

BEFORE THE ENVIRONMENT COURT

Decision No. [2017] NZEnvC 31

IN THE MATTER of the Resource Management Act 1991
AND of an application for a declaration under
s 311 of the Act
BETWEEN COASTAL RATEPAYERS UNITED
INCORPORATED
(ENV-2016-WLG-000028)
Applicant
AND KAPITI COAST DISTRICT COUNCIL
Respondent

Court: Environment Judge B P Dwyer

Hearing: at Wellington on 23 November 2016

Appearances: C Mitchell for Applicant
P Beverley and V Brunton for Respondent
M Slyfield Amicus Curiae

Date of Decision: 3 March 2017

Date of Issue: 3 March 2017

INTERIM DECISION OF THE ENVIRONMENT COURT

- A: I decline to make declaration 1.
B: Decision on Declaration 2 deferred pending further comment from parties.

REASONS

Introduction

[1] Coastal Ratepayers United Incorporated (CRU) is an organization representing the interests of various property owners on the Kapiti Coast. It has applied to the Court

COASTAL RATEPAYERS UNITED INCORPORATED v KAPITI COAST DISTRICT COUNCIL



for declarations in respect of two processes undertaken by Kapiti Coast District Council (the Council), namely:

- A review of the operative Kapiti Coast District Plan (the ODP) pursuant to s 79 Resource Management Act 1991 (RMA);
- The notification and processing of a Proposed District Plan (the PDP) replacing the ODP pursuant to Schedule 1 RMA.

[2] The following declarations were requested:

Declaration 1

The Council, having notified a full review of the District Plan, cannot change the ambit of that review under section 79 without first notifying the provisions which are no longer subject to the review, and/or notifying the existing provisions which it intends to remain 'operative' after the proposed plan is completed.

Declaration 2

In withdrawing the coastal hazard and other provisions under clause 8D of Schedule 1 of the RMA, the Council changed the meaning of the remainder of the PDP.

[3] The application set out the grounds on which the declarations were sought in these terms:

In respect of Declaration 1

1. In November 2012 the Council notified a proposed district plan as a full review of its operative district plan under section 79(4). Consequently section 79(5) applied to that review.
2. Submissions on the proposed district plan closed in March/April 2013.
3. In June 2014 the Council notified a withdrawal of a number of provisions and parts of provisions contained in the proposed district plan.
4. In June 2014 the Council did not notify (or otherwise explain):
 - a) which provisions of the operative district plan were (consequent on the withdrawals) no longer subject to review, so that the ambit of the review after June 2014, for the purposes of section 79, is not defined; or
 - b) identify which provisions of the operative district plan (if any) are intended to remain in force when the PDP is made operative.
5. If section 79 authorises the Council to change the ambit of a review, then subs(2) and (3) apply and have not been complied with.
6. Since June 2014 to the date of this application both the matters in 4(a) and (b) above remain unclear.
7. Consequently the provisions of section 79 and Schedule 1 have not been complied with.

In respect of declaration 2

1. In November 2012 the Council notified a proposed district plan as a full review of its operative district plan under section 79(4).
2. In June 2014 the Council notified a withdrawal of a number of provisions and parts of provisions contained in the proposed district plan. The provisions of the PDP affected by these withdrawals included those relating to coastal hazards.
3. Schedule 1 Clause 8D authorises the Council to withdraw a proposed district plan, but does not expressly authorise the withdrawal of parts of a proposed district plan.
4. However the High Court, in *West Coast Regional Council v Royal Forest and Bird Protection Society of New Zealand* [2007] NZRMA 32, has held that the power under Clause 8D is a



power to withdraw part(s) of a proposed plan. The Court constrained the power to withdraw part as follows:

[25] Assuming that there is power to withdraw part of a proposed plan it seems to us that it is implicit that the balance must be left as it was. For cl 8D only confers power to withdraw a plan. Anything new has to be notified and tested by a process in which the public can participate. If there is a power to withdraw part, that power cannot include a power to make a change to the meaning of the remainder of the policy statement or plan. Provided it is a withdrawal and not a variation by the back door, it does not matter whether the withdrawal is of a complete part, some few provisions, or a mix. But it must only be a withdrawal and not a variation.

5. The withdrawal of parts of some provisions has changed not only the meaning of those provisions but also their effect within the proposed plan. Thus, for example, the withdrawal of words such as 'coastal', 'coastal hazard' or specified CHMAs (Coastal Hazard Management Areas) from provisions has the effect, in some instances, that the ambit of that provision changes from a specific part of the environment to a wider one.
6. The withdrawal in June 2014 accordingly 'changed the meaning of the remainder of the plan'. The withdrawal, at least to that extent, could only be validly effected by variation to the proposed plan.
7. Consequently Schedule 1 Clause 8D has not been complied with.

Affidavits from K J Moody and J E S Allin were filed supporting the grounds identified with further affidavits of Ms Moody and Q G Poole being filed by CRU prior to the hearing of these proceedings.

[4] The Council opposed the making of declarations. It filed affidavits from B M T Julyan, S J Stevenson and E J I Thomson in support of its position.

[5] Notwithstanding the extensive material included in the various affidavits, the relevant and determinative factual matters in these proceedings are limited and in reality not in dispute to any significant degree. For the purposes of this decision I set out the contended "key background facts" identified in CRU's submission without further comment (footnotes omitted):

7.
 - a) Council notified the PDP as a full review of its operative district plan (1999) in 2012. Submissions and further submissions closed in 2013.
 - b) CRU was established in November 2012 primarily by owners of coastal properties whose interests were affected by PDP provisions including hazard lines and hazard management areas.
 - c) CRU made a submission on the PDP as did many of its members. Over half of the 777 submissions on the PDP were concerned with the coastal provisions. The great majority of those submissions opposed those provisions.
 - d) In 2013 Council commissioned separate independent reviews of the PDP as a whole (the Allan/Fowler review), and of the science used to develop coastal hazard provisions in the PDP (the Science review).
 - e) Both of those panels worked over late 2013 and early 2014, and both set up meetings with PDP submitters and other interested parties to inform their reviews.
 - f) Both panels reported to the Council in June 2014. The Science panel concluded that the science advice used to develop the PDP coastal hazard provisions was not sufficiently 'robust' for that purpose. It recommended that the Council undertake further work, in a collaborative way, on both science and risk management options.
 - g) The Allan/Fowler panel conducted a wide ranging review of the PDP against the Council's declared goals. Its broad conclusion (*At present, the PDP does not represent good practice,*



but it does not represent unacceptable practice. It could be substantially improved through the further statutory processes.) resulted in a comprehensive of recommendations including some to address the results of the Science panel's review.

