BEFORE THE HIGH COURT AT WELLINGTON

NUMBER CIV-2017-485-627

UNDER	The Resource Management Act 1991 ('the Act')
IN THE MATTER OF	An appeal against Environment Court decisions [2017] NZEnvC 31 (interim decision) and [2017] NZEnvC 100 (final decision) under section 299 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

Submissions for Appellant

Dated 29 September 2017

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May it please the Court

1. This is an appeal against two decisions of the Environment Court which, respectively, refused two declarations sought by the Appellant ('CRU') under section 310 Resource Management Act 1991 ('RMA'). These declarations are referred to as 'Declaration 1' and 'Declaration 2'. Declaration 1 was refused in the Court's interim decision. Declaration 2 was made in a restricted form in the Court's final decision.

2. This outline briefly introduces four elements of the Appellant's submissions:

    a. the statutory framework;
    b. the factual context;
    c. the declarations sought by the Appellant;
    d. the appeal.

3. These matters are then covered in more detail, in submissions which follow.

The statutory framework

4. The Council is a territorial authority. The RMA requires every territorial authority to have a district plan.

5. The RMA also requires every territorial authority to review the provisions of its district plan on a 10 year cycle. The Council can choose whether such a review is of the whole district plan, or a review of specific provisions which are due for review. In either case, the Council is obliged to publicly notify any alterations to those provisions or plan, and any provisions or plan which are not to be altered. Section 79 contains these review requirements.

6. Once a proposed new district plan or proposed new provisions has/have been notified, the Council has two further relevant powers:

    a. It may withdraw the proposal (Sch.1, Clause 8D). A withdrawal must be publicly notified with reasons. There is no right of submission.
    b. It may propose alterations to the proposal – these are described as variations (Sch.1 Clause 16A). Any variation must be publicly notified for submissions, and will merge with the original proposal when it reaches the same stage in the Schedule 1 process.

7. Declaration 1 concerns section 79, and the consequences of notifying a full replacement plan, and then withdrawing provisions from it.

8. Declaration 2 concerns the ambit of Clause 8D.

Factual context

9. In 2012 the Council, as part of a full review begun in 2008, notified a proposed new district plan. This proposed new district plan ('PDP') is an entirely new plan, in 3 volumes and running to some 1,500 pages. It is structurally distinct from the current operative district plan ('ODP') and some 50% longer. The PDP does not propose to keep any specific provisions of the ODP, and though the substance of many existing provisions is retained, there are many new provisions in the PDP which have no direct counterpart in the ODP.

10. Submissions on the PDP closed in early 2013.

11. The coastal hazard management provisions in the PDP were highly controversial. Around half of all the 777 submissions on the PDP related to these provisions, and the great majority of them opposed the new provisions Many were from CRU members, or people who adopted CRU's position.

12. Although preparations for hearings of submissions began in 2013, this process was halted after the 2013 elections when the 'new' Council commissioned two independent panels of experts to review, respectively, the science and models used to create the PDP's coastal hazard provisions ('the Science Panel'), and the quality of the PDP ('the PDP Panel'). Both panels consulted widely, and reported to the Council in mid-2014.

13. Of particular relevance to this proceeding, the Council quickly resolved to accept all of the PDP Panel's recommendations. Three key recommendations were the withdrawal of PDP coastal hazard provisions, the preparation of a variation to the PDP on coastal hazards, and the constitution of a coastal advisory group to guide further work on coastal hazard management. CRU was satisfied with this outcome.

14. In October 2014, the Council gave notice of withdrawal of a number of provisions (some 80 in all) from the PDP. Through 2015 the Council worked on a range of possible improvements to the PDP.

15. However the Council made no moves to initiate a variation to the PDP or to establish the Coastal Advisory Group, both of which it had resolved to do. In early 2016 the Council again began preparations for the hearing of submissions. This was of great concern to CRU for a range of reasons:

    a. The Council made it clear that it had decided to 'park' the coastal hazard issues indefinitely pending some definitive guidance from Government, and that it intended that the existing ODP provisions would remain in effect for that indefinite period until a future plan change would be initiated, well after the PDP had been completed. A major concern to CRU was that the Council was unwilling or unable to identify exactly what these 'remnant' ODP provisions were. The Council itself regarded those ODP provisions as outdated and inappropriate, and that the coastal hazard identification science behind them was several decades old and more limited than that used and rejected for the PDP provisions.

    b. The 2014 withdrawals had effectively extinguished many of the submissions on the PDP - indeed, all of the submissions concerning coastal hazards. Yet the Council declined to 'ring fence' issues which would inevitably be related to coastal hazard management – for example the definition of the 'coastal environment', and provisions relating to coastal landscape protection and construction of seawalls. The Council has proceeded to hear submissions on these issues but expressly excluding any consideration of hazard. Any submitter who wanted to address the coastal hazard aspects of these issues was precluded from doing so, although the Department of Conservation was allowed to address whether the remaining ODP provisions 'gave effect to' the NZ Coastal Policy Statement.

c. The 2014 withdrawals created some unintended consequences, and a larger number of potentially significant future consequences – mostly resulting from the lack of any contemporaneous assessment of those matters. It transpired that what the Council had done was a simple word search (for example 'coastal hazard') followed by an excision of relevant parts of provisions. The Council's response to this concern was that any problems could be fixed during the hearing process. CRU was not satisfied as to the legality of this approach, and was also concerned that any 'fix' would not include the views of those submitters whose submissions had been extinguished by the withdrawals.

16. As it became clear that the Council would neither defer the planned hearings to enable further discussions and potential resolution of these concerns, nor 'ring fence' issues which would be affected by a lengthy deferral of the coastal hazard issues, CRU considered the options for judicial resolution.

Declarations requested

17. CRU made an application for two declarations in July 2016.

18. Declaration 1 concerns the consequences of withdrawals of provisions, part provisions and general explanatory text from the PDP. There are two distinct pathways to CRU's requested declaration that if, following the withdrawal of a PDP provison some ODP provision is intended to remain in effect after the approval of the PDP, then this can only be achieved by variation to the PDP:

    a. Where a PDP is proposed as a full replacement for the ODP, then the ODP ceases to have effect once the PDP is approved. Nothing in the text or purpose of the RMA supports a conclusion that the withdrawal from the PDP of a whole or part provision automatically maintains any 'counterpart' in the ODP, still less does it provide any clarity as to how such 'counterparts' could be identified.

    b. Alternatively, if the effect of a withdrawal is to maintain an existing ODP provision after the PDP is approved, then that is a decision which is subject to section 79(3), which requires that any such decision by the Council requires that provision to be notified as if it were a change.

19. Declaration 2 concerns the ambit of the power of withdrawal in Schedule 1 Clause 8D(1). In the *West Coast* decision(CB561), the High Court concluded that the power to withdraw a proposal must include a power to withdraw parts of a proposal, provided that any withdrawal is not also an 'alteration'. The approach in that decision implicitly relies on the clarity of that distinction – present in that case, but not present in the different circumstances of this case. There are, again, two separate but consistent approaches:

    a. The power to withdraw part of a proposal must be limited to the withdrawal of a part which is sufficiently distinct and severable to the extent that it can be regarded as a separate or stand alone proposal.

    b. Even if the issue is not approached in the restricted way contended for above, the Council withdrawals need to be evaluated as a whole. On that basis, the Environment Court's findings required Declaration 2 to be made as requested, rather than limited to specific provisions.

The appeal

20. In relation to Declaration 1, the appeal asserts that the Environment Court's conclusion on key issues of interpretation was wrong. On this declaration, the Court wrongly defined the key issues, and thus reached the wrong conclusion. It is not enough, of course, for the Appellant to demonstrate that the Court erred in its approach. It must also establish that the answer was wrong.

