

IN THE MATTER OF

Resource Management Act 1991

AND

EVIDENCE DOC.
TOPIC PC 113.
SUB# 14.
DATE 20 Nov 2013

IN THE MATTER OF

Request for Private Plan Change

113 – Ruakaka Racecourse of the

Whangarei District Plan

LEGAL SUBMISSIONS ON BEHALF OF THE DIRECTOR-GENERAL OF CONSERVATION

20 November 2013

Department of Conservation
PO Box 10 420
WELLINGTON
Counsel acting: Teall Crossen
tcrossen@doc.govt.nz
telephone: 04 471 3056

Introduction

1. The Ruakaka Racecourse sits within a sensitive coastal environment that has nationally important conservation values. It is surrounded on three sides by the Ruakaka Bream Bay Scenic Reserve and is 300 metres from the Ruakaka Wildlife Refuge. The request for Private Plan Change 113 (PPC113) by the Whangarei Racing Club (WRC) to enable development of the racecourse site will expose the neighbouring public conservation land to significant adverse effects.
2. The Director-General (D-G) however, has not opposed PPC113. The D-G considers that a number of amendments to PPC113 are required to avoid or mitigate the potential adverse effects of developing the racecourse site and protect the important ecosystems within the land administered by the Department of Conservation (Department). The relief sought is based on the national significance of the values at risk, and the experience of the Department in managing adverse impacts of people in sensitive environments, including at Bream Bay.
3. Evidence on behalf of the D-G has been lodged from:
 - a) Dr Tony Beauchamp on the ecological values of the conservation land surrounding the Ruakaka Racecourse;
 - b) Mr Shaughan Anderson on the impacts of people on conservation land at Bream Bay and best practices for managing impacts; and
 - c) Mr Andrew Riddell on the issues arising from the D-G's submission in relation to the relevant planning framework. Mr Riddell's evidence includes an appendix reflecting the proposed amendments to PPC113 sought by the D-G.
4. These legal submissions will cover the following matters:
 - a) Legal status of the public conservation land surrounding the Ruakaka Racecourse;
 - b) Statutory basis of decision under the Resource Management Act 1991 ("RMA");
 - c) Adverse effects on public conservation land;
 - d) Consideration of s32 RMA and whether the policies and rules are the most appropriate for achieving the objectives of the Plan;
 - e) Planning analysis;
 - f) Financial viability; and
 - g) Conclusion.

Legal Status of Public Conservation Land Surrounding the Ruakaka Racecourse

Reserves Act 1977

5. As set out in the evidence of Dr Beauchamp, the Ruakaka Racecourse is surrounded on three sides by the Ruakaka Bream Bay Scenic Reserve ("RBBSR"), which is administered under the Reserves Act 1977 by the Department¹. The RBBSR is a scenic reserve for the purposes specified in s19(1)(b) of the Reserves Act which states:

(b) for the purpose of providing, in appropriate circumstances, suitable areas which by development and the introduction of flora, whether indigenous or exotic, will become of such scenic interest or beauty that their development, protection, and preservation are desirable in the public interest.

6. Section 19(3) provides that scenic reserves shall be administered and maintained so that, (amongst other matters):

... (a) except where the Minister otherwise determines, the flora and fauna, ecological associations, and natural environment and beauty shall as far as possible be preserved: ...

7. The D-G is seeking that PPC113 be amended to appropriately avoid or mitigate the potential adverse effects on the important conservation values of the RBBSR.

Wildlife Act 1953

8. The estuarine area to the south and west of the racecourse, approximately 300 metres from its nearest boundary was declared a Wildlife Refuge in 1958 pursuant to s14 of the Wildlife Act 1953.² Under the Wildlife Act, the public have a right of entry to the Ruakaka Wildlife Refuge, but it is unlawful to disturb wildlife or bird nests within the boundaries of the refuge.³ The Department is responsible for the management of the Ruakaka Wildlife Refuge.

¹ "Declaring Land to be Held for Conservation Purposes and Declaration That the Areas Become a Reserve" (25 June 2009) 94 New Zealand Gazette 2122.

² "Declaring an Area in the Whangarei Acclimatisation District to be a Wildlife Refuge" (6 November 1958) New Zealand Gazette 1553.

