BEFORE THE WHANGAREI DISTRICT COUNCIL

IN THE MATTER of a submission by Northport Limited under the First Schedule of the Resource Management Act 1991 (**Act**) on proposed Plan Change 144 – Port Zone

LEGAL SUBMISSIONS FOR NORTHPORT LIMITED (SCOPE OF RELIEF)

10 DECEMBER 2019

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MAY IT PLEASE THE COMMISSIONERS

1. INTRODUCTION

1.1 Northport Limited (**Northport**) is a primary submitter on proposed Plan Change 144 (**PC144**) to the Whangarei District Plan (**Plan**). In its submission it seeks, inter alia, the inclusion in the Plan of comprehensive noise standards and controls to apply to Northport as well as provisions to apply to adjoining land uses to manage potential reverse sensitivity effects now and in the future.

1.2 Northport has been invited to comment on the legal submissions[1] dated 4 December 2019 on the topic of noise, which were provided to the Hearings Panel by the Whangarei District Council (**Council**).

1.3 I have reviewed these submissions, Northport's primary submission, the summary of submissions prepared and notified by the Council, and Northport's evidence on PC144 concerning noise. I have not seen the earlier legal submissions prepared by Mrs Shaw referred to in her 4 December 2019 submissions.

2. LEGAL TESTS

2.1 To accept relief sought by a submitter at a hearing on a plan change, the planning authority must be satisfied of three key matters:

(a) There must be jurisdiction to accept the relief – i.e., it must arise from a submission that is 'on' the plan change under consideration;[2]

(b) The relief must be within the scope of the submission – i.e., it must have been reasonably and fairly raised in the submission;[3]

(c) The relief must otherwise be appropriate for acceptance as a change to a resource management plan.[4]

2.2 These submissions do not address requirement (c). This requirement assumes that (a) and (b) have been met and is therefore focussed on whether relief sought in a submission ought to be allowed, rather than whether it can be entertained in the first place.

2.3 Mrs Shaw's submissions note that she has previously provided advice to the Hearings Panel on the first requirement – that a submission must be "on" the plan change in question. It is assumed that her advice has been that the Panel has jurisdiction to consider the Northport submission on the

[1] Prepared by Sarah Shaw, barrister.
[2] The *Clearwater* tests.
[3] The *Countdown* principle.
[4] Section 32 etc.

grounds that it is "on" PC144. I agree with that conclusion and do not consider requirement (a) further in these submissions.

2.4 The key question therefore is whether there is scope to accept the more detailed relief now sought by Northport in its evidence. Mrs Shaw also identifies that as the key question,[5] but then, with respect, does not answer it. Rather, she applies the *Clearwater* tests again to the more refined relief, when the correct legal approach (as she accepts) is to determine whether the relief is reasonably and fairly raised in the submission. Although there is some similarity between the two tests, specifically the one concerning prejudice/participation, they are not the same. A helpful restatement of the law on "scope" - requirement (b) above - can be found in *Environmental Defence Society Inc and others v Otorohanga District Council*.[6]

3. SCOPE

3.1 There is no doubt in my submission that the following planning outcomes were reasonably and fairly raised in Northport's submission on PC144:

(a) Introduction of the National Planning Standard for Ports to apply at Northport, including the 'Port Noise Standard';

(b) Noise controls to apply to activities at the port at specified locations (described as Inner and Outer Noise Control Boundaries);

(c) A Port Noise Management Area (**PNMA**) within which sound insulation requirements would apply to new noise sensitive activities.[7]

3.2 All of these items of relief were summarised in Council's summary of submissions, prepared and notified in accordance with the Act.[8]

3.3 In its evidence, Northport has provided some refinement to its proposed relief, which has arisen due to more detailed acoustic modelling work having been completed. To the extent that this more detailed work essentially "fills out", makes more certain and ensures the workability of the outcomes sought in Northport's submission without enlarging the relief, I submit that it is within the scope of the submission.

3.4 The final issue to evaluate is whether any of the more refined relief now seeks to impose planning controls on third parties in circumstances where those outcomes were not signaled in the Northport submission or Council's summary of submissions (the procedural fairness question).