21. In relation to Declaration 2, the appeal asserts that the Court wrongly limited the scope of its evaluation of the ambit of Clause 8D by reference to instances of 'illegal' withdrawals that it had required the Appellant to give. Although the Court accepted CRU's argument that several of the specific provisions identifed could not be validly withdrawn under Clause 8D, it limited the declaration to these provisions, notwithstanding its parallel finding that there might be other provisions similarly affected. CRU asserts that the Council's withdrawal of coastal hazard provisions was outside the scope of Clause 8D.

Factual context

22. This section does not repeat the overview contained in paragraphs 9-16.

23. It is somewhat frustrating for CRU that the Environment Court, having stated on several occasions that the factual background was of no great relevance to the determination of the issues, then appeared to give significant weight to the Council narrative in both of its decisions. Not one of the four CRU affidavits was referred to in either of the Court's decisions. Indeed, CRU was left in some doubt that the Court had read its affidavits.

24. This is not a judicial review application. Nevertheless, it is axiomatic that if an understanding of factual context is an important aspect of the determination, then it should be a balanced context.

25. Three contextual matters are particularly important:

    a. What the Council did is not what it had resolved to do in 2014. It knew the correct course of action, adopted it, and then did something different.
    b. The Council did not know, until mid 2016, which ODP provisions it intended to remain in force following the 2014 withdrawals from the PDP. Its decision to notify (as an information notice) what it thought those provisions were was purely a response to the CRU proceeding - without the proceeding there would have been no such advice.
    c. There was no contemporaneous analysis of the effect of the PDP withdrawals in terms of the scope of Clause 8D - but every indication that the Council's view was that the power of withdrawal was unlimited.

26. Each of these three matters, and its significance to interpretation, is now briefly discussed.

The Council chose the right course and then did something else.

27. The Council resolution of 24 July 2014 could not be more specific. Having commissioned an expert review of the PDP, and having commited to accepting the recommendations of that review, it resolved:

    4. The Council resolve to withdraw from the PDP the coastal hazard

management areas on the plan maps along with the associated policy section and rules, and clarify the parts of the operative district plan which provide stop-gap coverage relating to coastal hazards.
5. The Council develop an implementation plan to progress work on the coastal erosion hazard assessment, and other aspects of coastal hazard management. The implementation should build on the work already done and incorporate adequate and appropriate communication and consultation provisions, including a role for an advisory group as described in section 6.4 of this report.
6. At an appropriate time (or times) the Council proceeds with a variation (or variations) to include suitable and relevant policy, methods and rules in the PDP to address the district's coastal hazards in accordance with the NZCPS, the RPS and best practice;

28. The Council accepts that it has not implemented items 5 and 6 of the resolution and has no timetable for doing so. It did not implement the second part of item 4 - the 'stop gap' ODP provisions - for over 2 years. What it proposes instead is a future change to the ODP which will then be the completed PDP together with remaining 'old' ODP provisions. In doing so, it assumes both that at that stage the current ODP will still exist, and that the provisions it will be changing are easily identifiable. In answer to the criticism that this approach its contrary to its own resolution it points to another component of the resolution:

> 62 That the Council endorse the Option 4 Implementation Plan (Attachment 6 to Report SP-14-1253) and staff update the Regulatory Management Committee and Te Whakaminenga o Kāpiti (TWOK).

29. The Implementation Plan referred to in this part of the resolution was an attachment to the officers' report headed 'draft indicative option 4 timeline', and shows, during 2018-2019 a 'Proposed Coastal Plan Change as per Schedule One process (2 year process)'.

30. As Moody says in her affidavit (para 21 CB96): 'I assume that the person preparing the timeline did not appreciate the distinction between a variation and a change'.

31. It is even less clear that the Council itself appreciated either the built in contradiction, or that the officers would proceed to disregard the variation resolution recommended by the PDP Panel in favour of an obscure 'indicative timeline' which itself was probably based on a misunderstanding. If it was not a misunderstanding, the only other conclusion is that the Council was deliberately asked by its officers to make inconsistent decisions.

32. The Court's interim decision at [7] records '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." (CB11 emphasis added). This latter intention did not come to CRU's attention until mid 2016, and if the resolutions of 24 July 2014 were the first step in this communication programme then the words "clear" and "consistent" are not the ones that spring to mind.

33. There is certainly no evidence of any such confusion in the report of the PDP Panel. They did not recommend a change to the ODP, but rather variation to the PDP. On the contrary at Section 5.3 of their report they say (CB495):

> We do not consider that any option which involved modifications or changes to the operative District Plan would result in a 'good practice' second generation district plan.

34. Again, discussing the PDP Panel's report, Moody notes (para.25 CB97) both its rationale for a variation and need for urgency and the significance of the issue to all the submitters (Section 5.5 CB502) - including the several hundred whose submissions on the issue would simply be extinguished upon the withdrawals.

35. The importance of this factor to the questions of interpretation, particularly under Declaration 1, is highlighted by the Court's statements in the Interim decision

> [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 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.

36. The final sentence in the paragraphs quoted above illustrate the difficulty the Court created by not taking a balanced view of the factual context. The *'efficient and practicable alternative'* had been identified at the outset. There was no evidence (nor any real basis for concluding) that the alternative of notifying the ODP provisions, updated as necessary, (as variations to the PDP) is either inefficient or impracticable. This was a very important, even determinative, factual finding by the Court which lacked evidential support.

37. As for the dichotomy of 'getting it right' or 'getting it quick', the Court implicitly saw this as an entirely Council issue. In other words, 'getting it right' within the context of a 10 year review cycle was not recognised as an issue of sufficient importance to affected people to consider whether the policy of the RMA favours giving them an opportunity to have a say on the proposals until the Council proposes some new alternatives, perhaps years down the track.

38. A concluding point on the Council's approach is the statement made by the Council's district plan Manager:

> While there may have been a full district plan review commenced, the Council is not now advancing a full replacement plan. As is the case in Wellington City which has taken a rolling review approach, the district plan can be made up of different components approved at different times. (Moody Reply Affidavit Ex3 CB141)

39. The use of 'may' is unfortunate if it indicates some doubt on the point: but there was no doubt at all in the intention expressed in the Council's public

notice (CB442). Nor is there any acknowledgment that Wellington City's approach had been consistent with its notice and its resolutions.

40. The Court was dismissive of the CRU argument that the transition from a publicly notified full review to a more limited one required, at the very least (assuming it was even possible), some notice under Schedule 1

> [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.

Failure to identify ODP provisions

41. it is clear that the Council did not know just which ODP provisions or part provisions it intended should remain in force by default - ie as a simple consequence of withdrawing provisions from the PDP.

42. Prior to the withdrawals from the PDP, on 10 September 2014, the Council's planning consultant advised 'It would be appropriate on the KCDC website to note specifically which objectives, policies and rules from the operative district plan will apply in terms of coastal hazards and hazardous facilities to provide additional guidance' (Moody Reply Affidavit ex5 CB150). This was not done.

43. Allin's affidavit (para.171 CB71) records that she asked the Council in January 2016 that *'if it is anticipated that the operative Plan provisions will continue to apply in relation to coastal hazards and mitigation activities once the PDP is operative, could you please let us know at your earliest convenience what precisely are those provisions (objectives, policies and rules)*'. The response (Allin paras.172-177CB71-72) which referred her to the Council website was not helpful (and, as it transpired, not accurate). She notes that in March 2016 the initial report by the Council to the hearings panel under section 42A (Allin para.184 CB72) advised that the Council *'was still considering which provisions contained in the ODP relating to coastal hazards will remain in force...*'. It was not until 13 July 2016 that a Council section 42A overview report considered the issue:

> The withdrawn parts of the PDP were notified to the public but, as far as I am aware, no attempt was made in 2014 to define the ODP provisions which would remain in force. In March 2016 the Council prepared an internal draft of the likely provisions. I used this as a starting point for my own review which is now attached as Appendix One of the Section 42A coastal overview report.