- h) The Council resolved in July 2014 to accept all the Allan/Fowler report recommendations. Critically for present purposes, these recommendations included withdrawal of the PDP coastal hazard provisions, identification of ODP provisions to remain in effect, a consultative group to develop replacement provisions, and a variation to introduce those new provisions.
- i) In the same resolution the Council also endorsed a draft timeline appended to the officers' report which showed a future plan change (to be commenced around now) rather than a variation. No reason has ever been suggested for the discrepancy - though the only logical conclusion is that the person preparing the timeline either did not understand the legal difference between a plan change and a variation, or think it significant.
- j) The PDP coastal hazard provisions, and several parts of provisions, were withdrawn in October 2014
- k) Of the recommendations and resolutions noted under h) above only the withdrawal of PDP provisions (or parts of provisions) had been implemented by the time this proceeding was lodged
- l) The Council states that it will not notify a variation to the PDP on coastal hazard provisions, and will not notify, for public submission under a Schedule 1 process, the ODP provisions which it intends to remain in force.

[6] It will be seen that the heart of CRU's complaint summarized in the key background facts relates to the withdrawal of provisions of the PDP pertaining to coastal hazard lines, coastal hazard areas and the rules relevant to them (the coastal hazards provisions). CRU contends that the Council's intention that coastal hazards provisions of the ODP continue to remain in force pending identification of suitable replacement provisions can only be effected by undertaking a further review of the ODP pursuant to s 79 RMA and that the withdrawal of the coastal hazards provisions changed the meaning of the PDP to such an extent as to require a variation (or variations) of the PDP to be undertaken.

[7] The Council's position is set out in its submissions by reference to the material contained in Ms Stevenson's affidavit in the following terms (footnotes omitted):

- 6. Ms Stevenson also explains in her affidavit the Council's intention, communicated consistently and clearly since July 2014, to undertake further coastal hazard work and, at the appropriate time, introduce a plan change to deal with those matters.
- 7. Ms Stevenson also identifies that there are, however, a number of other processes underway that have an influence on how and when it is appropriate to commence that coastal hazards process. These include:
 - (a) the Greater Wellington Regional Council ("GWRC") Natural Resources Plan was notified for consultation in September 2014, and then formally in July 2015. The Council made a submission on the plan and requested that GWRC amend one of its methods and undertakes a number of regional initiatives relating to coastal hazards;
 - (b) the Ministry for the Environment is leading the revision of the Coastal Hazards and Climate Change Guidance (2008), which will be revised by late 2016 to address, among other things:



- (i) the NZCPS;
- (ii) the latest Intergovernmental Panel on Climate Change reports; and
- (iii) the Parliamentary Commissioner for the Environment's November 2015 Report *"Preparing New Zealand for rising seas, certainty and uncertainty"* ("PCE Report");

- (c) the Ministry for the Environment is developing a National Policy Statement on Natural Hazards (including coastal hazards), with an issues document to be released for consultation some time in 2017;
- (d) the Resource Legislation Amendment Bill 2015 proposes to introduce into section 6 as a matter of national importance to be recognised and provided for *"the management of significant risks from natural hazards"*;
- (e) on 12 October 2015, in the middle of the replacement district plan review process, the Canterbury Earthquake (Christchurch Replacement District Plan) Order 2014 was amended to withdraw certain coastal hazards provisions from the Proposed Christchurch Replacement District Plan;
- (f) in announcing the plans to decouple coastal hazards from the Proposed Christchurch District Plan process, on 29 September 2015 Environment Minister Dr Nick Smith stated:

"We are proposing both legislative change and national policy guidance on such hazards as part of our Resource Management Act reform programme ... It makes sense for the timing of this work to be aligned with national policy";

- (g) in November 2015, the PCE Report was released. In this report the Parliamentary Commissioner concluded that better direction and guidance was required from central government on scientific assessment of the impact of rising sea on coastal hazards, the process of engaging with the community and the planning and management decisions that follow; and
- (h) GWRC recently notified a Regional Hazards Strategy for consultation, with submissions closing in November 2016. The Council made a submission urging GWRC to address coastal hazards.

8. Finally, Ms Stevenson also noted:

- (a) the Council has already experienced the significant cost and difficulty associated with a small local authority seeking to undertake coastal hazard planning on its own, without support from regional or central government;
- (b) as the Parliamentary Commissioner for the Environment has noted, climate change adaptation should not be progressed in haste. Dr Wright stated:

"The Kapiti experience is instructive in a number of ways. Importantly, the process was hasty";

- (c) the Council is committed to this process but as noted, the issue is not if, but when. It is a matter of timing and with so much uncertainty, it is prudent to wait; and
- (d) for these reasons, over the next four years, Council intends to follow an



Implementation Plan for engaging with the community via the Coastal Advisory Group, and establishing a Technical Advisory Group, to progress the review of the coastal hazards provisions.

In short, the Council says that it continues to recognize the need for alteration of the existing coastal hazard provisions of the ODP. It has acknowledged that the replacement provisions initially contained in the PDP were not appropriate (consistent with the views of CRU) and has withdrawn them accordingly. The Council is committed to a process to identify appropriate coastal hazards provisions but it will be seen from para 8(d) of the Council's submissions cited above that this may take up to four years. The Council's position is that in the interim the existing coastal hazard provisions of the ODP will continue to apply and that there is no need for it to undertake any further review of the ODP or variation of the PDP to enable that to happen. It is that position which gives rise to the declarations sought by CRU.

[8] In the meantime, the Council has been conducting hearings on submissions to the PDP (other than submissions on coastal hazard provisions). I understand that those hearings will be concluded shortly and will have dealt with all aspects of the PDP other than the coastal hazards provisions which have been withdrawn.

[9] It was not clear from the CRU applications precisely what outcome it sought from these declarations. The Court was concerned that CRU's ultimate position may have been that the effect of the contended failures on the part of the Council was that the PDP process itself was invalidated to such an extent as to require the Council to recommence those processes. CRU has subsequently made it clear (through its counsel, Mr Mitchell) that is not the case.