³ See s14(3) of the Wildlife Act: "While any Proclamation or notice under subsection (1) remains in force, it shall not be lawful for any person, except as provided in subsection (2) or subsection (2A) or in subsection (2) of section 5 or pursuant to an authority granted under section 53 or section 54, to hunt or kill for any purpose, or molest, capture, disturb, harry, or worry any wildlife in the wildlife refuge, or to take, destroy, or disturb the nests, eggs, or spawn of any such wildlife, or for any person to bring onto the wildlife refuge or have in his possession or discharge in the wildlife refuge any firearm or explosive, or have in his possession or control in the wildlife refuge any dog or cat, or to do anything likely to cause any wildlife to leave the wildlife refuge."

9. As set out in the evidence of Dr Beauchamp and the Ecological Review submitted on behalf of the WRC (Ecological Review), the Ruakaka Wildlife Refuge is an important conservation site and is especially important to birds, many of which have threat or risk rankings and need specific sites for breeding and roosting. As Dr Beauchamp explains, even with the low levels of people currently visiting the area, birds are being disturbed, and this is impacting on the habitat values of the refuge.

Statutory Basis of Decision under the Resource Management Act 1991

10. The statutory provisions governing consideration of a request for a private plan change include ss72-77 and incorporate by reference ss31 and 32 of the RMA. Adopting the approach of the Environment Court in *Purdie v Wellington City Council* [2010] NZEnvC 83, it is submitted for the purposes of considering the request for PPC113 that the matters to be considered can be compressed as whether the terms of the plan change:
- a) Accord with and assist the Council in carrying out its functions so as to meet Part 2;
 - b) Take account of effects on the environment;
 - c) Meet the requirements of s32 RMA, including whether the policies and rules are the most appropriate for achieving the objectives of the Plan; and
 - d) Are consistent with or give effect to (as appropriate) applicable national, regional and local planning documents.

Part 2 of the RMA

Sustainable Management of Natural and Physical Resources

11. A decision to approve PPC113 must accord with Part 2 of the RMA, and the overall purpose of the sustainable management of natural and physical resources. In achieving this purpose, ss6-8 provide important guidance to decision makers. On the facts of this case, there are a number of matters of national importance that must be recognised and provided for under s6 in the Council's overall judgement.

Matters of National Importance

12. The relevant s6 matters that concern the relief sought by the D-G are:
- a) **Section 6(a)** - the preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins,

and the protection of them from inappropriate subdivision, use, and development. The RBBSR and the Ruakaka Wildlife Reserve both have high natural character values.⁴

b) **Section 6(c)** - the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna. The RBBSR and the Ruakaka Wildlife Refuge have been assessed as being significant indigenous vegetation and significant habitat of indigenous fauna.⁵

c) **Section 6(d)** - the maintenance and enhancement of public access to and along the coastal marine area, lakes, and rivers. The Ruakaka Racecourse is adjacent to the coastal marine area and a lake.

13. It is submitted that the additional mitigation measures sought by the D-G are required to recognise and provide for the above matters of national importance, so as to achieve the purpose of the RMA. The mitigation measures sought are discussed below under consideration of adverse effects on public conservation land.

14. It is also noted that there are other important matters under Part 2 of the RMA to be appropriately considered in exercising your overall judgment whether to approve PPC113, namely ss6(e) and (f), 7 and 8. In my submission, providing for these matters does not impact on the relief sought by the D-G.

Adverse Effects on Public Conservation Land

15. Dr Beauchamp and the Ecological Review both identify that the public conservation land adjoining the racecourse, and the nearby Ruakaka Wildlife Refuge, have high ecological values. They provide important habitat for a large number of threatened species, including the nationally vulnerable New Zealand dotterel which breeds at the refuge.⁶

16. There is also agreement that the potential adverse ecological effects of developing the racecourse site, and bringing significantly more people to the environment include:

- a) Increased disturbance of wildlife;
- b) Increased predation of wildlife;
- c) Weeds; and

⁴ Beauchamp evidence, para 43.

⁵ Beauchamp evidence, para 44.

⁶ Beauchamp evidence, para 39.

d) Impacts on the dune lake.

17. Dr Beauchamp identifies adverse effects not included in the Ecological Review, namely impacts of light and noise on wildlife and increased risk of fire.⁷ Additionally, the development has the potential, without appropriate safeguards, to adversely affect the high natural character values of the adjacent coastal environment.

