion. At any one time only one stage shall be quarried and one stage shall be undergoing backfilling and rehabilitation, such that no more than 12 hectares is exposed at any one time. Rehabilitation of the entire site shall be completed within 1 year of completion of excavation of the overall site.

[295] Condition 83 also specifies a number of rehabilitation requirements which are generally consistent with other requirements addressed elsewhere in conditions or evidence, so are not repeated here, but one of which is: "[t]he rehabilitation of the site,

shall be undertaken so that a completed grass cover is achieved".[267] Condition 84 requires a Rehabilitation Management Plan to be submitted to the Christchurch City Council for certification prior to any works commencing.

Management plans

[296] A draft "Quarry Management Plan for 21 Conservators Road"[268] was provided to court. Paragraph 44 of the Quarry Management Plan states "[t]he finished form of the rehabilitated land will be in accordance with the Rehabilitation Plan included as **Appendix 2**". The draft Rehabilitation Plan was not provided.

[297] A draft Cleanfill Management Plan was provided in the same folder, and with rehabilitation addressed in section 3.2, as follows:

> Once the cleanfill has reached a level where there is at least 3 metres to highest recorded groundwater level, the site will be rehabilitated by spreading topsoil, and planting pasture grass.
>
> And:
>
> Each stage of the site will be fully rehabilitated within 1 month of extraction and cleanfill being completed within that stage.

[298] The draft Quarry Management Plan notes at paragraph 45 that:

> The rehabilitation shall be undertaken in accordance with condition 31 of CRC157162 and shall include:
>
> a. A batter with a maximum of 3 to 1 gradient to be built of clean fill or in situ material on the cut faces adjacent to the external boundary of the site.
> b. Original depth of top soil to be spread over the batter and the floor of the finished quarry, but shall not be less than 350mm.
> c. The soil surface to be 'level' (apart from the battered slope at the edges of the quarry).
> d. Following reinstatement of topsoil, the land shall be used for 12 months for growing pasture or crop to re-establish the organic carbon content.

[267] We noted differences as to the depth of topsoil 300 mm of topsoil in the conditions of consent and the Quarry Management Plan. These differences are immaterial to the decision.
[268] Dated May 2017.

[299] Mr Francis, a director of the applicant company, confirmed "that the ultimate goal for us at the end of the process and after final rehabilitation is to turn it, return it back to productive farmland as much as possible".[269]

[300] It was not entirely clear what he had in mind by "productive farmland", but given the plan to over-sow with grass we assume some form of pastoral use. The court questioned the applicant's planner, Mr Bligh, on the adequacy of 300mm of topsoil on top of cleanfill to produce land suitable for "pastoral use". He replied:

> ... I have seen this condition applied in a lot of cases, and having seen sites rehabilitated in accordance with this kind of condition, it's equally achievable that it achieves a good pastoral cover, if we want to call that. I wouldn't be able to go into the, any additional detail as to the productivity, soil for stopping (sic), or whatever. But it seems to work, in my experience.[270]

[301] Our evaluation focused on the directive requirements of policy 17.2.2.13(a) and (b) as our starting point. We are content that the rehabilitation of the land to support pastoral farming[271] would satisfy clause (a), but this is not provided for in any proposed condition. Clause (b) requires proposals for new quarrying activities demonstrate "through a quarry site rehabilitation plan the objectives, methodology and timescales for achieving site rehabilitation and appropriate end use". We interpret the policy as requiring the applicant for a proposed new quarry to produce the site rehabilitation plan at the time the application for consent is lodged. Even if we are wrong and the clause requires a management plan condition, we are still to satisfy ourselves that the policy in the District Plan will be achieved.

[302] Other than requiring the rehabilitated site to be grassed, there is no stated end use objective. While recognising the views expressed by Mr Bligh above, we received no expert evidence to demonstrate that the proposed rehabilitation will allow use of the land for pastoral use. More particularly, whether 300-350mm of topsoil over clean-fill can be returned to pastoral use. As the decision-makers we are not in a positon to ensure the sites will be rehabilitated to enable subsequent use of the land permitted or consented activities (policy 17.2.2.13). To achieve objective 17.2.1.1(a)(i)) – support and maintain the potential contribution of rural productive activities – the policy

[269] Transcript at 199.
[270] Transcript at 553.
[271] Mr Francis suggested the end use of land would be "productive farmland" but gave no indication as to the scope of activities the land could support. At this location, pastoral farming, as a minimum, could support sheep and beef.

contemplates something more than growing grass. We give these findings significant weight.

