BEFORE THE HIGH COURT AT WELLINGTON

NUMBER CIV-2017-

UNDER	**The Resource Management Act 1991 ('the Act')**
IN THE MATTER OF	**An appeal against a decision of the Environment Court under section 313 of the Act**
BETWEEN	**Coastal Ratepayers United Incorporated** an incorporated society under the Incorporated Societies Act 1908
	Appellant
AND	**The Kapiti Coast District Council,** a territorial authority under the Local Government Act 2002
	Respondent

NOTICE of APPEAL

Dated 26 July 2017

Solicitor for Applicant: Mitchell Law (Chris Mitchell) , PO Box 499 Waikanae 5036, ph/fax 04 293 3646 email: chris@mitchelllaw.co.nz

Notice of Appeal

Parties

1. The Appellant is Coastal Ratepayers United Incorporated, an incorporated society whose several hundred members mostly live, or own properties, in the Kapiti Coast District.

2. The Respondent is the Kapiti Coast District Council ('Council'), a territorial authority under the Local Government Act 2002.

The decision appealed against

3. The decisions appealed against are an interim decision and a final decision of the Environment Court on an application for declarations by the Appellant, under section 310 Resource Management Act 1991 ('the Act'), in relation to the Respondent's proposed district plan.

4. These decisions of the Environment Court are titled:

a) [2017] NZEnvC 31 *Coastal Ratepayers United Inc v Kapiti Coast District Council* (interim decision of 3 March 2017).

b) [2017] NZEnvC 100 *Coastal Ratepayers United Inc v Kapiti Coast District Council* (final decision of 6 July 2017).

5. The Appellant's application to the Environment Court sought two declarations. The Environment Court's interim decision refused the first declaration, and requested further submissions on the second declaration. The Environment Court's final decision made the second declaration in an amended form.

Errors of law alleged by the Appellant

6. In this Notice, the alleged errors are particularised in relation to each of the two declarations sought by the Appellant in its application of 5 July 2016 – referred to as 'Declaration 1' and 'Declaration 2' respectively.

7. As to Declaration 1, the Environment Court erred in holding that the Council was not required to notify, under Schedule 1, those provisions of its operative district plan (ODP) which it intended to remain in effect after the proposed district plan becomes operative. Within the Environment Court's interim decision particular errors include:

a) At [6] *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.* The Appellant did not, and does, not make any such contention. It contends that <u>if</u> some ODP provisions are to remain in force (and these were not and could not be identifed by the Respondent at the time the issue arose), then these

provisions must be identified and notified within the current review process, that being the obligation under section 79(6)-(7).

b) At [13] *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.* The 'processes' referred to by the Environment Court are the review provision (section 79), and 'changes' under Schedule 1. If there is any conflation, it is within section 79 itself – a provision which cannot be understood or applied in isolation from Schedule 1. Schedule 1 is expressly referred to in four relevant subsections of section 79. The obligation under section 79, whichever review option is taken, is to notify 'in the manner set out in Part 1 of Schedule 1 and this Part'.

c) At [20] *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.* This statement is incorrect where (as in this case) a full review has been undertaken (and a new proposed plan notified). Section 79 provides that plan reviews may be undertaken on a partial basis or a full basis. In this case a full review was chosen: this requires the notification of a new plan, which may subsequently be altered by variation or withdrawn. Nothing in section 79(6) impliedly supports the staggered notification of a reviewed plan by an indeterminate number of changes over an open ended time span. Such an implementation would render the whole plan incapable of coherent analysis. (On the other hand, if a local authority wishes to review its plan in stages it may do so, and then multiple plan changes will occur as various aspects of the review are completed. But this is not what the Respondent set out to do).

d) In a number of passages (particularly [31] – [33], [38] – [39]) the Environment Court appears to have formed a view based on 'pragmatic' factors raised by the Respondent which are either legally irrelevant (the '*entirely analogous'* Christchurch approach, made under special legislation, allows exemption from or modification of legislative provisions which would otherwise apply) or made without any reference to the Appellant's contrary evidence. Neither decision makes any reference to decisions of higher courts on the relevant purposes of the legislation which were referred to by the Appellant. Nor does the decision refer to any potential impact on affected communities caused by leaving old and undefined provisions in effect for an indefinite period.

