

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

**CIV 2013-406-026  
[2013] NZHC 2577**

BETWEEN	KARAKA POINT ENVIRONS RESIDENTS INCORPORATED Applicant
AND	MARLBOROUGH DISTRICT COUNCIL Respondent

Hearing: 23-24 September 2013

Counsel: K L Clark QC and T Power for Applicant  
M T Scholtens QC and M J Radich for Respondent

Judgment: 3 October 2013

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**JUDGMENT OF SIMON FRANCE J**

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**Introduction**

[1] These judicial review proceedings involve a challenge by a group of ratepayers to a decision of the Marlborough District Council (the Council) to shift their 58 addresses (all on the one road) from one rating zone to another. The effect on these ratepayers is significant, resulting in a doubling of rates in some cases, and an increase of up to two and a half times the existing rates in others.

[2] The challenge is a process one – namely, that the ratepayers were not given an adequate opportunity to present a contrary viewpoint. The hooks on which the challenge is hung are breaches of both the Local Government Act 2002 (the Act) and the common law duties to consult. In particular, there is a focus on the inadequate articulation of the basis for the Council's decision, meaning that the ratepayers could never really respond.

## **General context**

[3] In 1997 the Council created six geographical rating areas. The names of the six groups reflect their essential nature:

Blenheim  
Blenheim Vicinity  
Picton  
Picton Vicinity  
General rural  
Administrative rural

[4] The rating areas are used when levying two rates, namely the General Works and Services Rate, and what are known as Geographical Area General Works and Services Charges. These two rates together are required to provide a certain level of income for the Council. Each geographical area is allocated a percentage of that rates total which it is to provide. The higher burden is carried by the town areas; within those areas distinctions are then also drawn – for example, between residential, commercial etc.

[5] The effect of transferring properties to a different geographical area is not to alter the total rates collected, but to alter the distribution. The present dispute involves a shift of properties from Picton Vicinity to Picton. That means there are 58 less addresses to contribute to Picton Vicinity's share, and 58 more to contribute to Picton town's share. The overall impact this has will depend on the land value of the addresses being transferred. The individual impact on the particular ratepayers can obviously be significant.

[6] As their names suggest, Picton Vicinity and Blenheim Vicinity are areas that are adjacent to the town areas of Picton and Blenheim. The boundary splitting Picton and Picton Vicinity has always been on Port Underwood Road, which is where these houses are located. The challenged decision moves the boundary line from number 78 further down the road, now drawing it at number 351. The rationale for stopping at 351 is that it is the point where one first encounters a large unsubdivided rural property. The applicants in these proceedings are all the addresses between 78 and 351 (including 351).

[7] This case is about the Council's decision to change the boundary at all. The ratepayers say nothing has changed since 1997 when the existing boundary was drawn, and there is no basis to bring them within the higher rating area of Picton town. The challenge, though, is not to the reasonableness of the decision but rather to what the residents say is an inadequate opportunity to persuade the Council otherwise. The Council responds by saying that every opportunity has been given, and the real problem is simply that the ratepayers, understandably given its impact on them, do not agree with the decision.

### **How and why a change was made**

[8] A local authority is required to have a long term plan which covers a period of ten consecutive financial years, but has a life of only three years at which time it must be reviewed. It was in the course of the three yearly review, required to be completed by 30 June 2012, that the Council looked at its rating areas.

[9] The papers show that the Council (or its working group) considered three issues – whether to retain a land value rating system (yes), whether to retain the concept of six geographical rating areas (yes), and

if yes, [whether there] are any areas that could be potentially moved from one rating area to another?

[10] The Minutes of the initial meeting show that two councillors identified the Port Underwood Road area in which the applicant ratepayers live as a potential area of movement. Officials were asked to prepare reports on the option (as well as on other areas identified). This was done for the next meeting.

[11] At that next meeting aerial maps of the relevant areas were provided, as were some generalised examples of what practical effect such a move would have on a ratepayer. The potential impact of the move was calculated on five assumed levels of land value. The examples showed that, in both percentage and dollar terms, the shift would be significant. For example, a ratepayer with a land value of \$320,000 would face an increase from \$839 to \$1,844. A ratepayer with a land value of \$650,000 would face an increase from \$1,934 to \$3,973.