[303] We will address the effect on amenity separately under noise and transportation provisions. Returning to policies 17.2.2.1 and 17.2.2.2, as we have noted elsewhere, the District Plan enables a range of activities on rural land that have a direct relationship with rural productive activities, one of which is quarrying (policy 17.2.2.1). This policy is constrained by the requirement that decision-makers "ensure" activities utilising the rural resource avoid, remedy or mitigate adverse effects on rural character and amenity values (policy 17.2.2.2). We are satisfied there will be a moderate adverse visual effect on rural character and associated visual amenity, this is a localised effect. The applicant could have reduced this effect were it to offset the site entrance with the bunds, but the court's suggestion on this matter was not taken up. Overall, the landscape evidence did not persuade us that the cumulative effects are such that rural character and visual amenity will be maintained. This required a fine-grained analysis of the landscape to evaluate the cumulative visual effect on rural character and on derived amenity values of what would be the seventh quarry in this locality.

[304] The District Plan acknowledges activities occurring within the transport system may give rise to adverse effects, these effects are to be managed (objective 7.2.2). More particularly the adverse effect(s) of an activity within the Transport Zone are to be managed so that the effects are consistent with the amenity values and activity of adjacent land uses, whilst providing for the transport network function safely and efficiently (policy 7.2.2.3).

[305] While District Plan noise provisions exclude effects arising from transport zones, including roads, there is a requirement to manage the adverse effect(s) of an activity within the Transport Zone so that the effects of the activity are consistent with the amenity values and activity of adjacent land uses (7.2.2.3).

[306] The evidence on existing ambient noise levels at the notional boundaries of residential properties was unclear at best and did not provide certainty of what levels will be with the SOL and Frews quarries operating. It is clear that it approaches or exceeds 55 dB at times and will increase by around 3 dB as a result of the HGL quarry. The combined noise level, although again unclear, could approach 60 dB at times, although not as a normal condition. Overlapping with our findings for rural environment

above, on balance we were not satisfied that the proposal would achieve the objective of "managing the effects from the transport system" (objective 7.2.2.). The weighting on this matter is adequately provided for under the rural environment findings.

[307] Likewise, the separate provisions addressing noise, which again overlap with the rural environment. We have found the noise effects of accelerating and decelerating trucks entering and leaving the Conservators/Savills/Guys Road intersection, and possibly entering and leaving Frews Quarry are likely to significantly affect the ability of affected residents to enjoy their local environment, but was not addressed in evidence by the noise experts.

[308] We are satisfied the above intersection is a suitable design and that the intersection will perform at an acceptable level of safety. Therefore the activity can achieve objective 7.2.1. The applicant did not, however, recognise the need for nor propose to mitigate the noise effects on dwellings in Savills Rd of accelerating and decelerating trucks. The volume and movement of heavy goods vehicles[272] along Conservators Rd will change the contribution of this relatively quiet, low trafficked road to the amenity of the surrounding properties, including residential amenity.

[309] The above effects are not at a level consistent with existing amenity values and adjacent land use (policy 7.2.2.3). That being the case, we find the objective 7.2.2 is not achieved.[273]

[310] Somewhat perversely given the context of this appeal, the relevant objective talks about the need to manage the effects of noise to "levels consistent with the anticipated outcomes for the receiving environment" (objective 6.1.2.1). The District Plan does not describe the outcomes either for the Waimakariri Rural Zone or for any particular receiving environment. We have assessed the additive effect of noise relative to the receiving environment keeping in mind this is a rural zone and it is anticipated that, to some extent, rural productive activities will generate noise. We specifically considered the noise from the mobile crusher as residents report hearing crusher noise in their environment. We are satisfied that if the mobile crusher was located no closer than 250m and certainly if located at 500m, which we understand to be practicable, while the noise may be audible its level, frequency and duration would be acceptable within this rural environment.

[272] Being 75% of all traffic movements.
[273] We say doubtful because the objective is expressed in broad terms "managing adverse effects from the transport system".