18. The D-G is seeking that the values of the conservation land be protected through a number of additional mitigation measures not currently provided in PPC113. In summary, the key additional measures sought by the D-G are:

- a) Limiting the intensity of any development to 100 residential units;
- b) Requiring an Ecological Management Plan as part of the conditions of any consent granted for a Management Plan;
- c) Including the matters recommended by Dr Beauchamp in the Ecological Management Plan;
- d) The employment of a warden as an essential component of the Ecological Management Plan; and
- e) Appropriate controls on development, including building setbacks to protect natural character values.

Intensity of development

19. Mr. Brandon on behalf of the WRC, in outlining the viability of the proposed development notes that the racecourse property benefits from a number of features, including “Close proximity to the beach which provides an attractive setting,” and “Adjoining wildlife rich conservation areas.”⁸ Dr Beauchamp’s opinion is that the most effective way to avoid the adverse effects caused by increased disturbance to these sensitive ecological areas is to prevent access by people.⁹ Mr Anderson’s evidence supports this and attests to the correlation between the number of visitors and the impacts on the soft shore dune environment in Bream Bay.¹⁰ Put simply, the more people that are living close to the beach, the more likely there will be increased number of visitors accessing the beach environment

⁷ Beauchamp evidence, paras 79, 80-82 and 87-88.

⁸ Brandon evidence, para 2.1.

⁹ Beauchamp evidence, para 6.

¹⁰ Anderson evidence, para 6.

across the dunes and adversely affecting the ecological values of the RBBSR and the Ruakaka Wildlife Refuge.

20. The D-G is seeking that the maximum number of residential units permitted by PPC113 in the Ruakaka Equine Environment be reduced from the currently proposed 350, down to 100. This figure is based on similar levels of intensity agreed between the Department and neighbouring developers in relation to subdivision resource consent applications as set out in the evidence of Mr Riddell.¹¹ Mr. Riddell has based his assessment on the land in Precincts B and C, as this is where development is primarily intended to occur. The objective of Precinct D excludes intensive residential units as it provides:¹²

To allow for the development of the eastern precinct and existing grandstand and function room, capitalising on the views from the existing landform, to provide for multiple uses that may include watching racing, public open space, accommodation, conference centre facilities and related commercial development, as well as some low scale residential development.

21. Mr Riddell has of course excluded the racecourse itself.

22. The limit of 100 residential units is supported by the ecological evidence of Dr Beauchamp, who states:¹³

In my opinion, the best and most effective way to avoid the adverse effects caused by increased disturbance to sensitive ecological areas is to prevent access by people. However, the adverse effects could be mitigated by limiting the number of people likely to access the sensitive ecological areas.

23. Dr Beauchamp summarises his conclusion on the intensity issue as follows:¹⁴

The potential number of residents, and those working in or staying in commercial activities, should be less than or equal to those agreed with the immediate surrounding subdivisions.

24. The current zoning of the area in the WDP is Coastal Countryside Environment, where the basic minimum subdivision and development standards apply, including a 20ha minimum lot size as a controlled activity. Accordingly, the current zoning of the racecourse protects the neighbouring conservation land from intense development and the associated increased

¹¹ Riddell evidence, paras 109-115.

¹² PPC113, REE 5.2.

¹³ Beauchamp evidence, paras 60-61.

¹⁴ Beauchamp evidence, para 14(a).

disturbance to wildlife values. Allowing 100 residential units within the racecourse site represents a significant increase from what is currently permitted.

25. In assessing this issue, it is not a relevant matter to compare the level of intensity sought by the WRC in PPC113 with what could be permitted if the area theoretically had a different zoning that would enable a greater level of intensity, such as Living 1. This approach has been relied upon by evidence presented on behalf of WRC, and is noted in the Section 42A Hearing Report.¹⁵ For example, Mr Mead's evidence states:¹⁶

The 350 residential dwelling cap represents a substantial reduction in the number of dwellings that could be accommodated on the land, should it no longer be used for race course purposes. Residential subdivision is the most likely alternative use, should race course activities no longer be sustainable. There is the option of the council purchasing the land for open space, but that is not a RMA-related matter. At 50ha, up to 600 to 750 homes could be built in a medium density format (12 to 15 dwellings per hectare).