[12] The Minutes show that the Council officer responsible for preparing the report identified that the options were to move the addresses now, or to do it incrementally whenever resource consents were sought. A councillor floated the idea of implementing the increases over a number of years, and of writing to ratepayers. This latter idea was considered premature since the working group had no powers of decision, and it needed to await Council endorsement.

[13] The Minute records that the decision was taken to move the boundary. In terms of discerning the reasons *why* it was thought the existing boundary should change, it is fair to say none are recorded. That is not to say there were no reasons – just that any papers presented, and the Minutes, do not identify what they are.

[14] The next part of the process can be briefly stated. The working party's recommendation went forward to an informal Council meeting where the entire Draft Long Term Plan was discussed. The rating change proposal was agreed to and became part of the proposals contained in the Draft Long Term Plan.

[15] Before leaving this section it will be helpful to note that the background report initially provided to the working group differentiated the two areas in this way:

- Picton : all of that area encompassed by the former Picton Borough Council, together with the area of those properties serviced by Picton Water or Sewerage Schemes ...
- : also included in the Picton area are a number of properties where it is an express condition of subdivisional resource consent.
- Picton Vicinity : all of that area from [x] to [y]...; excluding properties serviced by the Picton Water or Sewerage Schemes, but including the properties listed in the schedule above.

[16] The point in quoting this is that it would appear to a reader otherwise without knowledge that access to town water or sewerage was a key determinant of whether new properties were brought in the Picton zone. I was advised during the hearing that the previous boundary across Port Underwood Road reflected where the town

water and sewerage ended. No plans exist to extend the supply to the properties in dispute.

[17] It has been noted that inadequate access to information, and in particular access to the reasons why the Council made the change, is a key complaint of the applicant ratepayers. In relation to that complaint, it can be observed that all the papers on which I have been drawing were ultimately provided to the ratepayers, pursuant to an official information request. However, this was not done until after both written submissions had closed, and oral submissions in support of those written submissions had been received. The Council responds to this complaint by saying it in effect overcame the issue by extending the consultation period for these ratepayers well beyond the day on which oral submissions were heard.

#### **How did the ratepayers come to learn about the change?**

[18] The Act sets out a detailed list of what must be covered by a Long Term Plan. It is a key policy document for a local authority, and reviews are obviously significant undertakings. The purpose of the exercise is for the local authority to decide what it is intending to do, and how it is going to fund those plans.

[19] The Act mandates that the review of the Long Term Plan is governed by what the Act calls a “special consultative procedure”. This procedure is superimposed on, or complements if one prefers that term, the general consultation obligations that attach to all decisions of the Council. The general consultation requirements largely mirror the well known common law obligations,<sup>1</sup> but a large measure of discretion is given to Councils in how to implement them. A key determinant of how that flexibility is to be exercised is how significant the decision being taken is. Obviously with entities as large and complex as local authorities, the level and significance of decisions can vary wildly. What is required for a high level decision affecting many people would be wholly inappropriate for a much less significant decision affecting a few people.

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<sup>1</sup> Counsel referred to the summary of the common law principles set out in *Aorangi School Board of Trustees v Minister of Education* [2010] NZAR 132 at [36]. I am content to adopt those. I do not understand there to be any dispute as to the applicable principles.

[20] The Act's general consultation and information obligations are supplemented in nominated situations by the special consultative procedure. Again, as with the general consultation obligations, the requirements of this special procedure are subject to Council discretion as to how to implement them, but they provide the framework to be followed for decisions that the Act says can only be made following the procedure. In general terms, and as it applies to a Long Term Plan, the Council must:

- (a) prepare a statement of proposal, which itself must include a draft of the Long Term Plan. This statement is to be made available at the Council offices and other appropriate venues. It is to be subject to public notice, and the proposals for consultation on it must be set out in this notice. A period of at least one month for submissions must be provided;
- (b) prepare a summary of the statement of proposal. That summary is to be distributed as widely as is reasonably practicable and indicate where the statement of proposal can be obtained. The form of the summary is a matter for the Council to decide but it must contain "a fair representation of the major matters in the statement of proposal".

[21] The matters I need to address at this point are (i) how the summary (which under the special procedure is a key tool for giving notice) was distributed; (ii) what the summary said about the rating change, and (iii) what the Draft Long Term Plan said about the rating change. It will also be detailed how, in addition to the summary, the Council wrote individually to the 58 households.