44. Moody tabulates discrepancies between the Council's public notice of 25 October 2016 and the Council's section 42A report of June 2016 (Reply Affidavit Ex.2 CB137).

45. The brief, and undisputed, point is that there is no certainty on which ODP provisions will apply. The Council's public notice of 25 October has no statutory status. It is obviously an issue on which Council's own planners could not agree. And it is obviously an issue on which other persons could disagree, and Council could change its own mind.

Failure to assess consequences of withdrawal

46. When CRU asked Council, by way of an official information request, for all information on the contemporaneous analysis of the effect of its withdrawals, it received only a single document. This document is exhibit 5 to Moody's Reply affidavit CB147-150. Though there are no identifying details on the face of the document, Council confirmed that it was dated 10 September 2014 and prepared by Carolyn Wratt, Principal Policy Planner, MWH Ltd.

47. The document does not refer to the existence of any constraints on the use of Clause 8D. Neither does any of the advice given to the Council for the purposes of its decision making.

48. Instead, when the CRU application was made, Council embarked on a retrospective assessment of the limited number of provisions nominated by CRU as clearly invalid instances in compliance with the Court's direction.

49. The central thrust of Council's assessment of these instances was that expert planning evidence was required to evaluate whether specific provision withdrawals had any effect on the remainder of the PDP and if so whether any such effect was minor. Whilst the Court rejected the Council's approach favoured by its planning witnesses Thomson, Julyan and Stevenson, it also rejected implicitly a 'bright line' argument advanced by CRU that once there was <u>any</u> alteration to the effect of a remaining PDP provision, then the withdrawal process had to be made by variation rather than under Clause 8D.

50. The difficulty arising is the 'retrofitting' of an assessment which needed to be done and tested at the outset, and still has not been done.

Statutory Context

51. This appeal concerns interpretation of provisions in the Resource Management Act 1991 ('RMA'). The Interpretation Act 1999 is relevant.

52. The relevant RMA provisions were not amended during the relevant period - 2012 to 2016. In 2017 the Resource Legislation Amendment Act amended section 79 but these amendments do not affect the issues in this appeal.

53. In considering the 'light of [the] purpose' of section 79 and Clause 8D it is necessary to consider the context in which they arise. That, in turn, requires reference to general provisions within the Act - its purpose, the nature of land use controls, the Council's functions, and its obligation to have a district plan.

The Resource Management Act 1991

54. The RMA commenced on 1 October 1991. Its long title is:

An Act to restate and reform the law relating to the use of land, air, and water

55. With the passage of time, and the great number of amendments to the RMA, it is more difficult to identify whether a particular provision was a restatement or a reform of earlier law, or both. It suffices to note, first, that the two provisions at the heart of this appeal - section 79 and clause 8D Schedule 1 - both had similar antecedents in the Town and Country Planning Act 1977; and second, that these provisions also apply to a range of plans and policy statements at regional and national level which had no direct antecedents.

The purpose of the RMA

56. The purpose of the Act is stated in section 5:

> **5 Purpose**
> (1) The purpose of this Act is to promote the sustainable management of natural and physical resources.
> (2) In this Act, **sustainable management** means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while—
> (a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
> (b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
> (c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.

57. The definition in section 5(2) has been the subject of extensive judicial consideration, and of academic and professional commentary, some of which will be referred to below. It remains as it was when enacted in 1991.

58. In most contexts within the RMA, section 5 is bundled with other provisions of Part 2 - sections 6-8. Sections 6-8 are matters which decision makers must 'recognise and provide for', 'have particular regard to', or 'take into account'. Sections 6-8 do not assist with the issues of interpretation in this appeal.

Restrictions on the use of land

59. A key point of distinction between district plans (which are mandatory) and regional plans (which, save for the coastal marine area, are not) is that the former are largely concerned with the management of land based activities, which are restricted *only* to the extent that the district plan rules restrict them. By contrast, the natural resources (water, air and some land) managed by regional councils are generally all restricted by statute and cannot be undertaken without consent, unless a regional plan rule provides otherwise.

60. This distinction is relevant, for Declaration 2, to the High Court's approach in the *West Coast* case where the Court noted that the withdrawal of proposed regional plan's wetland provisions simply left wetlands to be managed, as they always had been, under the provisions of the Act - sections 13 and 14.

61. Section 9 is relevant to all the PDP provisions which the Council has withdrawn, and to all those ODP provisions which it intends to remain in effect. Only subs.(3) is presently relevant:

> **9 Restrictions on use of land**
>
> (3) No person may use land in a manner that contravenes a district rule unless the use—
>
> (a) is expressly allowed by a resource consent; or
> (b) is allowed by section 10; or
> (c) is an activity allowed by section 10A.

62. The trigger for a restriction on the use of land (and thus the need for a resource consent to allow a particular use) is whether that use would contravene a 'district rule'. 'District rule' is defined in section 43AAB(1):

> In this Act, unless the context otherwise requires, **district rule** means a rule made as part of a district plan or proposed district plan in accordance with section 76.

63. It should also be noted that, in relation to district rules, section 76(2) provides:

> Every such rule shall have the force and effect of a regulation in force under this Act but, to the extent that any such rule is inconsistent with any such regulation, the regulation shall prevail.

Functional responsibility of Council

64. The council's functional responsibilities under RMA are listed in section 31:

> **31 Functions of territorial authorities under this Act**
>
> (1) Every territorial authority shall have the following functions for the purpose of giving effect to this Act in its district:
> (a) the establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the effects of the use, development, or protection of land and associated natural and physical resources of the district:
> [(aa) omitted - not in force until 2017]
> (b) the control of any actual or potential effects of the use, development, or protection of land, including for the purpose of—
> (i) the avoidance or mitigation of natural hazards; and
> (ii) *the prevention or mitigation of any adverse effects of the storage, use, disposal, or transportation of hazardous substances;* (now repealed) and
> (iia) the prevention or mitigation of any adverse effects of the development, subdivision, or use of contaminated land:
> (iii) the maintenance of indigenous biological diversity:
> [(c) repealed, (d)-(f) not presently relevant]
>
> (2) The methods used to carry out any functions under subsection (1) may include the control of subdivision.

65. The version of section 31 set out above applied at 2016 but (b)(ii), though in force when the PDP was prepared, was repealed in 2017. The significance of

the latter (which will be returned to below) is that the Council withdrawal of PDP provisions in 2014 included all the hazardous substances provisions.

Requirements for plans

66. The purpose of a district plan is stated in section 72:

> **72 Purpose of district plans**
> The purpose of the preparation, implementation, and administration of district plans is to assist territorial authorities to carry out their functions in order to achieve the purpose of this Act.