[10] Finally, on an introductory basis, I record that I considered it appropriate to be assisted by amicus and that Mr M Slyfield accepted instructions for that purpose. There were two reasons for that:

- Firstly, because of my concern as to the number of people potentially affected by any ruling which might be made in these proceedings. CRU advised the Court that over half of the 777 submissions on the PDP related to the coastal hazard provisions. The consideration of those submissions must be affected by any decision made in these proceedings. The Court was of the view that it was not practicable to invite participation of all affected submitters in these proceedings, but that it would be appropriate



for amicus to represent such interests;

- Secondly, the Court was concerned that with only two parties participating in the declaration process there might be a somewhat *narrow* focus on the issues between those two adversarial parties and that an objective outside view may assist the Court.

[11] In light of those comments I now consider the issues arising out of the application.

Declaration 1

[12] In response to directions from the Court, CRU identified seven questions which it considered arose from Declaration 1 in these terms:

1. If the provisions of the ODP which were reviewed by the withdrawn provisions:
 - a) are intended to remain in effect when the PDP is made operative; and
 - b) had been due for review under section 79(1) prior to notification of the PDP
 is the Council required to notify these provisions under section 79(7) or section 79(3)?
2. If the answer to 1 is 'yes' then when must this notification occur?
3. The Council contends, in relation to both section 79(7) and (3) that neither can apply as it does not think that the relevant ODP provisions do not require alteration. Is the Council's decision that these ODP provisions should continue to have effect when the PDP is made operative, and until they are changed at some future date, a decision that the provisions do not require alteration within the timeframe contemplated by section 79?
4. If the answer to 1 is 'no', in the absence of any variation to the PDP, do the provisions of the ODP which were reviewed by the withdrawn provisions remain in effect when the PDP becomes operative?
5. If the answer to 4 is 'yes', and it is not clear which provisions are to remain in effect because there is no formal identification of them, how are the relevant provisions to be determined, and what process applies to resolve any differences of opinion between the Council and those affected? How do affected persons know that there are provisions in the ODP to remain in force and what they are?
6. If the provisions of the ODP which were reviewed by the withdrawn provisions are not intended to remain in effect, is the Council required to notify these provisions under section 79(7) or section 79(3)?
7. Is the review obligation under section 79(1) satisfied by the commencement of a review notwithstanding that the reviewed provisions are then withdrawn under Schedule 1 clause 8D?

[13] The fundamental contention of CRU's case was that the answer to Question 1 is yes and that having determined as part of the PDP process that the coastal hazards provisions of the PDP were to be withdrawn then the Council was obliged to notify the provisions of the ODP which would remain in effect in the meantime as part of the



review. Both the Council and amicus resisted that proposition.

[14] I consider that it is inherent in the way that Mr Mitchell phrased question 1 of Declaration 1, that CRU has conflated two separate processes that are under consideration in this instance. Firstly, reviews of district plans (and other instruments) pursuant to s 79 RMA and secondly, changes to district plans pursuant to the process contained in Schedule 1 RMA. That is apparent from the reference in question 1 to the “provisions of the ODP which were reviewed by the withdrawn provisions” and similar references in various other parts of CRU’s submissions.

[15] Reviews of District Plan are undertaken pursuant to the process contained in s 79 RMA, whereas changes are undertaken pursuant to s 73 (and ultimately Schedule 1). Those Sections relevantly provide:¹

79 Review of policy statements and plans

- (1) A local authority must commence a review of a provision of any of the following documents it has, if the provision has not been a subject of a proposed policy statement or plan, a review, or a change by the local authority during the previous 10 years:
 - (a) a regional policy statement:
 - (b) a regional plan:
 - (c) a district plan.
- (2) If, after reviewing the provision, the local authority considers that it requires alteration, the local authority must, in the manner set out in Part 1 of Schedule 1 and this Part, propose to alter the provision.
- (3) If, after reviewing the provision, the local authority considers that it does not require alteration, the local authority must still publicly notify the provision—
 - (a) as if it were a change; and
 - (b) in the manner set out in Part 1 of Schedule 1 and this Part.
- (4) Without limiting subsection (1), a local authority may, at any time, commence a full review of any of the following documents it has:
 - (a) a regional policy statement:
 - (b) a regional plan:
 - (c) a district plan.
- (5) In carrying out a review under subsection (4), the local authority must review all the sections of, and all the changes to, the policy statement or plan regardless of when the sections or changes became operative.

I have listed s 79 first because it is apparent that the review processes under s 79 will commonly be a predecessor of the change processes provided for in s 73.



- (6) If, after reviewing the statement or plan under subsection (4), the local authority considers that it requires alteration, the local authority must alter the statement or plan in the manner set out in Part 1 of Schedule 1 and this Part.
- (7) If, after reviewing the statement or plan under subsection (4), the local authority considers that it does not require alteration, the local authority must still publicly notify the statement or plan—
 - (a) as if it were a proposed policy statement or plan; and
 - (b) in the manner set out in Part 1 of Schedule 1 and this Part.
- (8) A provision of a policy statement or plan, or the policy statement or plan, as the case may be, does not cease to be operative because the provision, statement, or plan is due for review or is being reviewed under this section.
- (9) The obligations on a local authority under this section are in addition to its duty to monitor under section 35.

73 Preparation and change of district plans

- (1) There shall at all times be 1 district plan for each district prepared by the territorial authority in the manner set out in Schedule 1.
- (1A) A district plan may be changed by a territorial authority in the manner set out in Schedule 1.
- (1B) A territorial authority given a direction under section 25A(2) must prepare a change to its district plan in a way that implements the direction.
- (2) Any person may request a territorial authority to change a district plan, and the plan may be changed in the manner set out in Schedule 1.
- (3) A district plan may be prepared in territorial sections.
- (4) A local authority must amend a proposed district plan or district plan to give effect to a regional policy statement, if—
 - (a) the statement contains a provision to which the plan does not give effect; and
 - (b) one of the following occurs:
 - (i) the statement is reviewed under section 79 and not changed or replaced; or
 - (ii) the statement is reviewed under section 79 and is changed or replaced and the change or replacement becomes operative; or
 - (iii) the statement is changed or varied and becomes operative.
- (5) A local authority must comply with subsection (4)—
 - (a) within the time specified in the statement, if a time is specified; or
 - (b) as soon as reasonably practicable, in any other case.

I make a number of observations about these provisions.