26. This suggested approach of a relative assessment of adverse effects against a speculative development and theoretical zoning is inappropriate and inconsistent with the RMA. Living 1 zoning does not apply to the site and it is not a relevant matter. In my submission, the issue for consideration is what is the appropriate level of intensity to protect the values of the public conservation land that surrounds the site, so as to achieve the sustainable management of natural and physical resources? Based on the evidence from Dr Beauchamp on the effects of intensity on the ecological values of the public conservation land, and the level of intensity for surrounding subdivisions, my submission is that the appropriate level is a maximum of 100 residential units.

27. It is important to highlight that the D-G has also sought an amendment to change "dwelling units" as currently provided for in PPC113, to "residential units" as recommended by Mr Riddell, as the term "residential units" is defined in the WDP. Additionally, the exception to the cap on intensity namely "Units in visitor accommodation and retirement villages or similar may be in addition to this" should be removed, otherwise this exception would undermine the cap on intensity.

¹⁵ Section 42A Hearing Report, para 265.

¹⁶ Mead, evidence, para 57.

Ecological Management Plan

28. In addition to reducing the intensity of the proposed development, there are a number of important avoidance and mitigation measures required to manage the potential adverse effects of developing the racecourse. Up to 100 residential units adjacent to this sensitive coastal environment will require careful management.
29. The key mechanism is a comprehensive Ecological Management Plan as was recommended in the Ecological Review. PPC113 provides for the preparation of a Habitat Protection Plan, yet this is narrower in scope than the more comprehensive Ecological Management Plan sought by the D-G. I note that both Mr Mead and Ms McNeal have not objected to this proposal.
30. The D-G is seeking that the Ecological Management Plan include the additional matters set out in the appendix of Mr Riddell, which is based on Dr Beauchamp's evidence, including:
- a) Identification of access points over DOC administered land to access the beach;
 - b) Establishment and maintenance of a track network within the DOC-administered reserve land to limit impacts on the RBBSR and the Wildlife Refuge;
 - c) Broadening animal control to all species of conservation risk;
 - d) Managing water use to maintain the natural hydrological processes of the dune lake;
 - e) Management of light-spill and noise;
 - f) Employment of a warden; and
 - g) Baseline and ongoing monitoring.
31. In order to avoid or mitigate the potential adverse effects of developing the racecourse land, it is important that the Ecological Management Plan for the entire area is considered as part of the resource consent application for the first precinct Management Plan. This is particularly important in relation to baseline monitoring, which can only occur prior to any development commencing. The proposal by Mr Mead to restructure PPC113 so that it is a requirement that the first Management Plan contain an Ecological Management Plan for the whole of the REE is a welcome step in this regard to address the concerns of the D-G.

Warden

32. The employment of a warden is a critical component of the Ecological Management Plan. This measure originated in the Ecological Review which recommended the employment of

an appropriately qualified and experienced person in the lead up to and during the breeding season to undertake predator control, maintain fences and act as a nest warden. Dr Martin confirmed this in his supplementary evidence yesterday.

33. The evidence of Dr Beauchamp and Mr Anderson both support this mitigation measure. Dr. Beauchamp elaborates on the responsibilities of the warden to ensure that the adverse effects would be appropriately managed. Mr Anderson's evidence provides a critical practical perspective, given his experience managing these issues on the ground for the Department for 31 years, 13 of which have been in the Whangarei area.
34. It is the D-G's case that the responsibilities that would be required of the warden require skill and experience, and cannot be undertaken by residents as currently envisaged in PPC113, although contributions from residents in addition to the employment of a warden would be welcomed. I note that Dr Martin considers that weed control, establishment of plantings, and monitoring are also required, but do not necessarily need to be undertaken by a warden. In my submission, relying on a resident's association lacks the certainty required to ensure that these important mitigation measures will in fact be undertaken.
35. It is also important that financing for the warden is appropriately provided to ensure that it is a permanent and full time position. I note that the supplementary evidence of Mr Martin supports the need for the warden function to be permanent, as in referring to the duties of the warden he states: "this work needs to undertaken each year, as the potential adverse effects of increased human use will also be ongoing." Dr Martin however, considers that outside of the breeding season this position could be part-time, owing to the lesser amount of work required when shorebirds are not breeding and international migrants are absent. Dr Beauchamp and Mr Anderson will both provide their opinion on this issue.
36. Mr Mead in his supplementary evidence has suggested an amendment to the requirements of an Ecological Management Plan to include reference to "a warden or similar to undertake the above duties," and that the Ecological Management Plan should also include the duties of the warden.
37. The D-G appreciates this proposed amendment to PPC113. However, in my submission, more appropriate wording would include reference to employment of the warden, to signal that the functions of the warden cannot be undertaken voluntarily by a Resident's

Association or a Body Corporate. Without such provision, you can have no assurance that the potential adverse effects of the proposed development provided for in PPC113 will be appropriately managed.