67. The Council is required to have a district plan:

> **73 Preparation and change of district plans**
> (1) There must at all times be 1 district plan for each district, prepared in the manner set out in the relevant Part of Schedule 1
> (1A) A district plan may be changed in the manner set out in the relevant Part of Schedule 1.
> (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 Part 2 or 5 of Schedule 1.
> (3) A district plan may be prepared in territorial sections.
> [(1B), (2A), (4) and (5) omitted]

68. A number of relevant words and terms are defined in sections 43AA, 43AAB and 43AAC as they were at the relevant time (those definitions which relate only to policy statements and regional plans have been omitted):

> **43AA Interpretation**
> **In this Act, unless the context requires another meaning,—**
> ***change*** means—
> (a) a change proposed by a local authority to a policy statement or plan under clause 2 of Schedule 1; and
> (b) a change proposed by any person to a policy statement or plan by a request under clause 21 of Schedule 1
> ***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)
> ***operative***, in relation to a policy statement or plan, or a provision of a policy statement or plan, means that the policy statement, plan, or provision—
> (a) has become operative—
> (i) in terms of clause 20 of Schedule 1; or
> (ii) under section 86F; and
> (b) has not ceased to be operative
> ***plan*** means a regional plan or a district plan
> ***policy statement*** means a regional policy statement
> ***rule*** means a district rule or a regional rule
> ***variation*** means an alteration by a local authority under clause 16A of Schedule 1 to—

(a) a proposed policy statement or plan; or
(b) a change.

43AAB Meaning of district rule and regional rule

(1) In this Act, unless the context otherwise requires, ***district rule*** means a rule made as part of a district plan or proposed district plan in accordance with section 76.

(2) Subsection (1) is subject to section 86B and clause 10(5) of Schedule 1.

43AAC Meaning of proposed plan

(1) In this Act, unless the context otherwise requires, **proposed plan**—

(a) means a proposed plan, a variation to a proposed plan or change, or a change to a plan proposed by a local authority that has been notified under clause 5 of Schedule 1 but has not become operative in terms of clause 20 of that schedule; and

(b) includes a proposed plan or a change to a plan proposed by a person under Part 2 of Schedule 1 that has been adopted by the local authority under clause 25(2)(a) of Schedule 1.

(2) Subsection (1) is subject to section 86B and clause 10(5) of Schedule 1.

(Section 43AAC(1)(a) was amended by the Resource Legislation Amendment Act 2017 to include any proposed plan notified on limited basis under new Clause 5A of Schedule 1: it appears that this provision could apply to any future variation to the proposed district plan - new Clause 13(2) of Schedule 12).

69. Sections 74, 75 and 76-77D are, respectively, provisions as matters to be considered in preparing district plan (s.74), its contents (s.75), and general and specific provisions on rules in a plan (ss.76-77D). These provisions do not assist the resolution of the interpretation issues in this appeal.

70. These provisions do however provide an important point of emphasis. Subject to addressing its functional responsibilities, and to the requirements to 'give effect to' national and regional policy statements, and to 'not be inconsistent with' or to 'have regard to' other plans, any Council has very broad choice as to the structure and contents of its district plan. There is no template, and one Council's plan may vary markedly in structure and content from that in a neighbouring district. Moreover a Council may propose (as it did in this case) a new plan which is significantly different from its existing one.

71. Until recently this diversity has been regarded as reflecting the diversity of people and communities and environmental factors in section 5(2). Although there has been a move (in the 2017 amendment) to introduce some homogeneity in the form of national planning standards, none yet exist.

Requirement for review of plans

72. Section 79 is the key provision for Declaration 1. Prior to the 2017 amendment it was:

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.

(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. This version of section 79 was in force from 2009 to its amendment this year. Prior to the 2009 amendment, the review obligation was less flexible, and section 79(2) required that:

> (2) Every territorial authority shall commence a full review of its district plan not later than 10 years after the plan became operative.

74. This was the provision in force at the time the Council commenced its review in 2008. The 2009 amendment allowed it to consider a more limited review, but the Council decided to proceed with a full review under section 79(4) and the proposed district plan was notified on that basis in November 2012.

Schedule 1 General process

75. Schedule 1 contains provisions on the process for preparing new plans and plan changes - from initial consultation, to notification, submissions, hearing,

decisions, alterations and amendments, and final approval. For present purposes all relevant provisions are in Part 1 of Schedule 1.

76. The provisions do not need to be set out in full, but their essence (prior to the 2017 amendment) can be described as follows:

- the process of alteration required by section 79(6) begins with the preparation by the Council of a proposed plan
- there are then a number of mandatory consultation steps
- the proposed plan is then publicly notified by the Council, and that notice must set a closing date for submissions on the proposed plan
- any person may make a submission
- the Council must notify a list of decisions requested by submissions, and that notice must set a closing date for further submissions
- specified persons may make further submissions
- the Council must hear submissions and make decisions on them (or make recommendations where submissions relate to proposed designations).
- the Council must notify its decisions
- any person who made a submission may appeal to the Environment Court in respect of any provision if that provision was identified in the submission

Schedule 1: withdrawal or variation of proposed plan

77. Schedule 1 Clause 8D is as follows:

> **8D Withdrawal of proposed policy statements and plans**
> (1) Where a local authority has initiated the preparation of a policy statement or plan, the local authority may withdraw its proposal to prepare, change, or vary the policy statement or plan at any time—
> (a) if an appeal has not been made to the Environment Court under clause 14, or the appeal has been withdrawn, before the policy statement or plan is approved by the local authority; or
> (b) if an appeal has been made to the Environment Court, before the Environment Court hearing commences.
> (2) The local authority shall give public notice of any withdrawal under subclause (1), including the reasons for the withdrawal.

78. Clause 8D was inserted in 1993. Before then, withdrawals were authorised by section 78. The only significant difference between section 78 and clause 8D is that the latter is restricted to the withdrawal of Council initiated proposals. (A proposal initiated by another person may be withdrawn under clause 28).

79. Schedule 1 Clauses 16A and 16B (again at 2016) deal with variations:

> **16A Variation of proposed policy statement or plan**
> (1) A local authority may initiate variations (being alterations other than those under clause 16) to a proposed policy statement or plan, or to a change, at any time before the approval of the policy statement or plan.

(2) The provisions of this schedule, with all necessary modifications, shall apply to every variation as if it were a change.

16B Merger with proposed policy statement or plan

(1) Every variation initiated under clause 16A shall be merged in and become part of the proposed policy statement or plan as soon as the variation and the proposed policy statement or plan are both at the same procedural stage; but where the variation includes a provision to be substituted for a provision in the proposed policy statement or plan against which a submission or an appeal has been lodged, that submission or appeal shall be deemed to be a submission or appeal against the variation.

(2) From the date of notification of a variation, the proposed policy statement or proposed plan shall have effect as if it had been so varied.

Declarations

80. The relevant parts of section 310 are set out below:

310 Scope and effect of declaration

A declaration may declare—

(a) the existence or extent of any function, power, right, or duty under this Act, including (but, except as expressly provided, without limitation)—

[...]

(h) any other issue or matter relating to the interpretation, administration, and enforcement of this Act, except for an issue as to whether any of sections 95 to 95G have been, or will be contravened.

81. Any person may apply to the Environment Court for a declaration (s.311). That Court may make the declaration sought with or without modification, or make another 'necessary or desirable' declaration, or decline to make a declaration (s.313).

82. The High Court's powers on appeal are contained in Rule 20.19.

Declaration 1 analysis

83. As submitted in the overview to these submissions there are 2 'pathways' to the conclusion expressed in the declaration. For each of these pathways the underlying proposition(s) will be set out, followed by the parties' respective positions and the Court's approach, and then an overall analysis.

First approach: The ODP extinguished by the adoption of a full review PDP

84. As noted in the overview of these submissions (para.18 above) the propositions in Declaration 1 can be stated as follows.

85. Where the Council has undertaken a full review under section 79(4), and has then, in accordance with section 79(6), notified a full proposed district plan

under Schedule 1, any subsequent decision to retain operative district plan provisions can only be effected by variation to that notified proposed plan.

86. Once a PDP, notified as a full replacement plan, is approved, with any amendments made following the consideration of submissions, the operative plan ceases to have effect.