[16] A notable feature of s 79 is the absence of any direct specification as to what constitutes a review and how local authorities go about undertaking them. The term “review” is not defined in either ss 2 or 43AA. Section 79 does not provide for public participation although I am aware that in practice local authorities routinely provide for that as part of their review processes in a similar manner to their decision making and consultation obligations under Subpart 1 of Part 6, Local Government Act 2002. Clearly, Parliament sought to enable local authorities to carry out reviews in such manner as they see fit.

[17] A further aspect of s 79 is the limited nature of the determination to be made by local authorities pursuant to it, namely whether or not any provision of the documents identified in s 79(1)(a),(b) and (c) or the full documents identified in s 79(4)(a), (b) and (c) “requires alteration”. Section 79 does not require the reviewing local authority to determine the form of the alterations to be made. Any alterations are undertaken pursuant to s 73 which in turn requires that the alterations must be made in accordance with Schedule 1 RMA with its very detailed requirements for consultation and public participation. Additionally, alterations must be subject to the scrutiny provided for in s 32 RMA. This is a completely separate process from the review carried out under s 79

[18] Although ss 79(1) and (4) make a distinction between review of (individual) provisions of the identified instruments (1) and full reviews (4) it is clear that there is an overlap between them and that full reviews must or may be undertaken pursuant to either ss 79(1) (depending on the age of a plan) or 79(4) particularly when regard is had to s 33 Interpretation Act 1999. In this instance, the Council had undertaken a full review of its ODP. I was advised that some of its provisions could be 20 years old.

[19] The scheme of review contained in s 79 provides that even if it concludes that an instrument under review does not require alteration, a local authority must publically notify that existing instrument and undertake a Schedule 1 process in respect of it as if it was a change.² This enables interested persons to challenge the status quo in the event that a local authority has determined not to alter an instrument after a review. In this instance the Council determined in its full review that the ODP required alteration (including alteration of the coastal hazards provisions) and duly commenced a Schedule 1 process for the PDP accordingly.

Section 79(3) and (7).



[20] There was some discussion in CRU's submissions as to whether the actions of the Council when withdrawing the coastal hazards provisions from the PDP in accordance with Schedule 1 constituted a "transition from a full review under SUBS.(4) to a more limited review", however I do not consider that anything turns on that. The submissions again conflate the review process with the Schedule 1 process. There is nothing in s 79 which requires a review to be given effect in a single Schedule 1 process. I consider that it is open to a local authority to give effect to a determination under s 79 to alter a district plan by undertaking a number of consequent plan changes.

[21] The fact of the matter is that the Council has undertaken a full review of the ODP and has determined that its provisions (including those relating to coastal hazards) require alteration. It has not made a decision that the coastal hazards provisions of the ODP do not require alteration as suggested by CRU in question 1. Mr Slyfield contended in his amicus submissions:³

Having reviewed the ODP provisions, and having found that the coastal hazard management provisions require alteration, Council could not notify the ODP provisions as provisions "not requiring alteration" (under ss 79(3) or (7)). That is not the outcome of the review, and the review stands. It is not withdrawn.

I concur with that statement. Having made its determination that the ODP requires alteration the Council has completed the review process.

[22] Looked at from a different perspective, the question might be asked, what would the purpose of such a further review as sought by CRU be? The answer is that the Council would doubtless conclude again that the coastal hazard provisions of the ODP need alteration which must be undertaken through a Schedule 1 process. That is the conclusion which it has already reached under the review which it has undertaken and, I understand, is the prevalent view of most stakeholders including CRU. The real issues here are not the need for further review, but:

- The status of the ODP in the interim;
- The likelihood that the Council will take at least four years to bring down a further Schedule 1 process for coastal hazard provisions for the reasons set out in the affidavit of Ms Stevenson (para [7] above).



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Amicus submissions at para 9.

[23] What became apparent from consideration of the parties' submissions is that RMA has not directly addressed the status of the ODP in the particular circumstances applicable in this case, although the situation where there are both operative and proposed plans in existence is very common. The respective views of the parties on this topic are found in the following submissions from counsel.

[24] The position of the Council was described in these terms in Mr Beverley's submissions:

21. Further, in this context, the RMA does not expressly address the current scenario where:
 - (a) a full review of the ODP was undertaken;
 - (b) a full PDP was notified;
 - (c) parts of that PDP were then withdrawn; and
 - (d) the question arises as to the ongoing status of the ODP provisions covering the same topics as the withdrawn provisions (in the context of these proceedings, the coastal hazard provisions).
22. Given that the RMA does not expressly provide for it, it necessary to ascertain what Parliament's intention would have been in these circumstances.
23. It is submitted that the proper interpretation of the RMA in this context is as follows:
 - (a) a local authority may undertake a full review of an ODP (section 79(4) of the RMA);
 - (b) following that review the local authority may prepare and notify a full replacement PDP (Schedule 1 of the RMA);
 - (c) the ODP must continue in force until the new PDP becomes operative – while not expressly provided for, this must be the proper interpretation of the RMA;
 - (d) a local authority is entitled to withdraw parts of that PDP (clause 8D of Schedule 1 of the RMA); and
 - (e) in that context, the relevant provisions in the ODP (ie that cover the same topics as the withdrawn provisions – in this case the coastal hazard provisions) must remain in force once the (now partial) PDP becomes operative.

[25] CRU's position in this regard was summed up in Mr Mitchell's submissions in the following terms:

31. The intention to maintain operative provisions without alteration for an indefinite period, likely to be many years, must be subject to either subs.(3) or (7). The Council position, that these provisions do not apply because it does not consider that the provisions do not require alteration, is simply inconsistent with its actual decision that the provisions will remain without alteration until some unspecified future date. It cannot say one thing and do another (as it did with its July 2014 resolution). The public is entitled to participate on the proposal that the well overdue for review provisions (whatever they be) are to continue to remain and affect their properties or activities. They must be able to submit on whether those provisions are suitable or not to apply to their community.

[26] The answer to the queries raised by counsel is found by implication rather than



direct statement in RMA and I refer to the relevant provisions.

[27] Section 73 relevantly provides that:

- (1) There shall at all times be one district plan for each district prepared by the territorial authority in the manner set out in Schedule 1.

[28] What constitutes a district plan is defined in s 43AA which provides that:

district plan –

- (a) means an operative plan approved by a territorial authority under Schedule 1; and
(b) includes all operative changes to the plan (whether arising from a review or otherwise).

[29] For the sake of completeness I refer to s 79(8) which provides that:

- (8) A provision of a policy statement or plan, or the policy statement or plan, as the case may be, does not cease to be operative because the provision, statement, or plan is due for review or is being reviewed under this section.