[22] The reason for these inquiries is to determine:

- (a) when can it be said these ratepayers first received the appropriate notice, and did the procedure followed by the Council comply with the Act?

- (b) in terms of being able to properly participate in the consultation period, what did the summary and Long Term Plan tell the residents about why this change was happening?

[23] The summary of the proposal was distributed in a free weekly paper that is distributed to all households. The summary was produced as a glossy insert. As a method of distribution it seems a reasonable way for the Council to fulfil its statutory obligations. (The Council would also wish to highlight a series of Public Notices it had been inserting in local newspapers – free or otherwise – for two weeks prior to distribution of the summary.)

[24] There are always glitches, however, and these ratepayers represent one. The paper is distributed only to houses that have rural post boxes. A large number of the Port Underwood Road addresses do not, and accordingly they never received the paper. My view on this aspect, which is not pivotal to the outcome, is that what the Council did was fine in terms of fulfilling its specific statutory obligations to distribute the summary as widely as is reasonably practicable. However, given there was a small group of ratepayers whose rates were very significantly affected by the proposal, these ratepayers needed specific attention and notice. That obligation flows not from s 89 of the Act (which sets out the requirements for distribution of the summary) but from the Act's general consultation and notice obligations, which have at their heart the provision of an opportunity to participate. I doubt the Council would disagree with this since it did, of its own motion, write specifically about the change to each of the ratepayers.

[25] Some of the ratepayers did receive the summary in the newspaper. Those who did have all filed evidence saying it never occurred to them as a result of reading it that they were impacted in this way. The summary document, under a heading called "other matters" said:

Rating area review – changes are proposed that will bring additional properties into the Blenheim, Picton and Blenheim Vicinity rating areas. In most cases, this will result in a rates increase for those properties on page 229 and pages 200–203 of the Plan.

[26] The statutory obligation (in s 89(a) of the Act) in relation to a summary is that it give “a fair representation of major matters in the statement of proposal”. The applicants specifically plead a breach of this provision. Again, resolution of it as a separate ground of challenge is not pivotal or indeed necessary. However, by way of brief comment, the summary did nothing to alert the Port Underwood residents of the massive rates hike that was being proposed. My hesitation about whether this amounts to a breach of s 89(a) is because I am unsure whether this rating change for just 58 residences could be called a “major matter” within the meaning of s 89(a) – it is surely significant for the ratepayers, but in the overall scheme of things represents between \$100,000–\$140,000 of a rates revenue budget of \$51.7 million. It affects only a small number of ratepayers along one road.

[27] Ms Clark QC submitted that one could infer that it is a major matter from the fact that the Council have referred to it in the summary. But s 89(a) is not a code for the summary’s contents. Councils, I am sure, give thought to what can be most usefully and concisely included. This may include information not strictly required by s 89, and so I do not accept it is correct to work backwards and say its inclusion means the Council thought it a major matter.

[28] I have already indicated that I consider these ratepayers needed clear specific notice of the change. To the extent the Council relies on the summary, I do not consider it gives such notice. However, I decline to hold the summary breaches the Act’s requirements as set out in s 89. It just did not fulfil a specific notice obligation the Council had, which derives from the Act’s general notice and consultation provisions, as well as the common law if resort to that were needed, which it is not.

[29] Finally in relation to the summary it can be observed that it gives no reasons at all for the change. Recalling also that it would still be another six weeks before the ratepayers received the background Council papers, it can be said that as at 18 April 2012 these ratepayers did know of the change, and if they did, they would have no explanation for why it was being made unless they had read the Draft Plan.



[30] Concerning the Draft Plan, the passage which I have previously cited from the summary directs the reader to pages 229, and 200-203 of the Draft Plan. Turning first to page 229, it forms part of the “Revenue and Financing Policy” section of the Plan. Within it, s 12 addresses “Proposed Changes to Existing Funding Policy”, and s 12.6 states:

Council has reviewed the six Geographic Rating Areas and contiguous areas that are receiving similar benefits and proposes the following changes ...

- Transfer 58 properties from the eastern point of Waikawa Bay to Karaka Point to and including 351 Port Underwood Road from the Picton Vicinity Geographic Rating Area to the Picton Rating Area.

[31] Based on this, one could infer the reason for the change is that these addresses are receiving similar benefits to the contiguous area, namely Picton Town.<sup>2</sup> Looking at the other pages of the Draft Plan to which the summary sends the reader is sent, pages 200–203 are Notes to the Funding Impact Statement. In terms of the present issues nothing is added. All they literally do is describe the geographical areas by reference to address or certificate of title number.