87. The withdrawal of provisions from the PDP under Clause 8D does not affect this. In particular, the withdrawal of provisions from the PDP under Clause 8D cannot, of itself, result in relevant ODP antecedents to those provisions remaining in force. If the PDP is proposed as a full replacement plan, then that is what it remains.

88. If the Council withdraws any PDP provisions under clause 8D, and also wishes (consequentially) to retain some ODP provisions, it must follow the prescribed Schedule 1 process which is a variation to the PDP. If it does not wish to retain any existing ODP provisions it need do nothing further. (Two, presently irrelevant, exceptions can be noted: the entire PDP could be withdrawn, and new PDP notified; or the Council could replace PDP provisions with ODP provisions if this decision is requested by a submission on the PDP).

The CRU position

89. These consequences of a full review noted above flow directly from the Act and are entirely consistent with its evident purpose - they do not require any purposive refinement or augmentation.

90. The contrary view - that withdrawal automatically causes antecedent provisions to remain in force - has no statutory foundation.

91. If a Council wishes to retain existing ODP provisions to 'cover' withdrawals from the PDP, then the Schedule 1 process provides for variation to the PDP. Under a variation, the existing provisions can be brought into the PDP, whether on an expressly transitional or open ended basis. The Council accepts this, but prefers to argue that the same outcome can be achieved under a withdrawal process which does not allow any affected persons to make or continue submissions.

92. And far from being consistent with any evident statutory purpose, it is more likely to lead to exclusionary, inconsistent, and even perverse results which are contrary to the statutory purpose.

The Council position

93. The essence of Council's position is taken from its counsel's submissions to the Environment Court.

94. The RMA does not expressly answer the present question which he formulated as *'the ongoing status of the ODP provisions covering the same topics as the withdrawn provisions*'.

95. Council agrees that it undertook a full review under section 79(4), and that it notified a full replacement plan, and that the ODP must continue in force until the new PDP becomes operative.

96. Council says that it is entitled to withdraw parts of the notified PDP under Clause 8D.

97. Council says that in this 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*'.

98. Counsel's argument is contained at para.24 of his submissions:

> *It cannot have been Parliament's intention that, in the scenario outlined above, all provisions in the ODP would be rendered inoperative on the coming into force of what would only be a partial new plan. In other words, it cannot have been the intention to create a regulatory gap, merely because the process commenced with a full review and a full replacement plan. That approach would not give recognition to the statutory power to withdraw part of a proposed plan.*

The Court's decision

99. The Court's decision on this point is, contained in para. [30]:

> [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.

Analysis

100. It is accepted by the Council, and at least implicitly by the Court, that where a replacement plan is notified following a full review, that replacement plan will, when the Schedule 1 process is finished, replace the existing ODP which will then cease to have any effect.

101. However the Council argues, and the Court accepted, that where the Council withdraws part of its replacement plan under Clause 8D, then that withdrawal has the following automatic consequences:

- if the provision withdrawn has no relevant antecedents in the ODP, then the replacement plan remains a full replacement plan; but
- if the provision withdrawn does have a relevant antecedent in the ODP, then the ODP will remain in force to that extent, and the replacement plan will only be a 'partial new plan';
- in either case the submissions on the withdrawn provisions are nugatory;
- and there is no opportunity for public submission on the 'reinstatement' of the ODP provisions

102. There are great difficulties with this approach. It is internally inconsistent, uncertain in its effect, and contrary to the evident purpose of the Act. Each of these is now discussed.

Internal inconsistencies

103. The internal inconsistencies are illustrated by the Council's own withdrawn provisions which fall into three distinct categories:

- coastal hazard provisions (and part provisions)
- hazardous substances provisions
- priority areas for restoration

104. The coastal hazard provisions have some relevant ODP provisions, but there was evidently significant difficulty in identifying them, and some potentially significant disagreement (within Council) on what they are. They would include ODP objectives, policies, rules, maps and definitions (assuming for the moment that the ODP explanatory texts would fall away). But, as noted in the PDP Panels' report (Section 6.4 CB509-510) these provisions may have multiple purposes - ie they are not solely directed to the management of coastal hazards. It is even less clear, as noted in Declaration 2, just how these provisions would integrate with those remaining in the PDP.

105. The hazardous substances provisions have relevant ODP provisions which are easy to identify (being a separate and limited topic). They were withdrawn because, as the PDP Panel noted, they are no longer necessary following the completion of the regulations and standards under the Hazardous Substances and New Organisms Act. Moreover, as noted at para.65 above, section 31 has now been amended to remove this as a functional responsibility of territorial authorities. The ODP provisions are thus a dead letter, and the consequence of a PDP withdrawal retaining those ODP provisions would make no sense.

106. The priority area for restoration provisions did not, in the Council's view, have any relevant ODP provisions, though the documentary evidence to support this is sparse. The Council's view is that the withdrawal of these provisions does not have the consequence of retaining any ODP provisions.

107. If a statutory consequence is to be assumed, in order to give effect to a clear statutory purpose, it should be characterised by consistency and internal logic.

108. The outcome of this approach is thus selective. Following a partial withdrawal, without any notification or public engagement, the Council can choose which, if any, ODP provisions continue to apply. But that choice has no particular statutory effect. That leads to the difficulty of uncertainty.

Uncertainty

109. It is, or should be, axiomatic that constraints on the use of land, which may have a profound effect on people subject to them, should have a high degree of certainty.

110. As messy as it is, the position here in relation to ODP coastal hazard provisions by no means represents the worst potential outcome in terms of certainty, if this Council view were to be applied in every instance of withdrawal. Broad applicability must be a consequence of any judicial ruling on the effect of withdrawal.

111. The Court's approach is the antithesis of certainty. The outcome depends entirely on the selection, definition and administrative application of provisions by the Council, with no public engagement, and no practical avenue to resolve disputes or uncertainties in real time. (The concession of uncertainty is made by Council's Counsel at p.45 l.15-27 Transcript CB384)

The purpose of the Act

112. The requirement to publicly notify plans and policies has been a constant since the RMA was enacted. Similar requirements existed under the statutory antecedents. Delivering the Salmon lecture in 2013, the Chief Justice[1] referred to this statutory history in passages which contain a number of presently relevant points:

> Decisions about the environment they live in affect people directly in a number of ways. Regulation of the use of land directly affects property interests, both the land in issue and neighbouring land. Early planning statutes in all jurisdictions faced deep hostility, and were strictly supervised for legality by the courts, because they were seen to tend to expropriation of property interests. That is why close attention has always been paid to the criteria and standards by which discretion is conferred and by which it is exercised, in order that such regulation is predictable and the use of discretionary power can be explained.
>
> The right of the community to impose restrictions on landowners in the wider public interest became accepted in part because there was wide public participation provided for in the subordinate legislative activity of establishing plans. That process bought democratic legitimacy.

[1] The Rt Hon Dame Sian Elias, GNZM, Chief Justice of New Zealand: "Righting Environmental Justice"

113. In contrast to the notification provisions under Part 6 (for resource consent applications), plan notification does not presently involve concepts of limited or non-notification, or any requirement to assess the effects of proposed plans on individuals.

114. Even the most simple or spatially limited proposal to change a plan, whether from the relevant Council, or a 'private' person, must be publicly notified. Anyone, anywhere, may then make a submission on the proposal, is entitled to be heard on that submission, and may appeal against a decision on that submission. This participatory process, under which a plan is proposed, evaluated against submissions, and adopted, underpins its legitimacy.