[30] Considering specifically the provisions of s 73 and 43AA, I consider that the position is as follows:

- There is presently a district plan for the Kapiti District, namely the ODP;
- The ODP contains provisions in respect of a wide number of issues (including coastal hazards);
- The Council has reviewed the full ODP (including the coastal hazards provisions) and considered that it requires alteration;
- The alterations are contained in the PDP which is presently going through the plan change process contained in Schedule 1;
- When the change processes have been completed and the changes have been made operative in accordance with Schedule 1⁴ they replace the provisions which they have “changed”;
- Due to withdrawal of the coastal hazards provisions from the PDP, those provisions will require the undertaking of a further plan change to make the alterations which the Council has decided are required;
- Until such time as they are changed, the existing coastal hazards provisions are part of the ODP. They remain in force, not because the Council has determined that they should not be altered (it has in fact determined that they should be altered) but by operation of law until they are in turn



changed by some future change or variation as is the Council's announced intention as a result of its review.

[31] I suggest that the above outcome would reflect the common understanding of those who practice in the RMA area. It is a logical outcome. As Mr Slyfield submitted, the difficulty is not with that outcome "but with the exercise of identifying in a certain and clear way which of the ODP provisions were (originally) proposed to be altered, and are now (as a result of the withdrawal) remaining unaltered, so as to continue to be operational".⁵ I concur with that submission.

[32] In his submission for the Council, Mr Beverley identified a similar situation in relation to the Christchurch Replacement District Plan, where coastal hazard provisions of that proposed district plan were withdrawn and where the Council was required by cl 5A(2)(c) of the Canterbury Earthquake (Christchurch Replacement District Plan) Order 2014 to give public notice that the existing coastal hazard provisions will continue to apply and to identify those existing coastal hazard provisions.

[33] The Christchurch situation is entirely analogous with the situation in this case, although RMA does not contain any equivalent provision requiring the Council to give such notice. Clearly it is important that the public is made aware which existing provisions of the ODP relating to coastal hazards will continue to apply until the Council is able to satisfactorily identify replacement provisions and complete the necessary Schedule 1 process to put those replacement provisions in place. Notwithstanding that it was not required to do so, on 26 October 2016 the Council gave public notice identifying the provisions of the ODP which it considered would remain in force as a consequence of the withdrawal of the coastal hazards provisions.

[34] Those comments bring me to the issue of the period of time (presently estimated as four years⁶) which is likely to elapse before the Council commences the plan change processes necessary to bring down the alterations to the existing coastal hazards provisions and CRU's complaint as to that length of time.⁷

[35] I commence my comments in that regard by noting that nothing in ss 79(2), (3),

⁵ Amicus submissions at para 24.

⁶ Above at para [7].

⁷ Above at para [25].



(6) or (7) requires a reviewing local authority to commence Schedule 1 processes within any specified time of completing its review. Obviously the Council is bound by the provisions of s 21 RMA which requires it to exercise its functions “as promptly as is reasonable in the circumstances”.

[36] A delay of some four years in commencing the required alteration by plan change might be regarded as pushing the extreme boundaries of promptness and CRU's concerns in that respect are understandable. The explanation for that time period was set out in Ms Stevenson's affidavit summarized in the Council's submissions⁸. It must also be recognized that there will be a further period of time before any potentially controversial plan change process is completed.

[37] Integral to determination of appropriate coastal hazards provisions is consideration of the effects of climate change, a matter to which the Council is required to have “particular regard” in exercising its functions under RMA.⁹ Aspects of the provisions as to coastal hazards which the Council sought to bring down in the PDP were found to be seriously deficient and the Council determined to withdraw those provisions and bring down more appropriate provisions. There has been and will continue to be a substantial community cost in that process which will be greatly exacerbated if the coastal hazards provisions are found wanting a second time. It must also be recognized that the decisions which the Council may ultimately make as to the appropriate coastal hazards provisions in its District Plan will likely have far reaching impacts on property owners affected by them.

[38] Under those circumstances it is more important that the Council gets it right rather than gets it quick. Prima facie, I accept that the information provided in Ms Stevenson's affidavit together with the Council's submissions support the proposition that the likely time frame is reasonable in these particular circumstances, although I do not make any definitive finding in that regard and would require a good deal more information before doing so.

[39] In making those observations I acknowledge that the situation where control of coastal hazards will continue to be undertaken for a substantial period of time pursuant



⁸ Above at para [7].

⁹ Section 7(i) RMA.

to provisions of the ODP which the Council has found require alteration is seriously unsatisfactory, however it is difficult to see what efficient or practicable alternative there is.

[40] In light of those observations I answer (where necessary) the questions asked by CRU as follows:

- Question 1 - the answer is no for the reasons set out in paras [14] – [21](above);
- Question 2 - no need to answer;
- Question 3 - the Council does not contend that the coastal hazards provisions of the ODP do not require alteration, rather it found in its review that they do require alteration being the decision which it was required to make under s 79(2) or (6). The Council did not make a decision that the coastal hazards provisions of the ODP should continue to have effect when the remainder of the PDP is made operative. That happens by operation of the relevant provisions of RMA;
- Question 4 - this question is inaccurately framed as the coastal hazards provisions were not “reviewed by the withdrawn provisions”. The withdrawn provisions sought to alter the coastal hazards provisions which the completed review found required alteration. For the reasons previously stated the coastal hazards provisions remain in effect when the remainder of the PDP is made operative by operation of the relevant provisions of RMA;
- Question 5 - the Council has purported to identify those provisions of the ODP which remain in force by public notice in a process akin to the Christchurch Plan process;
- Question 6 – again, this question is inaccurately framed for the reason given in question 4. Again, the Council has not found that the coastal hazards provisions should remain in effect. It has found in the completed review that they require alteration and that continues to be the Council’s position;
- Question 7 – the review obligation is completed when the Council makes a determination as to whether or not the reviewed provisions or reviewed full plan require or do not require alteration as it has done in this case.



[1] For all of the reasons set out above, I **decline to make Declaration 1.**

Declaration 2

[42] Declaration 2 raises the issue of the consequences of the Council having withdrawn the coastal hazards provisions from the PDP. The issues raised by CRU under this head revolved around the observation made in the High Court decision *West Coast Regional Council v Royal Forest and Bird Protection Society of New Zealand* [2007] NZRMA 32 (the West Coast decision) that although part of a proposed plan may be withdrawn, such a withdrawal may not operate as “a variation by the backdoor”.¹⁰ CRU contended that in some instances withdrawal of the coastal hazards provisions has had the effect of changing the meaning of the remainder of the plan to such an extent that a variation of the PDP was required.