[32] The final aspect of this part of the analysis is to note that a letter was sent to all the affected ratepayers on 20 April 2012. To place the timing of the letter in context, and recalling that the statute requires a submission period of not less than one month:

- (a) on Thursday 5 April the Council placed newspaper notices advising the Draft Plan was to be adopted that day, and that submissions would close 10 May (6 April was Good Friday);
- (b) on 10 April formal notices advertising the Plan were lodged in the various newspapers. The Council regard this as the formal start of the one month period;

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<sup>2</sup> The difficulty the ratepayers have with this as an explanation is that the position now in relation to receiving services is exactly the same as it was in 1997. Further, if the criterion is receiving services, the addresses on the other side of the new boundary line which are staying in Picton Vicinity get exactly the same services as the 58 addresses being shifted.

- (c) on 18 April the summary was included in the weekly free paper distributed to “all” households;
- (d) on 20 April the Council wrote to the affected ratepayers. Some received this letter the next day (Saturday, 21 April). The letters were sent to the rating address held for each property.

[33] The letter provided:

Dear Ratepayer

Change of Geographic Rating Area – Property ID “x”

The Marlborough District Council 2012–2022 Draft Long Term Plan includes a proposal to transfer 58 properties, from the eastern point of Waikawa Bay to Karaka Point to and including 351 Port Underwood Road, from the Picton Vicinity Geographic Rating Area to the Picton Geographic Rating Area, following a review of the six Geographic Rating Areas and contiguous areas that are receiving similar benefits. The proposal affects your property.

The impact of the proposal will be to increase your Geographic Area General Rates and Charges.

There then followed a table which identified the \$ change under each line item, and at the bottom a total showing what the particular ratepayer’s rates would be under Picton Vicinity, and what they would now be under Picton Town.

[34] The letter concluded that the Draft Long Term Plan was open for public submission “from 5 April to 10 May 2012. Submissions will be considered by Council on 20, 31 May and if necessary 1 June 2012”.

[35] Bearing in mind the formal requirements of the Act in relation to the special consultation procedure, the general obligations under the Act to consult, and the Act’s underlying themes of public involvement, I consider this is the point in time that the Council could say the clock was running. The letter tells the ratepayers of the change, makes it plain to them they are affected by it, gives them the specific individualised effect of the change, and provides the only available reason given for the change, namely that the properties receiving similar benefits to contiguous areas. The recipient is also advised of the right to make submissions.

[36] In reaching this conclusion I acknowledge that how the Council complies with its statutory obligations is a matter for its judgement, but the Act makes it clear that the exercise of this discretion is to be informed by these considerations of notice, information, and opportunity and encouragement to participate. When assessing its consultation obligations in a particular case the Act also requires that the Council have regard to the significance of the decision to the persons affected.

[37] The Council would be in error to consider compliance with the formal obligations set out in the Act (preparing a proposal, distributing a summary as widely as reasonably practicable, giving public notice, allowing one month for submissions) necessarily and always discharges all its obligations. The specifics of a situation may require specific action. I do not believe the Council had such a limited view of its obligations because it was the Council, of its own initiative, that chose to write individually to these ratepayers. That reflects an awareness that more than the formal requirements of the special consultative procedure can be required in order to fulfil the Council's overall obligations.

[38] Something obviously went wrong with the timing. The Council chose not to explain in its evidence why the letter was only sent on 20 April. I do not intend to fill that deliberate gap with anything favourable, but one can surmise an oversight occurred. The reality is that a councillor back in 2011 when the matter first was being considered suggested the ratepayers should be written to. It was decided then, for good reasons, not to do so at that point, but postponing individual notice until 12 days into the Council's own 30 day submission period was an error. The Act says the submission period should be "not less than one month". That is not in itself a long period, and if the Council chooses to meet that obligation by allocating the minimum period possible, it needs to be sure that affected ratepayers are given the full measure of their allocated time for submissions. The Act prescribes this is a "special" consultation process; it plainly intends a proper opportunity for public participation.

### **What happened when the letters were received?**

[39] Residents reacted. Some immediately tried to gather the affected parties together; some contacted the nominated Council person for more information. Evidence on these events has been filed by both sides. I do not see much benefit in describing this evidence in any detail. Rather, a few observations will suffice.