8. As to Declaration 2, the Environment Court erred in limiting the declaration to examples (given by the Appellant at the Court's request) of instances where the withdrawal of specific provisions had clearly changed the meaning of remaining provisions.

Questions of law to be resolved

9. The questions of law arising on this appeal include those on the application made to the Environment Court. These are set out below:

For declaration 1:

When a full review of a district plan (ODP) is commenced under section 79(4), and the Council subsequently withdraws provisions from the proposed district plan (PDP), then:

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 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 section79(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?

For declaration 2:

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)?

10. In relation to Declaration 2, questions 4 and 5 above may not require an answer unless the Respondent pursues its arguments on those issues.

11. A further question of law in relation to Declaration 2 is whether the effects of every provision covered by the withdrawal must be assessed in isolation, or whether the Court's findings that a number of key provisions could not be withdrawn under Clause 8D and that a number of other provisions may be similarly affected, taints the entire withdrawal.

12. A further question of law in relation to Declaration 2 is the ambit of Clause 8D Schedule 1. On its face, it is a power to withdraw a proposed plan. In the *West Coast* decision the High Court concluded that the power to withdraw the whole plan included a power to withdraw discrete provisions, provided that such a withdrawal did not 'alter' the meaning of the balance of the relevant plan. The question is whether that decision should be followed in the entirely different circumstances of this case.

The grounds of appeal

13. As to Declaration 1, the Environment Court's errors of interpretation arose from misunderstanding the application, failing to consider the purpose of the legislation and the relevant provisions, and wrongly concluding that the Respondent had no practical alternative to doing what it did.

14. As to Declaration 1, the Environment Court wrongly concluded that the Respondent's stated view that existing plan provisions could not remain without change removed any obligation to notify those provisions

under Schedule 1 even though the Respondent intends them to remain in force indefinitely.

15. As to Declaration 1, the Environment Court wrongly failed to recognise that the purpose of the legislation might best be achieved by allowing people and communities to make submissions on existing provisions which are intended to remain in force indefinitely.

16. As to Declaration 2, the Environment Court failed to consider the purported withdrawals under Schedule 1 Clause 8D in totality, and failed to require the Respondent to produce any evidence that it had properly considered those withdrawals in the way required by the High Court's decision in *West Coast Regional Council v Royal Forest and Bird Protection Society of New Zealand [2007] NZRMA 32.*

17. As to Declaration 2, the Respondent's withdrawals in totality could not be validly made under Schedule 1 Clause 8D.

18. As to Declaration 2, the High Court, on this appeal, should not follow the approach in the *West Coast* decision. Changes to the proposed district plan of the complexity involved in the Respondent's withdrawal, in whole or part, of some 80 different provisions should have been notified as a variation where the merits and effects of those proposed withdrawals could have assessed in their complete context.

The relief sought

11. The making of both Declarations 1 and 2 as sought in the application to the Environment Court of 5 July 2016. Or such other declaration as the Court thinks fit.

In the alternative:

12. Because of the time which has passed since the application was made, and because the Respondent has continued with the hearing of submissions on its proposed district plan, then an order requiring the Respondent, within a set time, to notify a variation to its proposed district plan covering the same substantive matters would be an appropriate alternative relief.

Dated at Waikanae this 26th day of July 2017

P C Mitchell
Solicitor for Plaintiff

This document is filed by Phillip Christopher Mitchell of the firm Mitchell Law, solicitor for the Applicant. The address for service of the Appellant is 99 Tutere Street, Waikanae.

Documents for service on the Applicant may be left at that address for service or may be—

(a) posted to the solicitor at PO Box 499 Waikanae 5036; or

(b) emailed to the solicitor at chris@mitchelllaw.co.nz