[311] While there are several contributing sources of noise within the receiving environment, the additive effect is one of up to 400 HGV/d or a rolling average of 250 HGV/d. This would be to take noise levels beyond that which we can say that noise is being managed relative to the receiving environment. To this extent, the objective (6.1.2.1) is not achieved.

Outcome

[312] The applicant has not discharged its persuasive burden and satisfied us that it is has met either of the threshold tests under s 104D.

[313] Given the scale and intensity of localised effects, particularly the significant adverse effect of noise amenity, we are not satisfied that would be a consentable proposal under ss 104 and 104B of the Act.

[314] While the proposed use and development of the land supports an activity that has the potential to contribute positively to the economy and the wellbeing of the District, the evidence is not sufficient to conclude the same activity will also support and maintain the function, character and amenity values of the rural environment generally (objective 17.2.1.1). Given this, we are not satisfied the proposal promotes sustainable management of natural and physical resources and uphold the appeal declining the application for resource consent.

[315] As an aside, the court acknowledges the impact on residents of the development of quarrying in this area and their felt sense of frustration, and at times, helplessness, when responding to the applications in respect of which they were notified and their efforts to 'police' the compliance by neighbouring quarries with the conditions of their consents. Despite that, the residents conducted the proceedings in a measured and responsible manner.

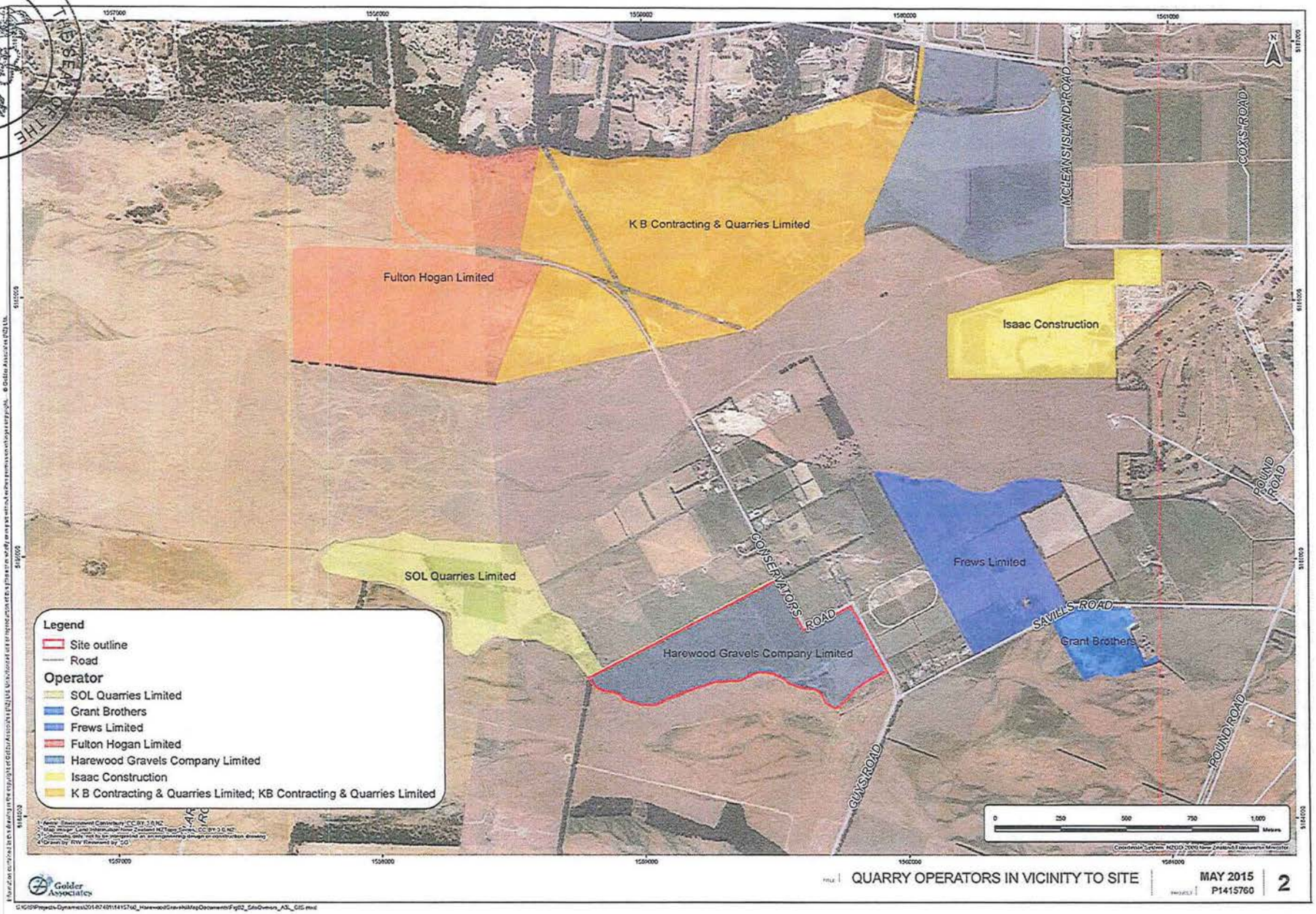
For the court:

J E Borthwick
Environment Judge

Attachment A

Site locality	See attached Golder Associates Figure 2 dated May 2015
Street address	21 Conservators Road
Site zoning	Rural Waimakariri under the Christchurch District Plan
Proposed activity	To extract aggregate from an area of 28 hectares of land
Nature of activity	To be operated as a project based quarry delivering run of pit and processed aggregates to large infrastructure projects within agreed timeframes.
Duration of consent sought	30 years.
Location of site access	Conservators Road, with the first 150 metres of the access road into and out of the site to be sealed.
Hours of operation	7 a.m. to 6 p.m. Monday to Friday, 7 a.m. to 1 p.m. Saturdays, with no work on Sundays or public holidays, excluding dust mitigation measures.
Rights of use	Restricted to quarry related vehicles under the direct control of Harewood Gravels Limited, with no public sales or access.
Quarry products	Minimum 80% run-of-pit and not more than 20% crushed aggregate.
Activities not allowed	No production of crusher dust or fine sand will occur at the site and no concrete or other off-site materials will be imported for crushing on site.
On-site facilities	Automatic scanning of loads used to measure volumes of materials on trucks registered to use the site. No wheel wash is proposed. No weighbridge will be used.
Buildings	Other than a small utility building near the measuring point and possible staff facilities, there will be no buildings on site.
Depth of excavation	Approximately 7 m.
Location of crusher	Minimum of 500m west of Conservators Road at a depth of at least 5 m below natural ground level
Boundary bunding	A 3m high bund in the locations shown on the attached HGL Figure 6 with a separation distance of 24m between the road reserve boundary and the closest area used for quarrying.
Boundary planting	A shelterbelt will be planted and maintained along the road boundaries of the property, except at the vehicle access and will be trimmed as a hedge to form a dense screen to ground level at a height of no less than 3m.
Staging	Six stages in the order shown on HGL Figure 6.
Area exposed	Up to maximum of 12 ha at any one time.
Rehabilitation	Not less than 3 metres of cleanfill and/or undisturbed material above the highest recorded groundwater level, with 300 mm of topsoil and grassed

Noise limits	Daytime (7 a.m. to 6 p.m.) – 50 dB $L_{Aeq(1\ hour)}$ Night-time (6 p.m. to 7 a.m.) – 40 dB $L_{Aeq(1\ hour)}$ at the notional boundary of any dwelling existing at 14 March 2016 on a neighbouring site.
Dust	No visible dust emissions originating from the site beyond the site boundary.
Truck routes	All trucks will turn right onto Conservators Road and then left into Savills Road and onto Pound Road, with controls on turning direction onto Pound Road in peak periods. Trucks entering the site will use the reverse route.
Vehicle movements	Up to 400 heavy vehicle movements per day, including the transport of cleanfill to the site, with a twelve month rolling average of 250 heavy vehicle movements per day. Up to a further 30 light vehicle movements a day could also occur



Golder Associates

QUARRY OPERATORS IN VICINITY TO SITE

MAY 2015
P1415760

2

Handed up by
Mr Chapman HG
22/3

- Bunds to be 3 metres high
- Not to scale

harewood gravels

Conservators Rd Block

FILE NAME Bund Plan Stage 6

DRAWN	DATE	PROJECT NO	FIGURE No	REV
JF	25-2-16	HG-2	6	1