[40] First, the Council officer involved did his very best. In my view, he acted in good faith, tried to assist and provide information, tried to explain matters as he could, and indeed became an information board facilitating attendance by residents at the planned residents' meeting. He returned calls and made considerable effort to respond.

[41] Second, some common themes emerged from the ratepayers. They wanted to know why a change was being made, what new services were being planned, and how the Council thought what it was doing was fair.

[42] Third, there was concern over the timeframe being given to respond. It was considered by ratepayers that there was not enough time to get together, and work out how to respond to something that, as one ratepayer said, "had come out of left field". The responses from the Council to this concern were to adhere to the 10 May written submission date. The evidence shows that orally one ratepayer was told that, whilst the 10 May date was fixed, further information could be presented when making oral submissions. But 10 May was adhered to as the date for written submissions. This did not give these ratepayers a month, or anything like it.

[43] Fourth, from an information viewpoint, the Council and its officers identified no further reasons as underlying the change. However, some other queries were answered that are relevant. For example, attempts were made to explain that it was not a move driven by a council desire to increase rate revenue. It was explained that in terms of total rate revenue, the change is neutral. This point is also the answer, at least from the Council's viewpoint, to the queries being made about what increased services were to be provided. The answer is none; rather the decision is about these ratepayers being allocated a different share of the burden required to provide the existing services.

[44] A further point that emerged through the process was that ratepayers focussed on town water and sewerage as a point of difference between themselves and Picton Town. The Council pointed out that this was not relevant because the General Rates in question did not fund water and sewerage. As I observed at the hearing, while the Council is obviously right on this, it is not surprising that it was a focus of endeavour, and a point of annoyance, for the ratepayers. After all, going right back to the initial briefing paper provided to the working group, town water and sewerage were identified as the main explanation for houses being included in the new Picton rating area that had not previously been in the old Picton borough. Water and sewerage seem to be one of, if not the only, key original criteria. In terms of receiving such services, nothing had changed for these ratepayers nor was anything going to change. It is understandable the ratepayers focussed on this, and struggled perhaps with the Council response that water and sewerage were now somehow irrelevant to the analysis, when previously it largely defined the categories.

#### **The next stage**

[45] The ratepayers filed 34 individual written submissions, and one from their lawyers acting on behalf of 107 interested persons. Some of them, including the lawyers, presented oral submissions.

[46] As part of their written submission, the lawyers for the ratepayers made an official information request seeking relevant decisions and background papers. This package of material was sent to the lawyers twenty days later, on the day oral submissions were taken, but after they were made.

[47] The lawyers' submission traverses many topics such as alleged non-compliance with the Act, and pre-determination. Of importance to this case, however, is the focus of the submission on the only reason for the change known to the ratepayers – namely what is said in the Draft Plan about:

similar benefits to contiguous rating areas.

[48] The submission states that no evidence has been provided which outlines how the ratepayers do receive similar benefits. There is an analysis of what the Council

calls “essential services”, and the position of these properties in relation to those services is compared to the position of properties in the town rating area. The proposition is advanced that a conclusion that these addresses receive services similar to those in the town area is not rational. Finally, reference is made in the submission to the centrality of water and sewerage to previous definitions of the areas, and it is noted no change has occurred in terms of providing such services to the ratepayers.

[49] The submission concludes by recording a need for better understanding of the Council’s objectives underlying the proposal. The official information request is therefore made.

[50] The official information package that was provided twenty days later included all the meeting notes of the working party that have been discussed earlier. Also included was a more recent document that had been prepared for a Council working group which had formed to assess reaction to the 20 April letter.

[51] This background paper informed the working group that:

The main driver of change was to align rating areas with their potential to receive benefits.

[52] It may be that this is meant to be the same thing as receiving similar benefits, but it is the first time “potential to receive benefits” has been identified. Previously the focus was on services currently being provided. The background paper continued on to address the topics being raised by the ratepayers. In response to the question “on what basis is the proposed change being promoted?”, the paper observes:

The change follows Council’s review of the Revenue and Financing Policy and of the six Geographic rating areas. The area to be included in the Picton Rating Area was considered to enjoy the same benefits as those properties on Port Underwood Rd already in the Picton Rating Area. The current Picton boundary ends at the top of Cooks Ridge, with road access off Port Underwood Road, these properties are serviced by the Picton Water and Sewerage Schemes. However, water and sewerage are charged separately and are not part of the General Rate and UAC. There is no physical break, all properties on Port Underwood Rd are contiguous until after number 351.