[43] As it had done in respect of Declaration 1, at the Court’s direction, CRU identified a number of questions which it considered were pertinent to determine the application in these terms:

1. Is the High Court’s decision in *West Coast Regional Council v Royal Forest and Bird Protection Society of New Zealand* [2007] NZRMA 32 accepted as the authoritative statement of the limit of clause 8D?
2. If not, what refinement is contended for?
3. Have any of the provisions identified by CRU been ‘altered’ by the withdrawals in the sense excluded by the *West Coast* decision?
4. If so, is an evaluation of the significance of such alterations required for the purposes of this declaration?
5. If an evaluation of significance is required what is/are the reference point(s), given the power in Clause 16(2)?

[44] Insofar as question 1 is concerned, there was no dispute between the parties that the West Coast decision established that the power to withdraw a plan change contained in clause 8D of Schedule 1 included the power to withdraw part of a plan change. The issue in dispute was the effect of that partial withdrawal in this case.

[45] In light of the answer to question 1, I do not consider that question 2 requires a response.

[46] The heart of CRU’s case revolves around question 3 as to whether or not



¹⁰ *West Coast Regional Council v Royal Forest and Bird Protection Society of New Zealand* [2007] NZRMA 32 (HC) at 25.

various provisions in the PDP identified by CRU had been “altered” by the partial withdrawal of the coastal hazard provisions in the sense excluded by the West Coast decision.

[47] The West Coast decision contains a detailed and helpful analysis of the distinction between the concepts of **variation**, **alteration** and **amendment** of proposed plans. The particularly pertinent provisions of that decision for the purposes of these proceedings are paras [25] and [26] where the High Court commented as follows:

[25] Assuming that there is power to withdraw part of a proposed plan it seems to us that it is implicit that the balance must be left as it was. For cl 8D only confers power to withdraw a plan. Anything new has to be notified and tested by a process in which the public can participate. If there is a power to withdraw part, that power cannot include a power to make a change to the meaning of the remainder of the policy statement or plan. Provided it is a withdrawal and not a variation by the back door, it does not matter whether the withdrawal is of a complete part, some few provisions, or a mix. But it must only be a withdrawal and not a variation.

Conclusion

[26] The Council has purported to withdraw part of the plan. As the forgoing analysis demonstrates, the provisions withdrawn have simply returned the legality of activities back to the default provisions of ss9, 13 and 14. Notwithstanding that the council has not withdrawn all references to wetlands, the withdrawal does not, in our opinion, constitute a variation to the plan.

[48] At the Court's direction, counsel for CRU had filed a memorandum (dated 12 September 2016) identifying what it contended were nine substantive alterations to the provisions of the PDP brought about by withdrawal of the coastal hazards provisions which constituted variations. I set out the relevant portions of that memorandum, including the preceding commentary (footnotes omitted):

Specific considerations applied to the list

25. The list is confined to objectives, policies and rules and does not include a number of parts of the PDP (mainly explanatory or guidance text).
26. The list does not include provisions altered by the withdrawals which clearly should have been fully withdrawn or not altered at all. Issues arising from these errors must be addressed in another way.
27. The list is largely confined to examples where the alteration is plain within the provision itself. However the real potential for indirect alteration to overall meaning (such as by reading provisions in logical combination, or assessing the effect of ‘retained’ ODP provisions on retained PDP provisions), cannot generally be considered. There is no evidence that the Council considered these matters either.
28. The Court's request was that the list be of ‘substantive variations’. The list proceeds on the basis that any alteration to the effect of a provision (ie which changes what it can or might do) is, in effect, a variation to the PDP for the purposes of the *West Coast* approach. How



significant that alteration might be in any given situation will always be conjectural, and is not an issue the Court need address in this context.

List of provisions altered by withdrawal

29. The PDP has two objectives concerned specifically with natural hazards. Objective 2.4 has been altered (been withdrawn) below as shown in red. It needs to be read, of course, with other objectives including Objective 2.5 which relates to Natural Hazards, but was not altered – presumably because it did not employ the key word ‘coastal’. Natural Hazards plainly include coastal hazards, so Objective 2.5 applies to the coastal situation with the altered Objective 2.4 and with remnant ODP provisions. In additions to questions of balance and context, the Council hearings process may deal with PDP chapter 9 (which implements Objective 2.5) in a way which affects coastal hazards and without hearing from persons who made submissions on coastal hazards, these submissions being regarded as ‘non-justiciable’.
30. The significant alteration to Objective 2.4 (withdrawal shown in red below) is one of balance: to the extent that the achievement of (d) requires coastal management works then the strongly directive aspects of (a) to (c) are balanced by that protective objective. Without (d) activities such as protective walls may well be regarded as contrary to Objective 2.4. It is most unlikely that that was the Council's intent.

Objective 2.4 – Coastal environment

To have a coastal environment where:

- a) natural character, natural systems, natural landforms and natural processes, are protected, and restored where degraded;
- b) appropriate public access to and along the coast is improved;
- c) development does not result in further loss of coastal dunes; **and**
- ~~d) communities are not exposed to increased risks from coastal hazards.~~

31. The matter is further complicated by the open and unresolved issue of which current relevant ODP provisions are to remain when the PDP is completed.
32. The PDP's Policy 3.14 on restoration applied only to sites ‘identified as priority areas for restoration’. It now plainly applies to all land. Again it is unlikely that was the Council's intent. Withdrawal shown in red.

Policy 3.14 - Restoration

When considering applications for subdivision, land use or development, active restoration or remediation will ~~be required on sites identified as priority areas for restoration, to~~ achieve the following biodiversity benefits:

- a) resilient riparian buffers and margins which provide benefits in terms of sediment and erosion control and increased biodiversity values; and
- b) expanded *ecological sites* and habitat enhancement which provide greater benefits to biodiversity values through the planting of *locally indigenous vegetation* surrounding and linking fragmented remnant *ecological sites*.



33. PDP Chapter 4 deals with the Coastal Environment and its introduction states that it is intended to implement Objective 2.4 (above). Policies 4.8 – 4.15 relating to the Coastal Hazard Management Areas have been completely withdrawn. Policy 4.6 below has been altered by the removal (shown in red) of half of the listed matters. As with Objective 2.4

above the issue is whether the matters removed are intended to be addressed in some other way, presumably by means of remnant ODP provisions, and if so, to what extent.