115. In *Westfield (New Zealand) Limited v North Shore City Council* [2005] 2 NZLR 597 the Supreme Court said:

> [10] The district plan is key to the Act's purpose of enabling "people and communities to provide for their social, economic, and cultural well being". It is arrived at through a participatory process, including through appeal to the Environment Court. The plan has legislative status. People and communities can order their lives under it with some assurance. A local authority is required by s 84 of the Act to observe and enforce the observance of the policy statement or plan adopted by it. A district plan is a frame within which resource consent has to be assessed. (Elias CJ)
> and
> [46] The purposes of those public participatory processes are twofold – first, to recognise and protect as appropriate the particular rights and interests of those affected and more general public interests and, second, to enhance the quality of the decision making. (Keith J)

116. These points and the supporting authorities are well summarised by Catherine Nolan[2]:

> 'Public participation is an integral element of the RMA. The proposition that increased public involvement in resource management processes results in more informed decision making, and ultimately better environmental outcomes, has been described as a 'founding principle' of the RMA by the Court of Appeal in *Murray v Whakatane District Council*. Similarly in the High Court decision of *Ports of Auckland Ltd v Auckland Regional Council* the 'whole thrust' of the RMA was described as favouring interested parties having an input into the decision-making process. The RMA affords a wide scope for public involvement, and a right of participation is available at many stages in the processes it governs. The statutory provisions help to ensure that the ordinary citizen, 'Joe and Josephine Bloggs ... can communicate their views on important matters that affect them and the world around them'. The centrality of this participation is such that the RMA cannot effectively work without it, as it resides at the very heart of its structure and philosophy'. (footnotes omitted)

117. A decade later, in *Environmental Defence Society v The New Zealand King Salmon Company Ltd* [2014] NZSC 38, the Court returned to the theme,

[2] Affected Persons Under The Resource Management Act 1991: *Canterbury Law Review* [Vol13, 2007]

identifying three features of the RMA's hierarchy of plans and policies. It characterised the third feature thus:

> [15] Third, the RMA requires that the various planning documents be prepared through structured processes that provide considerable opportunities for public consultation. Open processes and opportunities for public input were obviously seen as important values by the RMA's framers.

118. In this analysis, the question of participation is not an issue of mere process, or a bundle of technical requirements which can be ignored or waived, or discarded or postponed because it is not convenient, or done away with for the sake of alleged pragmatism. It is central to the achievement of the purpose of the RMA.

119. It is an obvious point, but the core purpose of the RMA is to enable people and communities - rather than local authorities - to make provision for their well being. Local authorities are given the functions and obligations to manage resources and to propose and make policies and plans, but in a real sense they exercise those powers not only on behalf of, but subject to the oversight of, their people and communities. Public notification and participation are core parts of statutory planning under the RMA. The idea that, for something as fundamentally important as a new plan, notification is purely indicative and subject to change without notice jars with this purpose.

120. All these submissions were made to the Environment Court.

121. Regrettably neither of the Court's decisions contain any references to these submissions, nor to the authorities referred to in them, nor to most of the key provisions referred to in paras.55-72 above as the statutory context.

122. Instead, in relation to Declaration 1, the Court assessed the issues in a much more limited way. Having identified (at [7]) the Council contention that the ODP provisions will continue to apply, and recorded (at [12] question 4) the current issue as to whether or how this can happen, the Court concluded (at 30]) that the answer was provided by applying sections 73 and 43AA.

123. With respect, this reasoning is not only entirely circular, but misses the issue. There is no doubt that (under s.73) there must always be a district plan (as defined in s.43AA). But there is simply no semantic or logical basis under which these two sections also mean that the district plan must always contain specific provisions.

124. Within the framework established by Part 2 (purpose and principles), section 31 (functions) and sections 74 -76 (which deal with the contents of district plans) a territorial Council may choose what to include and what not to include in its plan.

125. The Council notified the PDP as a full replacement plan which, when completed, will become the operative plan under section 73. Assuming (contrary to Declaration 2) that Clause 8D allows the Council to withdraw provisions from the PDP in the way it did, there might be any number of reasons for doing so. The provisions might be redundant, contradictory, uncertain, *ultra vires,* unsupported by adequate evidence, or just belatedly recognised as a bad idea.

126. It would be perverse if the consequence of a withdrawal then necessarily entailed a search for some relevant antecedent provision, or, still more so, a search for a fragment of such a provision. Keeping such a provision, or a fragment of one, 'alive' might (and almost certainly would) have unintended and unpredictable consequences not just for the balance of the PDP, but more importantly for the people affected who were entitled to believe that the provision was being replaced.

127. The Council's submission that Parliament cannot have intended a 'regulatory gap' where a provision ceases to be operative is easily answered. There is no regulatory gap. If, in these circumstances, the Council wants to continue a currently operative provision it can notify a variation to the PDP under which the withdrawn provision is replaced by the existing one. That is the statutory mechanism for dealing with any gap caused by a withdrawal.

128. And that, of course, is precisely what the Council resolved to do in 2014.

129. The notification of a variation to include specified (and currently operative) provisions within the PDP to replace those withdrawn is a simple process which could, and should, have been completed long ago. It could have been advanced expressly on a transitional basis (with a sunset provision if necessary) to be further reviewed when the scientific and Government policy guidance that the Council hopes for becomes available.

130. We do not have the benefit of any reason for the Council's abandonment of its 2014 decision. It has not provided one (and the Court which was relentlessly insistent on examining CRU's motivation was disinclined to ask).

131. However there is a simple and unavoidable reason for the Council's position. It does not want to engage in any public process on the coastal issue. The very reason it is a difficult issue is that a large community of people is affected by any decision. And that, it might be thought, is the very reason why there should be a public process.

132. A Schedule 1 public notification of any coastal provisions, even on an expressly interim basis, would result in the need to consider submissions on amendments and improvements to those provisions. That is exactly the outcome the Council wishes to avoid. It is a purely political decision which lacks any apparent resource management basis.

133. Whatever the broader merits of the Council's position, particularly in terms of efficiently using its own resources, the arguments advanced on its behalf on this issue are a textbook case of making a decision and working backwards to identify a legal basis for it.

134. The Court's examination of statutory purpose was far too limited, and to some extent appears to have been constrained by its limited view of the factual context in which the issues arose. The transcript at pages 40-42 (CB379-381) indicates that the Court was concerned at the consequences of a variation for the Council. Somewhat inevitably then, its decisions have far more emphasis on 'fitting' the statutory provisions to the purposes of the Council rather than to those of the legislation itself.

Second approach: if the outcome of a full review under section 79 is the retention of ODP provisions, then section 79 requires that those provisions must be notified under Schedule 1.

135. As noted above, section 79 provides two options for the review of district plan provisions:
    - either the Council can review those provisions which are due for review
    - or it can review the whole district plan, in which case it must review every provision in it.

136. Which ever option is chosen by the Council, there is an obligation to notify altered or unchanged provisions, or an altered or unchanged plan. Clearly the Council undertook a full review of the district plan and then notified a proposed new district plan. The public notice under Clause 5 Schedule 1 stated that the proposed district plan:

> *amends, and when made operative will replace, the objectives, policies, rules and standards, maps and appendices of the operative 1999 District Plan.*

137. The same point was repeated in the public notice (also under Clause 5) extending the time for making submissions on the coastal provisions of the PDP.

138. The public notice of the withdrawal of provisions under Clause 8D Schedule 1 made no reference to any consequential change to the ambit of the Clause 5 notices.

139. The Council has, during these proceedings, asserted that the review is no longer a full one and that the PDP is only a partial new plan. Those positions are directly contrary to the public notice it gave, and begs the question as to how this change of scope can be achieved.

140. Assuming that the Council could, under section 79, transition from a notified full review and replacement to a partial replacement of the operative district plan, one would expect a clear process to enable this.