38. Finally, to manage adverse effects on natural character values of the public conservation land, appropriate setbacks are sought as set out in Mr Riddell's evidence. Dr Martin has agreed with Mr Riddell in relation to increasing the setback distance on the southern boundary from 10 to 16m. Mr Riddell has also proposed an assessment of effects on natural character should be included in any Management Plan. In my submission, a separate natural character assessment is appropriate, given the preservation of the natural character of the coastal environment is a matter of national importance. Additionally, Policy 13 of the NZCPS 2010 makes it clear natural character is not the same as amenity or landscape values.

Consideration of s32 RMA and whether the policies and rules are the most appropriate for achieving the objectives of the Plan

39. The D-G has sought that PPC113 be amended to provide for more appropriate ways to avoid and mitigate adverse effects on the environment as discussed below.

Integrity of the Management Plan Technique

40. PPC113 seeks to utilise the Management Plan Technique provided for in the WDP. The D-G has no concerns with the use of the Management Plan Technique per se. However, the evidence of Mr Riddell outlines ways to more appropriately reflect the Management Plan Technique through an amended rule structure. The rules sought are:
- a) Existing Coastal Countryside Environment rules would continue to apply in the absence of consent granted for a Management Plan.
 - b) Where consent has been granted for a Management Plan any further subdivision or development would be a non-complying activity. This is consistent with the chapter on the Management Plan Technique.
 - c) A Management Plan that does not meet the performance standards as set out in the Requisite Policies is a non-complying activity.
 - d) Any activity or structure that does not comply with consent granted from a Management Plan is a non-complying activity.
 - e) Subdivision that is not in accordance with consent granted for a Management Plan is a non-complying activity.

41. Both Ms McNeal for the Council and Mr Mead for the WRC comment on the amended rule structure proposed by Mr Riddell. I note that Ms McNeal agrees with Mr. Riddell's proposal that any activity that does not comply with an approved Management Plan shall be a non-complying activity. This is consistent with the Management Plan Technique chapter of the WDP.
42. On the issue of non-complying status, Mr Mead's opinion is this activity status does not add anything in terms of council's discretion to add conditions and there is still wide discretion to decline consent. In my submission, the gateways tests are important safeguards and moreover, they provide the community with certainty as to what is appropriate development at this site.
43. Additionally, I outline in the following section areas where the approach to the Management Plan Technique being proposed in PPC113 does not, in my submission, conform with the RMA.

Activity Status in Management Plans

44. PPC113 provides for Management Plans to determine the activity status for some land use activities. For example, in Precinct B, REE 3.4.2 states:¹⁷

Activities listed within an approved Management Plan shall have the activity status as set out in that Plan.

45. It is submitted that use of the Management Plan to determine the activity status of a land use is not consistent with the scheme of the RMA. The ability of a District Council to categorise activities is provided in s77A as follows:

- (1) A local authority may—
 - (a) categorise activities as belonging to one of the classes of activity described in subsection (2); and
 - (b) make rules in its plan or proposed plan for each class of activity that apply—
 - (i) to each activity within the class; and
 - (ii) for the purposes of that plan or proposed plan; and

¹⁷ See also REE 4.4 (a) which states "Once a Management Plan has been approved, then new equine related activities shall be a specified within the approved Management Plan" and REE 5.4 (a) which states "Once a Management Plan is in place activities listed in an approved Management Plan shall have the activity status set out in that Plan."

(c) specify conditions in a plan or proposed plan, but only if the conditions relate to the matters described in section 108 or 220.

46. PPC113 is inconsistent with this provision. It is not within the power of a Council to determine activity status by way of a decision on a resource consent for a Management Plan. To explain, applying the eligibility rules of PPC113, a Management Plan application is assessed as a discretionary activity. If consent is granted for a Management Plan that includes activity status for specified activities, those activity status rules would be in a resource consent, and not included in the District Plan. Yet, the authority to make rules for activity status under section 77A only applies to plans. In my submission, rules for the activity status of an activity must be provided for in a District Plan.