Policy 4.6 – Natural Coastal Processes

Natural shoreline movement will be accommodated and the resilience of coastal communities will be increased by using the best practice coastal management options, including some or a combination of the following:

- a) dune management;
- b) inlet management;
- c) engineering measures;
- ~~d) managed retreat;~~
- ~~e) building and development controls; and~~
- ~~f) Coastal Hazard Management Areas.~~

34. A number of rules in Chapter 4 have been altered (shown in red) as well. Generally these rules applied to sites within the Coastal Hazard Management Areas. Now that the rules have been amended, other rules apply to land which was within these areas. In other words, the PDP has been altered by withdrawals to apply rules to land that they did not apply to before.

Rule 4A.2.1 (controlled activity)

1. Earthworks and vegetation clearance on dunes undertaken for the purpose of dune restoration and the associated removal of nonnative plant species ~~within the no build rural CHMA.~~

Note: in some instances a consent may also be required from the Wellington Regional Council.

Comment: the application of the Rule is longer restricted to a defined area.

Rule 4A.3.1 (restricted discretionary activity)

1. Buildings and earthworks on land in the coastal environment which has been identified as having high natural character in District Plan Maps ~~where they are not located in a CHMA.~~

Comment: this Rule will now apply to many coastal sites which were previously in the CHMA. While the Rule may be regarded as more lenient than the withdrawn rule which did apply within the CHMA, it is nevertheless restrictive, and persons who will now (following the withdrawal) be affected by it should have had the opportunity to submit on it. In other words, those people who were within the former CHMA would have submitted on rules for CHMA, and not considered how they might be affected by rules for land outside CHMA, rightly believing those rules were not relevant to their situation.

Rule 4A.3.2 (restricted discretionary activity)

2. Subdivision of land in the coastal environment which includes areas of high natural character in District Plan Maps ~~where it is not located within the CHMA.~~



Comment: as above

Rule 4A.3.3 (restricted discretionary activity)

3. Subdivision of land adjacent to the coast or a coastal esplanade ~~where it is not located in a CHMA.~~

Comment: as above

Rule 4A.4.1 (discretionary activity)

1. ~~All activities in the CHMA which are not listed as restricted discretionary, non complying or prohibited and~~ all other activities which do not comply with one or more of the permitted activity or controlled activity standards.

Rule 4A.5.4 (non-complying activity)

4. Buildings, structures and earthworks on land in the coastal environment which has been identified as having high natural character in District Plan Maps ~~where they are not located in a CHMA~~ which do not comply with one or more of the permitted activity or restricted discretionary activity standards.

Comment: These rules are a significant direct alteration to the classification of activities such as stream channel maintenance which was discretionary under Rule 4A.4.1 above (for example in the Mangaone Stream mouth at Te Horo as the river and/or stream mouth cutting took place in a CHMA) but following the withdrawal such maintenance is a non-complying activity. Again, it is unlikely that was the Council's intent.

[49] CRU contended that the West Coast decision established a "bright line" test which required that any change to the meaning of a provision remaining in the PDP as a result of the partial withdrawal required a variation and that the above examples failed that test.

[50] The Council responded to CRU's memorandum through the evidence of planning witnesses, Julyan and Thomson. Mr Julyan's evidence was a peer review of Ms Thomson's evidence. The assessment of both witnesses as to the provisions identified by CRU was helpfully collated in Appendix 1 of the Council submissions.

[51] Central to Ms Thomson's assessment of the alterations was a categorization of their consequences in these terms:

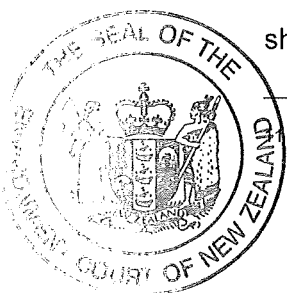


16. In my view, the examples cited by CRU fall into three different categories:

- (a) **Category one:** This category of examples relates to provisions which, when notified, partially related to coastal hazards and partially related to other planning matters (often in the form of a list). In partially withdrawing these provisions, the intent was to remove those aspects relating to coastal hazards, while leaving the other aspects of the provision intact. Inevitably, this means the provision is changed, as it no longer applies to coastal hazards, but still relates to other matters. This does mean that, taken as a whole, the PDP gives less weight to coastal hazards – this is a natural consequence of the withdrawal. I do not consider this to be an issue, as the relevant provisions of the ODP are intended to remain in force, such that there is still weight to be given to coastal hazards. Overall, I consider that such withdrawal examples have had a minimal effect on the balance of the plan.
- (b) **Category two:** The second category of examples cited by CRU relates to general provisions that, in the notified PDP, were not to apply to Coastal Hazard Management Areas (“CHMAs”). CHMAs had other specific plan provisions for the relevant activities. When CHMAs were deleted through the withdrawal, the more general provisions then applied to former-CHMAs. In my view, this is a necessary consequence of the withdrawal, as otherwise no rules would apply for certain activities in the former-CHMAs. In each of these examples, the general rules are less restrictive. Overall, I consider that such withdrawal examples have had a minimal effect on the balance of the plan.
- (c) **Category three:** A third category of examples relates to provisions that were previously specific to certain areas (such as CHMAs), but, as a consequence of the partial withdrawal, would now affect a broader area. I acknowledge that these examples did have an effect on the balance of the plan, but as I explain below, this is only a minimal effect. These provisions have been marked for deletion or significant amendment through the PDP process. I consider there is scope to deal with any issues with such provisions through the PDP process, or through a further withdrawal, should that be necessary.

[52] Ms Thomson assessed the nine provisions identified by CRU, fitting each provision into one of the three categories identified above. It is apparent that her assessment was essentially a determination as to the effect, which the “withdrawal examples” had on the balance of the PDP. Her determination was that the effect of each category of examples on the balance of the PDP was “minimal”.

[53] Ms Thomson’s approach was reflected in the submission of counsel for the Council “that any flow-on effects from the withdrawn [sic-withdrawal] of provisions on the balance of the plan are minor and are not of such significance that the withdrawals should have been dealt with by a variation”.¹¹ It was the Council’s position that the



Council submissions at para 96(d).

principle established in the West Coast decision can provide for some relativism so that minor or insignificant change to the meaning of the PDP which arises from the withdrawal does not require a variation.