[53] This is a different reason, or hints at one. It acknowledges that water and sewerage defined the previous boundary, but notes that they are covered by a general rate. It is then noted that there is no physical break in the addresses along Port Underwood Road until 351. It could be inferred from this that what is being said is that the old boundary was drawn on an incorrect basis, and when one removes that, there is a more obvious place to draw the boundary, namely after number 351.

[54] In terms of these proceedings the purpose of the analysis is not to comment on the soundness or otherwise of the reasoning, but to identify it, and determine when in the process it was first disclosed to the ratepayers. The answer to that is after the submissions period was over.

[55] As a consequence of the oral submissions, the Council properly responded by establishing a sub-committee to meet with some of the ratepayers. That meeting happened on 6 June. Before going to the evidence about it, more needs to be said about the Official Information disclosure. It was sent to the ratepayers' lawyers on Thursday, 31 May. The copy I have seen consists of 72 pages arranged in chronological order. No specific references to relevant pages were provided.

[56] It is to be recalled this is a ratepayers' group with 58 affected residences. Saturday, 2 June is the Saturday of Queen's Birthday weekend, so if one takes (generously I consider) Friday, 1 June as the starting point, there were two working days and three days of the Queen's Birthday holiday weekend to disperse the material, assimilate it, discuss it, and then attend a meeting on 6 June.

[57] There is no evidence as to how the ratepayers were selected to attend this meeting. At least one person who had made a submission complained subsequently about not being invited. The ratepayer attendees were the ratepayers' lawyer, and three ratepayers. Two of these are people who seem to have played prominent roles throughout the process. The third does not in his evidence refer to attending this meeting.

[58] One of the ratepayers who attended, Ms Rebecca Woledge, says that at the meeting the Council sought to provide a further rationale that had not been previously provided. It was that the character of the area had changed over time from predominantly holiday homes to predominantly residential homes. Ms Woledge deposes in response that this is factually incorrect, that no evidence to support it has been provided, and that had she had more time, it could have been disproven.

[59] Mr Gavin Bayliss, the other ratepayer attendee, also observes that this meeting was the first time they had been advised that the development that had occurred in the area had been taken into account in reaching the decision. He also deposes that information gathered subsequently, which would have been presented earlier had this basis for the decision been known, shows the Council's reasoning to be incorrect.

[60] The other version of the meeting available in the evidence is from Councillor Francis Maher, who observes:

14. At this meeting the Karaka Point representatives continued to advance the arguments made previously. In particular they considered the logical cut off point for the boundary between the Picton and Picton Vicinity Rating Areas was the point to which town water supply and sewerage disposal was available. Councillor Dew and I endeavoured to explain that the town water supply and sewerage disposal services are not funded through General Rates and so are not relevant for the purposes of setting the boundaries for General Rates.
15. What was relevant in our view was the character of each particular area and the extent to which it had changed from the time when the boundaries were originally set in 1997. We discussed this issue in some detail with the submitters. In Council's view, the area had become increasingly residential in nature over that time (more of a permanent nature, and fewer "kiwi holiday baches"). As such its character more closely resembled the Picton area than the Picton Vicinity. We considered that the Affected Ratepayers had a greater opportunity to benefit from services provided to the Picton area through General Rates than ratepayers within the Picton Vicinity. In particular, there was no distinguishing between the Affected Properties and the properties along the old Picton boundary. I continue to believe this is correct.



[61] Later in his evidence Mr Maher deposes that the Council has genuinely considered the issues, and has made changes to reflect the submissions heard. He believes all matters have had an appropriate airing, and it is now just a matter of differing opinions.

[62] At this 6 June meeting the possibility of conditions to ameliorate the impact was also raised. These involved adjusting the levy rate to reflect the fact that these ratepayers did not benefit from storm water services, and phasing in the increase. The proposal ultimately adopted in this respect was that in the first year, 100 per cent of the difference in rates would be remitted; in the second year 66.6 per cent; in the third year 33.3 per cent; and in the fourth year and onwards the full new rate would apply.