Prohibited Activity Status

47. The D-G has sought the following activities would be appropriately classified as prohibited activities:

- a) Prohibition on residential units over 100; -- Now non-complying (not prohibited)
- b) Prohibition of cats, dogs and mustelids on the site (except seeing eye dogs);
- c) Prohibition on access to the adjacent public conservation land except at two specified access points; and
- d) Prohibition on the dumping of waste, including green waste onto the adjoining public conservation land.

48. The Court of Appeal decision, *Coromandel Watchdog of Hauraki Incorporated v Chief Executive of the Ministry of Economic Development And Anor* [2008] 1 NZLR 562 provides the most authoritative decision on how to consider prohibited activity status. The Court of Appeal described the statutory process empowering a Council to make rules and stated (at para 28):

The important point for present purposes is that the exercise required by s 32, when applied to the allocation of activity statuses in terms of s 77B, requires a council to focus on what is "the most appropriate" status for achieving the objectives of the district plan, which, in turn, must be the most appropriate way of achieving the purpose of sustainable management.

49. As discussed in the Section 42A Hearing Report the Court of Appeal decision broadened the scope for activities to be classified by local authorities as prohibited. The Court of Appeal held that the High Court (which had upheld the Environment Court's decision) had erred by

applying a more restrictive approach that provided prohibited activity status should not be used unless an activity is forbidden.

50. On the facts of this case, the activities that the D-G is seeking prohibited activity status for are in fact activities that which the D-G considers should be forbidden. Prohibited activity status would provide the certainty that is required to avoid significant adverse effects on the public conservation land. In relation to banning cats, dogs and mustelids, restricting access to public conservation land and preventing the dumping of weeds, it is my understanding that the WRC agrees with these important conservation measures accordingly it is appropriate to reflect that in the WDP.

51. In order to ensure enforcement, further measures will be required at the resource consent stage for a Management Plan, including requiring covenants on each title for all these matters. I note that Dr Martin supports a covenant on titles in relation to the proposal to ban cats, dogs and mustelids, and prohibiting the dumping of green waste.

Notification

52. The current wording of PPC113 provides that land use proposals that are not contrary to the requisite policies are precluded from public notification. The Council is empowered to provide for this under s77D of the RMA which states:

A local authority may make a rule specifying the activities for which the consent authority—
(a) must give public notification of an application for a resource consent:
(b) is precluded from giving public notification of an application for a resource consent:
(c) is precluded from giving limited notification of an application for a resource consent

53. However, in the circumstances of PPC113, it is submitted that precluding public notification is contrary to the well established principle of case law that the RMA encourages public participation (see *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145). The Supreme Court has emphasised the importance of notification in relation to public participation (*Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] 2 NZLR 597):

A decision not to notify has significant consequences. It deprives others of the right to participate in the determination of the resource consent application. It also precludes any person other than the applicant from appealing or participating in the hearing of an appeal to the Environment Court from the grant or refusal of resource consent.

54. This is particularly of concern to the D-G in relation to applications for resource consent for Management Plans. I note that in Mr Mead's supplementary evidence he has recognised the concern of the D-G and made a proposal that precludes land use proposals that are not contrary to the requisite policies from notification, but provides that Management Plans be subject to the notification tests of the RMA.

55. The D-G seeks a rule requiring notification when consent is sought for a Management Plan as a discretionary activity. It is only at the Management Plan stage that the detail of the proposed development will be known, as stated in the evidence of Mr Mead.¹⁸ Accordingly, this is the stage where the detail of appropriate avoidance and mitigation measures can be considered in relation to an assessment of the potential adverse effects based on the actual development proposed. The perspective of the public and the expertise of the Department would be important contributions at this stage of the process. In my submission, it would be contrary to the RMA to exclude the Department as the administering body for the neighbouring public conservation land from being able to participate in the RMA process. It is also the D-G's view that public engagement in these processes are extremely valuable in enhancing the outcome, and assist in community understanding of the important issues to be considered.

56. Moreover, the matters to be determined through the Management Plans for each precinct in the proposed Ruakaka Equine Environment are matters that are more usually addressed by a district plan. Notification is of course mandatory for changes to district plans (see Clause 5(1) First Schedule of the RMA and *Coromandel Watchdog of Hauraki Inc v Chief Executive of the Ministry for the Environment* [2008] 1 NZLR 562). It would be contrary to the scheme of the RMA to allow matters that should be reflected in a district plan, which requires a mandatory public participation process to be determined by a Management Plan resource consent process and not require for public participation.