141. The only process provided by Schedule 1 to effect such a change in scope is under Clause 16A which allows the Council to initiate a 'variation' to the PDP (defined in s.42AA as an 'alteration'). A key aspect of the variation process for people who have made submissions on the original PDP proposals is that Clause 16B keeps those submissions 'live' where they relate to original provisions which are to be 'substituted' for new provisions under the variation. By contrast, of course, the Council's withdrawals simply extinguished the relevant submissions.

142. Alternatively, the Council could withdraw the entire PDP under Clause 8D and then renotify a more 'limited' set of alterations to the operative plan under Clause 5.

143. Either way, the people and communities affected are notified, and then able to make submissions on the new proposal.

144. In the context of a full review, the continuation of operative provisions after the completion of the review, without any notification would *prima facie* appear strongly inconsistent with the purpose of the Act.

145. That is the reason that CRU argued that section 79 applies to any decision to retain an operative provision.

146. Whichever review option is chosen (full or partial), the intent of section 79 is that a review which results in a decision to retain an operative provision requires that provision to be notified under Schedule 1 (see section 79(3) and (7)).

147. The Council's argument, tacitly accepted by the Court, is that no such notification is required because it did not conclude that the provision could remain without change. In other words it is free to continue, indefinitely, an operative provision because it thinks that the provision does require alteration.

148. CRU pointed to the obvious mismatch between what the Council says ('the provision cannot remain without alteration') and what it is doing (maintaining the provision without change for the indefinite future).

149. It is noted here that 'indefinite' is used in a literal rather than a pejorative sense. The Council acknowledges that the provisions it wishes to retain are completely out of date and need changing, but it will not propose any changes to them until much firmer guidance is provided by central and regional policies, and until a better level of scientific analysis is available (and this has not been commissioned). It thought that a change could be proposed in 4 years (ie by 2020) but that timing is subject to higher level decision making. The time could thus be longer, but it will not be shorter. It is therefore indefinite.

150. What cannot be undone is the fact that the Council did review the full ODP, including its coastal provisions, and concluded that the alterations notified in the PDP were appropriate. It is then allowed to change its mind, either by variation of specific parts of the PDP, or (subject to constraints discussed in Declaration 2) by withdrawal of some or all parts of the PDP. But where the change of mind is accompanied by an intention to maintain ODP provisions, it needs to be understood that this could only have been achieved at the outset by notifying them.

151. The Court's reasoning on this position is not conceptually clear. It expresses a number of conclusions as follows.

152. First, the Court regards the obligation to review under section 79 as separate from the obligation to notify under Schedule 1:

> [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.

153. With respect, if there is a conflation it is within section 79 itself. Section 79 cannot be read without understanding the obligations to notify something as a step in the review. The Court has effectively treated a 'review' (a term which

he notes is undefined) as purely limited to an evaluative exercise under section 79(1) or (4). On that view, the rest of section 79 is a 'separate process'. This uncoupling of the obligation to begin to review every provision every 10 years from the further obligations in the same section to complete that review by notifying something, is not only quite artificial, but pointless.

154. In the same way, a plan begins with the preparatory work, followed by consultation, notification, submissions, hearings and decisions, appeals and then, finally, appeals. These are all distinct procedural steps under Schedule 1 but it would be artificial to regard them as conceptually separate from the requirement, in section 73(1), to have a district plan 'prepared in the manner set out in Schedule 1'. One is substance and one is the process by which it is created.

155. The Council itself, it should be noted, treated the review as an ongoing process which will be completed when the PDP is completed and becomes operative.

156. Second, the Court states that CRU is requesting a further review. That is simply incorrect. What CRU says is that notification is required where the outcome of the current review is the retention of some existing provisions.

157. Third, the Court notes that there are no relevant time limits for the completion of the review or for the Schedule 1 process. That is correct but it again misses the point. CRU did not assert that there was a time limit - but that the step had to be carried out as part of the review. The declaration sought is concerned with consequences, not timing.

158. Fourth, the Court stated:

> [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.

159. The error in this approach (in addition to the repetition of the 'conflation' assertion) is that it attaches no significance to the notification under Clause 5. If, as the superior Courts appear to accept, public participation is integral to the planning process, then it is the public notification of a proposal which begins that participative process. The Council notified a full replacement plan, but now says that it is doing something else. It seems remarkably inconsistent with the participative purpose for this to be met with a judicial shrug on the basis that the Council could have approached the review in a different way. Once the Council committed to a review under section 79(4), it is possible (though improbable) that a new plan could have been notified in stages - but that is not what the Council did.

160. Fifth, the Court viewed the question of timing at [38]-[39] of the interim decision (noted at para.36 above) - 'getting it right rather than getting it quick'.

161. Two points make this approach untenable. First, there is no recognition of any benefit or purpose weighing in favour of the notification of provisions to be retained. Second, no recognition that people might be severely affected by the retention of these provisions for a period of years. Moreover, as noted above (at paras.127 and 141) the Act itself provides an efficient and practicable alternative, by notifying a variation - and the Council had formally adopted that option in 2014.

162. Sixth, the Court dismisses the benefits of notification:

> [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.
>
> [37]....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.

163. This, with respect, simply continues an apparently entrenched view under which there are only 2 options: either the existing ODP provisions, or some new provisions, fully based on current science and compliant and/or consistent with all superior policy directives. But it is a false dichotomy, involving a choice between something which is agreed to be defective, and something which cannot be attained for several years. Neither the Court nor the Council was prepared to consider a process under which people affected could express their views on these options, let alone propose something better. Planning is inherently a continuous process where perfect information is never available - but a Council must do the best it can when it is required to. And to do it through a public process.

164. Finally, the Court's description (at [33] Interim Decision) of the Christchurch model as 'entirely analagous' in this purposive context is problematic. How can a regulatory regime developed under legislation designed specifically to avoid the notification and other requirements of the RMA be called into service to shed light on the purpose of the RMA itself? A much better view of the Christchurch Order is that it illustrates that what was done in that City's Plan (and what the Council did here) required special legislation.

165. The Court's approach to Declaration 1 is inconsistent with the purpose of the Act, and inconsistent with its relevant provisions read in the light of that purpose. It has chosen an interpretation that makes the RMA fail to achieve its purpose, over one that would advance that purpose.

166. The key issue is the integrity of the notification process.

Declaration 2 analysis

167. This declaration concerns the ambit of Clause 8D.

168. Declaration 2 is based on a 'bright line' threshold for partial withdrawals. If the effect of a partial withdrawal (or a package of partial withdrawals) is that the meaning or the effect of the remainder of the PDP is changed, then that withdrawal is an alteration which cannot be effected by Clause 8D.

169. On its face, Clause 8D is a power to withdraw a notified 'proposal', whether that proposal is a whole plan or policy statement or an amendment to one. The proposal can be withdrawn at any time before any appeal relating to the proposal is heard by the Court or, if there is no appeal, before the proposal is approved by the Council. It is thus a procedure enabling the Council which notified the proposal to change its mind.

170. Prior to 2006, there were differing views in the Environment Court as to the ambit of Clause 8D (eg the Whakatane and Gisborne decisions (CB533-560).

171. In *West Coast Regional Council v Royal Forest and Bird Protection Society Inc [2007] NZRMA 32* ('the *West Coast* case') the High Court (Chisholm and Fogarty JJ) (CB561) decided that the power could be used to withdraw parts of a proposed plan, including, therefore, parts of provisions. But the power to make partial withdrawals must be subject to an important proviso which the Court expressed thus:

> **[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.

172. This approach to the use of Clause 8D rests firmly on a dichotomy: that 'withdrawal' and 'alteration' are different. The former is authorised by Clause 8D, but the latter must be initiated by variation under Clause 16A:

> **[24]** Although "alteration" is not defined, it can be seen that within the scheme of the RMA the concept of "alteration" is used to cover both "variations" and "amendments". However, it does not have a wider generic effect to include "withdrawals" (which are not defined) and beyond its use in the definitions of "variation" and "amendment" the concept has no life of its own.