[63] Following this meeting, the lawyers for the ratepayers wrote to the Council on 8 June making further submissions. Councillor Maher and other members of the sub-committee, together with some additional councillors including the Mayor, considered the letter, but on 12 June decided to confirm the rate shift in geographical rating areas. Mr Maher says there were on-going submissions from the ratepayers after this date until the final Council meeting on 28 June at which time the changes were adopted.

[64] The significance of this extended process is a point of difference between the parties. The Council characterises consultation as lasting until 28 June; the applicants, while not accepting the label consultation, say the process ended on 12 June when the decision was taken to confirm the boundary change.

[65] I cannot see anything turns the point in dispute. The issue was whether the boundary would be changed, and if so, would the impact be ameliorated. The key decisions seem to have been finally taken on 12 June, but aspects of the amelioration package were still being reflected on by Council beyond that.

[66] The ratepayers did not accept the proposals. The lawyers' letter of 8 June had continued to urge the Council to set up a committee to look at the boundaries, and not to proceed with the change. The character change point was disputed, and the lack of time to respond on that was emphasised.

[67] On 26 June, aware the Council had on 12 June confirmed its decision, the lawyers wrote again. The amelioration proposals were not accepted as a satisfactory answer, and Council was advised that legal proceedings would be filed.

### **Discussion**

[68] I do not consider resolution of the case to be particularly complex, nor to necessitate any in-depth analysis of the Act. It is regrettable that this means the judgment will not reflect the quality of submissions I have received from senior counsel on many aspects of the Act.

[69] In my view, whilst it is not an occasion to be particularly critical of the Council, a mistake has occurred. The reality is that at no point, at least perhaps until it did so orally at the 6 June meeting, has the Council adequately articulated the basis on which the decision has been made. Indeed, having read all the material and having been the recipient of able argument, I am still not sure as to the exact reason. I do not know if it is just a reassessment because the previous boundary was based on a flawed premise (water and sewerage) or whether it is because the perceived change in character makes an originally correct decision now incorrect.

[70] What is clear is that this idea of a change in character only emerged at the 6 June meeting, and that it was at least an important factor in the Councillors' minds in reaching the decision to shift the boundary. Whilst the Councillors may consider it was well discussed at that meeting, and all that could be said has been said, the ratepayers believe there is more to say and they have not had an adequate opportunity to counter it. On the former I have no view; on the latter I agree. There has been inadequate opportunity to address what has only emerged at the end of the process as the key reason for the change. It represents a fundamental flaw in the process.

[71] This conclusion, that a significant mistake which undermines the whole process has been made, is reinforced by several factors. First, the ratepayers were kept to the same submissions timetable as everyone else despite receiving late notice and asking for more time. They should have been given more. Second, at the time of preparing their written submissions and presenting oral submissions, all the ratepayers had to go on was the idea of “contiguous areas that are receiving similar benefits”.

[72] Put to one side for a moment the proposition that this may not actually be the reason. Accepting that it is why the boundary was changed, whether it represents sufficient information needs to be put in context. These boundaries had been in place since 1997. They seemed to be defined at that point by whether an address required town water or sewerage. Since that time, nothing had changed. These addresses still had neither. The road on which they live, which is obviously a difficult road lacking footpaths, lights and kerbs, had not changed. Other services had not changed. The access of the ratepayers to town based facilities had not changed. They were still the same distance from town they had always been. Finally, the houses still on the Picton Vicinity side of the new boundary were in exactly the same situation as them, and always had been.

[73] Having regard to these matters, I consider that, even if same services is the rationale, the Council had to make more effort to articulate why it was that this change was happening. It is only by providing these reasons that the ratepayers are enabled to fairly engage in a process that is of considerable significance to them. As it was, too much of their already truncated time was wasted trying to find out the “why” in order to address it. It is this lack of articulation of the reasons for the change why the Council’s genuine efforts to respond, including setting up a special sub-committee, have not alleviated the ratepayers’ frustration.

[74] The third of the factors I mention in support of my conclusion that the process has failed is the late receipt the official information package. I have already discussed that. Fourth, however, also for the reasons discussed, the substantial bulk of that delayed material was again an unintended diversion, because none of it contains the actual reason first disclosed at the meeting.

[75] Finally, providing only an oral articulation at this late stage of the change of character rationale protects that reason from scrutiny. The Council never has to actually sit down and articulate it, and see whether anything supports it or whether it is just an impression. Nor has the Council ever had to confront any properly presented contrary material or submissions. This lack of accountability is the antithesis of the special consultative procedure, and the general consultation rules in the Act.