57. Finally, on the issue of notification, it is unclear what land use proposals would be sought that are outside of the Management Plan process, and in my submission these should not be precluded from notification. The Environment Court considered a similar issue in *Waterfront Watch Inc v Wellington City Council* [2012] NZEnvC 74 where a variation introduced a

¹⁸ Mead, evidence para 24.

presumption against notification The Court held the presumption was not appropriate on the facts of the case and stated:¹⁹

Much has been said about the public participation philosophy of the Act, and we need not review that here, save to say that we see it as a cornerstone of the Act's processes which should not be dispensed with unless the reasons are clear and compelling.

Planning Analysis

New Zealand Coastal Policy Statement 2010 (NZCPS)

58. Mr Riddell has provided an analysis of the relevant planning framework. Based on his analysis, it is my submission that without amending PPC113 as sought by the D-G, the WDP would not give effect to the NZCPS as required by s75(3).
59. I note at the outset, in the request for PPC113, the WRC has highlighted the importance of Objective 6 of the NZCPS,²⁰ which states, "the protection of the values of the coastal environment does not preclude use and development in appropriate places and forms, and within appropriate limits." The D-G considers this objective is important and that PPC113 does not include appropriate limits on the proposed development of the racecourse. Consideration of relevant policies of the NZCPS supports this as discussed below.
60. As provided in the s32 Report for PPC113 provided by the WRC, Policy 13.1(b) is relevant in relation to avoiding significant adverse effects and avoiding, remedying or mitigating other adverse effects of activities on natural character in all areas of the coastal environment. However, in my submission, this is not the main policy test for consideration of PPC113 as concluded in the s32 Report. There are a number of other policies that should be given as much weight as Policy 13.1 (b) in the overall assessment of the NZCPS.
61. Of particular relevance is Policy 11 which provides for protecting indigenous biological diversity in the coastal environment. The direction in Policy 11(a) is to avoid adverse effects of activities on specified characteristics of biodiversity. The RBBSR and the Ruakaka Wildlife Refuge have two of the characteristics specified in Policy 11(a), namely 11a(i) - indigenous

¹⁹ Para 135

²⁰ Hill Young Cooper Ltd, Ruakaka Racecourse Plan Change – Section 32 Report, p20.

taxa that are listed as threatened or at risk in the New Zealand Threat Classification System lists; and 11a(iv) - habitats of indigenous species that are naturally rare.

62. Additionally, Policy 11(b) provides direction to avoid significant adverse effects and avoid, remedy or mitigate other adverse effects of activities on further specified biodiversity characteristics. Policy 11b(ii) refers to habitats in the coastal environment that are important during the vulnerable life stages of indigenous species. This is applicable to PPC113 as bar-tailed godwit and red knot use the Ruakaka estuary during critical fragile periods as spring tide roosts.²¹

63. Policy 11 of the NZCPS has been considered by the Environment Court. In considering the effects of cats and dogs on kiwi from a request for a private plan change for more intensive residential use in a coastal area north of Whangarei, the Court identified that Policy 11 of the NZCPS requires that adverse effects on specified taxa be avoided and commented: “That is a high test. It is difficult to escape the conclusion that this aspect of the Proposed Change weighs against approval” (*Longview Estuary Estate Limited v Whangarei District Council* [2012] NZEnvC 172 at 37).

64. Of course, “avoid” does not mean prohibited, and Policy 11 must be considered alongside other policies of the NZCPS. Mr Riddell’s evidence considers additional policies. Policy 5 in relation to land managed or held under Acts is clearly important, given the adjoining RBBSR and the Ruakaka Wildlife Refuge, as are Policies 18, 19 and 20 relating to public open space and access to the beach respectively.

65. In summary, the D-G considers that enabling development in this sensitive coastal environment can be provided for in PPC113, however only where appropriate safeguards are built in, for example as set out in the amendments proposed by the D-G. Absent those safeguards, PPC113 would not give effect to the NZCPS.

Financial viability

66. As noted earlier, one of the key areas where there is a significant difference between the D-G and the WRC is the level of residential intensity allowed by PPC113. The D-G submits the

²¹ Beauchamp evidence para 45.

intensity should be limited to 100 residential units as at this level the adverse effects on natural values can more appropriately be managed.