173. In [25] the Court was aware of the possibility that the withdrawal of a provision, or a part, might of itself alter the meaning of what is left. If that occured, then it would be a 'variation by the back door'.

174. In the context of the proposed West Coast Regional Plan (WCPRP), this dichotomy was sufficiently clear to the Court that further consideration of contingencies where such clarity was absent was unnecessary. In the *West Coast* case two contextual factors stand out:

a. The provisions withdrawn from the WCPRP related to wetlands. There were no existing operative provisions on wetlands (recalling that, in general, regional plans are not mandatory). The 'default' management provisions were thus sections 13 and 14 RMA, as they always had been. In the Court's view, after assessment, the withdrawal of the WCPRP provisions could not alter the effect of the balance of that plan.

b. Shortly after withdrawing the provisions, the Council had notified a variation introducing proposed replacement provisions - the Court noting at [76] that such a variation was a 'virtually inevitable' consequence of withdrawal, so that the participation rights of submitters and interested people would only be temporarily affected.

175. These contextual factors are highly significant to any simple application of the *West Coast* decision on the question of ambit. In particular, the Court's withdrawal/alteration dichotomy is potentially far more difficult to apply where the effect of the removal of provisions or parts of them goes beyond the immediately obvious. In the present case, a number of the specific withdrawals were in the immediately obvious category. But others might well have a materially different effect in a particular case - a point addressed in paras.179-181.

176. The Council's withdrawal encompassed some 80 provisions or part provisions. An exact number is complicated because a complete list was not provided - rather the notice referred to annotated version of the PDP for the full range. The Court directed CRU to itemise the specific withdrawn provisions which it contended were beyond the scope of Clause 8D. CRU provided 9 examples, noting that *'the list is not, and could not realistically be, an exhaustive one'.*

177. This qualification was important, and ultimately appears to have been accepted by the Court ([10] final decision):

> CRU did not claim to have identified every alteration to the PDP which might have been improperly brought about as a result of the Council's initial withdrawal of the coastal hazards provisions. It was not its function to do so. It may or may not be the case that further provisions of the PDP, similarly affected, emerge in future;

178. The Court accepted that 6 of the 9 examples were alterations to the PDP and thus beyond the scope of Clause 8D. It rejected the other 3 on the following reasoning

> [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.

179. The *status quo ante* referred to by the Court is the set of relevant part provisions of the ODP which, as noted above, remain uncertain. With respect, the Court's application of the *West Coast* decision fails to reflect the key

difference between the 'default' position in that case, and the default position contended for in this case by the Council.

180. The West Coast *status quo ante* were statutory provisions whose effect was examined by the Court. The present provisions are not only uncertain, but belong in the different contextual setting of the ODP - with its own matrix of objectives, policies, rules, definitions, and maps. Extracting small, but very important, fragments of the ODP and expecting that they will integrate seamlessly with the balance of the PDP might, at best, be regarded as optimistic and ambitious. But where no evaluation of this issue was ever attempted by the Council *prior* to withdrawal, it should be regarded as highly implausible that the integration will somehow automatically occur.

181. In examining whether the effect of the withdrawals is an alteration, one cannot stop at the immediately obvious. All district plan provisions are applied in a real world context where land use is either permitted, prohibited, or requires some type of discretionary consent. In the latter situation, the Act requires (under section 104 for example) an assessment, usually subject to part 2, of effects on the environment and relevant provisions of a plan or proposed plan. (And under section 104D consent to a non-complying activity requires an assessment as to whether a proposal is 'contrary' to relevant plan or proposed plan objectives and policies). It should also be noted, in this context, that an assessment of an application under section 104 must have regard to the New Zealand Coastal Policy Statement and to the Regional Policy Statement, both of which continue to have coastal hazard policies.

182. The importance of the wording of these objectives and policies is emphasised by the High Court's decision in *RJ Davidson Trust v Marlborough District Council* [2017] NZHC52 (at [151]): *Reflecting the open textured nature of Part 2, Parliament has provided for a hierarchy of documents the purpose of which is to flesh out the principles in s 5 and the remainder of Part 2 in a manner that is increasingly detailed both as to content and location. It is these documents that provide the basis for decision-making, even though Part 2 remains relevant. It does not follow from the statutory scheme that because Part 2 is open textured, all or some of the planning documents that sit under it must be interpreted as being open textured.* (decision is under appeal).

183. The point is that withdrawals from PDP objectives and policies necessarily have the effect of potentially changing the way in which any particular application for consent is assessed. Where the withdrawal is accompanied by a reversion to fragments of objectives and policies from another document (Moody Reply Ex.2 CB137-8), that potential must be even greater.

184. The CRU argument therefore reduces to these propositions:

- Any part withdrawal must not alter the potential effect of the remaining provisions;
- If this means that only the most obviously neutral provisions or text can be withdrawn, then that interpretation is consistent with the purpose of public participation in decisions which may change the position of some people or communities;
- The *West Coast* decision's enlargement of the scope of clause 8D is founded on a dichotomy which can only work if it is clear (as it was in that case);

- In a situation where, as in this case, the Court accepts the possibility of further invalid provisions, and the Council has to argue that extensive after the fact planning assessment of potential effects is required to determine whether a provision was validly withdrawn, then the withdrawal is outside the scope of Clause 8D

185. The withdrawal of coastal hazard provisions was beyond the scope of Clause 8D.

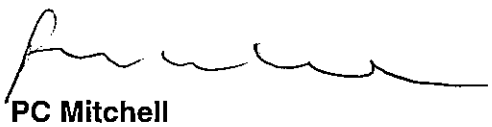
186. In *West Coast*, the High Court pondered the utility of a power of withdrawal which is limited to an entire proposal. Without derogating from the force of that question, it needs to be noted that a 'proposal' can be very small (for example a proposal to add a single building to a district plan list of heritage buildings subject to specific provisions. Or a part of a proposal might be larger, but still relatively insignificant (for example, purely explanatory material which turns out to be unnecessary or to have inaccurate references). There are, then, undoubtedly situations in which withdrawals of full or part proposals would not have consequences which have the level of significance apparent in this case. CRU respectfully accepts that there can be situations in which partial withdrawal under Clause 8D has no significant consequences.

187. The difficulty lies in formulating a restriction on the use of the Clause 8D power, as an alternative to a public process, where withdrawals have the potential to affect people - not just those who made submissions, but those who might have done so. Such an outcome, for example, plainly troubled the Environment Court in *Eldamos v Gisborne District Council* (CB541, 560) where the Council has withdrawn certain retailing provisions from its PDP to give effect to an agreement settling litigation in the High Court. The Court noted at [103] that the withdrawal *'deprived all occupiers of land [in specified zones] of the right, as a permitted activity, to use it for retailing, that right had been available for some 5 years'.*

188. The High Court's caveat on the use of Clause 8D cannot be simply applied to the current situation without some contextual assessment, and refinement if necessary. (Indeed that was the basis of the Council's 'effects' or significance based assessment of the instances given by CRU). The Environment Court's approach to the issue at [55] of the interim decision elevates what is essentially a situation specific finding by the High Court in *West Coast*, that a return to 'default' statutory provisions was not a variation, to a principle of law.

189. The Environment Court has endorsed an approach to Clause 8D which burdens people affected by these provisions with years of potential uncertainty, and extinguished their right to participate in significant decisions concerning them. It is an approach which is not consistent with either the purpose or the language of the provision.

Dated 29 September 2017



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