### **Decision**

[76] I consider the process has breached the consultation rules in the Act. I accept large discretion is given to the Council, but that discretion is always qualified by the need to have regard to the principles which underlie the requirements.

[77] The context here is a Long Term Plan, and a special consultation procedure that mandates at least one month being given to make written submissions. Further, the special consultation procedure has a clear purpose of ensuring full information, including the underlying reasons, is provided prior to that one month period. Any discretion or modification of the procedure had to have regard to the fact that here there was a small group of ratepayers who were particularly affected by the change and who were affected in a way that was plainly significant for them.

[78] Against that background I consider there to be a breach of the first of the consultation obligations contained in s 82(1) of the Act, namely the requirement to provide reasonable access to relevant material in a manner that is appropriate to the needs of the ratepayer. Breaches of other s 82(1) principles can also be identified, but they really are just consequential on this one fundamental flaw. I am not inclined to give much weight here to the Council's discretion to assess how to comply with its obligations because I do not consider the situation I have identified was the product of any considered decision. Put another way, the Council could never decide to exercise its discretion by adopting a process that withheld from ratepayers the true reasons underlying a decision. I am sure it did not intend to do that here, but that is what has happened. It means the ratepayers have been denied their right to properly participate, and the decision cannot stand.

[79] Finally, for completeness, I address formally the grounds of review and my conclusions on them.

[80] The first ground of challenge is that there was a breach of s 89(a) of the Act in that the plan summary was not “a fair representation of a major matter”. I did not receive focussed argument on what is a “major matter” within the meaning of s 89, and I am loathe to make comments that might have wider implications. I consider it was good administration to include the rating change in the summary. As previously stated, I am not presently persuaded a change like this affecting such a small number of ratepayers is properly seen as a major matter in the context of a Long Term Plan exercise.

[81] The second ground of challenge is that the consultation process was in breach of s 82 of the Act, which sets out the principles of consultation. For the reasons given, I accept this ground of review is established. Commenting on the particulars pleaded:

- (a) I consider the content of the 20 April letter gave sufficient notice, and do not consider the Long Term Plan itself had to be sent. If cl 46.1 of the Statement of Claim is a claim that the summary had to be sent, I do not accept that either. I do consider specific notice was required, but in my view the 20 April letter gave this in a clear way. I consider this is the first moment the ratepayers were given adequate notice;
- (b) I accept the ratepayers were not given a reasonable opportunity to make written submissions. An extension of time should have been given. I do consider this error was capable of being remedied, and that the extended process went a long way toward doing that. Had the information error not occurred and all the discussions had taken place on the basis of proper information, I doubt as a matter of discretion I would have found that the ratepayers had not had an adequate opportunity such as to require relief. It may not have been a process in perfect alignment with the formal scheme contemplated by the Act but it would have substantially met its aims;

- (c) I reject the challenges to the Long Term Plan based on non-compliance with s 77 of the Act, and the obligation on a Council to assess all practicable options. This was not that type of decision. Since the rates change is fiscally neutral from the Council's viewpoint, and significantly affects only a few ratepayers, the object of the proposal could only be to assess whether identifiable groups of ratepayers were paying the correct proportion. This is not an exercise that requires different options to be identified, and the Council correctly viewed its task.

[82] As I understand it, the other pleaded grounds of review were either abandoned or modified to form part of the process/consultation ground of review.

### **Remedy**

[83] The ratepayers seek a quashing of the decision to move their properties from the Picton Vicinity geographical rating area to the Picton geographical rating area. It is recognised that with such an order the concessions obtained about storm water and rates remission for the first three years would also necessarily go.

[84] At this point there is little that tells against granting the remedy. Even if the rates change was fully operative, quashing the decision would represent a relatively small total loss of revenue. However, as it happens, for the first year the increase has been wholly remitted, and for the second year it was remitted by 66.6 per cent. So the unplanned fiscal impact of granting the remedy is negligible.

[85] The consultation opportunity is a central plank in the statutory scheme. Its breach is not to be lightly dismissed. I consider the plaintiffs are entitled to their relief and the decision to transfer the 58 properties from Picton Vicinity to Picton is quashed.

[86] Costs memoranda may be filed if agreement cannot be reached.

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Simon France J