[54] Both Ms Thomson and Mr Julyan contended that it was inevitable that there would be changes to the remaining provisions of the PDP as a result of withdrawal of the coastal hazards provisions. Mr Julyan contended that:

10. At this point I would observe that the nature of withdrawals on a proposed plan are such that change is an inevitable consequence. There is a measure of practicality or common sense that is needed and applied in practice. The key issues to consider are in my opinion:
 - (a) Are the provisions still relevant and coherent?
 - (b) Would the withdrawals substantially change the reading or application of the plan (such that a party may be prejudiced by the change)?

[55] I accept that a commonsense approach is required in dealing with this matter. I concur with the proposition that it is (almost) inevitable that withdrawal of provisions of a proposed plan will have *knock-on* consequences, some of which may be seen to be of greater effect than others. Ultimately, however, I disagree with the approach taken by Ms Thomson and Mr Julyan of assessing the significance of the alterations as the determinative test as to whether or not a variation is required to accommodate those alterations. I consider that the appropriate tests are to be found in paras [25] and [26] of the West Coast decision namely:

- The statement that “anything new has to be notified and tested by a process in which the public can participate”;
- The conclusion that return to the relevant “default provisions” (in that case ss 9, 13 and 14 RMA - in this case the coastal hazards provisions of the ODP) does not constitute a variation.

In short, I consider that the test identified in the West Coast decision is not whether the effect of the alteration on the remaining parts of the PDP is “minor” or “major” but rather whether the alteration brings a new provision into a proposed plan which may affect the rights of some members of the public so the public should be able to test that alteration. Return to the previous provisions of the ODP does not constitute a “new” provision.

[56] It is my understanding that those provisions identified as being in Ms Thomson’s Category one (provisions 1, 3 and 8) involve a reversion to the *status quo ante* and accordingly do not constitute a variation.



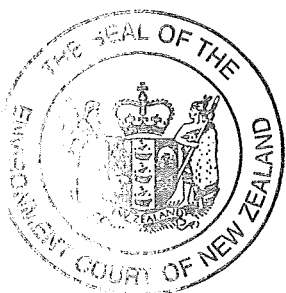
[57] In his amicus brief, Mr Slyfield contended that four of the changes identified in the CRU Memorandum of 12 September 2016 (provisions 5, 6, 7 and 9) involved general provisions that would now apply to Coastal Hazard Management Areas when formerly they did not and that two (provisions 2 and 4) involved provisions that were specific but now apply more broadly. He submitted that although these changes may be regarded as minor in nature by the Council witnesses, they are changes to the PDP of a kind that might readily be of interest to submitters (and, I suggest, potentially to other parties who had not submitted). I concur with that assessment and also consider that these changes introduce new elements into the PDP.

[58] At first blush, these changes are alterations to the PDP of the sort which the West Coast decision requires to be undertaken by variation. That finding supports the making of Declaration 2 in respect of provisions 2, 4, 5, 6, 7 and 9. However I hesitate to do so at this point as I consider that in a practical sense it is important that all other possible resolutions to the shortcomings in the Council process are fully considered before putting the ratepayers of the Kapiti District to the further expense inherent in undertaking variations of the PDP.

[59] It appears likely that some of the changes may be inadvertent and arise due to the detail in the PDP and a failure to accurately identify all of the consequential changes brought about to the PDP by withdrawal of the coastal hazards provisions. Arguably such inadvertent changes constitute errors which may be corrected by the Council pursuant to cl 16(2) of Schedule 1 which authorizes local authorities to “make an amendment, without using the process in this schedule, to its proposed...plan to alter any information, where such an alteration is of minor effect, or may correct any minor errors”.

[60] In determining whether or not application of cl 16(2) may be appropriate I have considered the following matters:

- That the term “information” is not defined. I consider that it must refer to all of the contents of proposed policy statements or plans;
- Clause 16(2) addresses two situations, alterations of minor effect and correction of minor errors;
- Clause 16(2) uses the term “minor” being the test used in Ms Thomson’s appraisal (albeit in a different context);



- One relevant test of whether an alteration is of minor effect and thereby authorized by cl 16(2) was identified in *Re an Application by Christchurch City Council*¹² as being whether the amendment (prejudicially or beneficially) affects the rights of some members of the public¹³. If so it is not authorized. If it is neutral, then it is permissible pursuant to cl 16;
- If the effect of the alteration is that the relevant provision reverts back to the status quo under the ODP then I consider that, consistent with the West Coast decision, it is appropriately regarded as neutral.

[61] I raise the issue of use of cl 16(2) somewhat tentatively as none of the parties before the Court suggested that was an appropriate means of resolution of the issues in this case, however it may be appropriate for the parties to consider that matter in light of these comments.

[62] Other remedies short of variation identified by the Council¹⁴ were:

- Deleting certain provisions through the PDP process “where there is scope through submissions”. It is difficult to see how that can be achieved. Withdrawal of the coastal hazards provisions from the PDP means that submissions on that topic are no longer “on” the PDP as those provisions no longer form part of the PDP;
- Further withdrawal of provisions through Clause 8D. I accept that in principle the Council may exercise the power contained in cl 8D again.¹⁵ I am unable to comment further on the appropriateness of doing so in any particular instance;
- The Council enabling affected parties to submit on a particular change through the PDP process. It is difficult to see how that can be accommodated other than through the variation procedure, being the process identified by the High Court in the West Coast decision.

[63] I consider that it is appropriate for the parties to consider these matters further in light of the foregoing comments. I will allow a period of 15 working days from the date of issue of this decision for them to file memoranda addressing the issues which I have



¹² *Re an Application by Christchurch City Council* (1996) 2 ELRNZ 431 (NZEnvC).

¹³ That appears to be consistent with the test applied in the West Coast decision.

¹⁴ Council submissions at para 98.

¹⁵ Interpretation Act 1999, s16(1).

discussed pertaining to declaration 2. It may be appropriate for the parties to meet with a view to reaching a common position on as many of these matters as possible, in which case a joint memorandum would be appropriate. I request amicus to submit any further observations which he might wish to make, although he is not obligated to participate in discussions between the parties.

[64] I have largely answered questions 4 and 5 in addressing question 3.

[65] I issue this decision as an interim decision to enable the parties to respond in accordance with para [63] (above). I will consider the matter of Declaration 2 further in light of the responses received.


B P Dwyer
Environment Judge