67. The case presented on behalf of the WRC to support a maximum intensity of 350 dwellings has included consideration of the economic viability of the development, as it contends that 350 residential units is required to offset the development costs of the proposed subdivision.²² In my submission, this is not a relevant matter to take into account.

68. It is well established in case law that while economic factors are important considerations in decision-making under the RMA, the financial viability of a project is not. In the leading case on this issue, the High Court ruled (*New Zealand Rail Ltd v Marlborough District Council* [1994] NZRMA 70):²³

Financial viability in those terms is not a topic or a consideration which is expressly provided for anywhere in the Act. That economic considerations are involved is clear enough. They arise directly out of the purpose of promotion of sustainable management. Economic well-being is a factor in the definition of sustainable management in s 5(2). Economic considerations are also involved in the consideration of the efficient use and development of natural resources in s 7(b). They would also be likely considerations in regard to actual and potential effects of allowing an activity under s 104(1). But in any of these considerations it is the broad aspects of economics rather than the narrower consideration of financial viability which involves the consideration of the profitability or otherwise of a venture and the means by which it is to be accomplished. Those are matters for the applicant developer and, as the Tribunal appropriately said, for the boardroom.

69. The evidence provided by the WRC has focussed on the financial viability of subdividing the racecourse site, rather than the broader economic benefits of increased intensity to the community. For example, Mr Vazey attests that if the dwelling units are reduced from 350 “it is questionable as to whether there would be enough funds generated to cover the infrastructure costs.”²⁴

²² Brandon evidence, para 2.7.

²³ See also *Royal Forest and Bird Protection Society of New Zealand Inc v Buller District Council* (No 2) [2013] NZRMA 293 where the Court affirmed the *NZ Rail Decision* and stated “The scope of the remarks of Grieg J, which are appropriate to that context, have no application to the discrete issue being examined by the Environment Court in this case: the proposal to shift the place for the overburden to be placed in order to protect some rare plants. This latter issue is a mitigation of one adverse effect in a complex project. There is nothing in the Act which prevents a consent authority from making a proportionate decision assessing the cost of a proposed condition. **This is quite a different exercise from embarking on judging the merit of an application against the financial viability of the project**” (emphasis added).

²⁴ Vazey evidence, para 3.3.

70. Moreover, in terms of considering the benefit to the community from increased number of dwellings up to 350, on the WRC's own evidence, the Ruakaka residential property market has been affected by an over-supply of residential sections.²⁵ While Mr Brandon considers that the situation is improving, the focus of his evidence is not whether there is a genuine need for increased housing that developing the Ruakaka Racecourse could meet. Rather, Mr Brandon's evidence is concerned with the viability of the proposed development, which is dependent on selling 350 sections, and that there is potential for increased demand to enable that.

71. In exercising your overall judgment whether to approve PPC113 and on the most appropriate level of intensity for this site, the question is not how many dwellings are required to provide for the financial viability of the proposed development, as that is a matter solely for the WRC. The question for consideration of this Hearing Panel is how many dwellings may be accommodated by the surrounding environment, so as to achieve the sustainable management purpose of the RMA. In making this assessment, the guidance provided in s6 is critical. The values at stake, namely the natural character of the coastal environment and the dune lake, significant habitat of indigenous vegetation and significant habitats of indigenous fauna, and public access to the coastal marine are nationally important. In my submission, the ecological evidence on this matter before you supports an intensity level of 100 residential units.

Conclusion

72. In conclusion, the area surrounding the Ruakaka Racecourse has high biodiversity values and the proposed development will expose those values to great risk. New Zealand's biodiversity continues to deteriorate including through disturbance and incursions of pests as a result of current landscape modification practices.

73. PPC113 has the potential to further increase the loss of biodiversity in this sensitive coastal environment. Some of the indigenous species at risk from the proposed development are threatened nationally.

²⁵ Brandon evidence, para 2.9.

74. The amendments sought by the D-G are based on the Department's experience in managing these issues. As set out in the evidence of Mr Riddell and Mr Anderson, the Department has worked with a number of landowners in the area to ensure the values of the public conservation land are not lost through inappropriate subdivision and have reached constructive solutions.

75. In my submission, the amendments sought by the D-G to PPC113 as explained above and in the evidence of the D-G's witnesses would give effect to the purpose of the RMA.

A handwritten signature in cursive script, appearing to read 'Teall Crossen', is written over a solid horizontal line.

Teall Crossen

Counsel for the Director-General of Conservation

20 November 2013