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[5] Legal Submissions, 4 December 2019, paragraph 4.
[6] [2014] NZEnvC 070 (copy **attached**).
[7] The extent of the areas where new noise sensitive activities would be subject to this requirement was identified on a plan attached to the submission.
[8] http://www.wdc.govt.nz/PlansPoliciesandBylaws/Plans/DistrictPlan/DistrictPlanChanges/Documents/PC-Urban-and-Services/6-Submission-Information/Urban-and-Services-Summary-of-Submissions.pdf

Port Noise Standard

3.5 I submit that no element of procedural unfairness arises with this aspect of the relief sought. Mrs Shaw agrees with this conclusion.[9]

Inner and Outer Noise Control Boundaries

3.6 Northport's submission clearly sought application of the Port Noise Standard to Northport and with it the introduction of Inner and Outer Noise Control Boundaries. The submission did not describe or graphically locate where those boundaries would be located, indicating instead that the modelling work to refine their location was underway. At paragraph 22, the submission set out in table form the noise limits that were sought to apply to port activities "*at any point on land at, or beyond, the inner control boundary*".

3.7 I agree with Mrs Shaw that potential procedural unfairness arising from the greater definition of the Inner and Outer Control Noise Boundaries needs to be considered from two angles.[10]

3.8 From the perspective of Northport, the boundaries now clearly identify the locations at which compliance with the specific noise limits will need to be achieved by port activities. As Northport is a submitter in respect of these provisions and is promoting them as controls on its own activities, I submit that no procedural unfairness arises to Northport.

3.9 The identification of the boundaries also has implications for other adjoining land uses, as the boundaries now effectively identify the extent of the future acoustic environment surrounding the port and the noise and related amenity expectations that could be experienced within that acoustic environment. In my submission, this evidential refinement of the noise control boundaries would have scope limitations if it resulted in third parties now being potentially subjected to a noisier future environment than they might otherwise have expected from analysis of Northport's submission. However, in my view, no such parties are likely to exist because:

(a) the submission identified the proposed future noise limits to apply on land at or beyond the Inner Noise Control Boundary;

(b) the submission mapped those adjoining sensitive land use areas where future port noise would be higher than presently experienced (i.e., the Draft PNMA Overlay);

(c) the more detailed acoustic modelling work has not enlarged the land areas likely to experience higher port noise; rather it has reduced it in some locations.

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[9] Legal Submissions, 4 December 2019, paragraph 8(b).
[10] Legal Submissions, 4 December 2019, paragraph 8(a).

3.10 For these reasons, I submit that the identification in Northport's evidence of the proposed Inner and Outer Noise Control Boundaries does not result in procedural unfairness to any party. The prospect of a noisier future environment being experienced around the port was clearly signaled in Northport's submission and duly summarised by Council in its summary of submissions. The absence of any further submissions on this issue does not now make it procedurally unfair to consider the more refined relief now put forward by Northport. The key point here, in terms of community expectations, is that the likely future extent of the higher noise environment adjoining the port has in fact been (slightly) reduced following the further modelling work (which was itself also signaled in the submission).

Noise Insulation Requirements

3.11 The land potentially affected by a requirement in future to protect itself from port noise was clearly identified in the submission. The more refined acoustic modelling work has not increased the number of land parcels at Reotahi and One Tree Point to which this requirement would apply. In fact, it appears to have reduced the number of parcels in some locations.[11]

3.12 One aspect of the more refined provisions that was not signalled in Northport's submission is the requirement that existing dwellings being altered or added to also complete sound insulation/protection works. In my submission, this specific aspect was not fairly and reasonably raised and is therefore out of scope. The submission is clear - that it is only <u>new</u> dwellings to which this requirement would apply.

4. CONCLUSION

4.1 Based on the established legal tests, I submit that the only aspect of the more refined relief now proposed by Northport that is out of scope is the proposal that existing dwellings being altered or added to within the PNMA also complete sound insulation/protection works.

4.2 I submit that all other aspects of the more refined relief, including the identification of the Inner and Outer Noise Control Boundaries, are within the scope of Northport's primary submission.

K R M Littlejohn
Counsel for Northport Limited

10 December 2019

[11] Compare Draft PNMA Overlay (map attached to Northport Submission) with Figure 3, Northport Noise Control Boundaries, 4 December 2019 (Marshall Day).

BEFORE THE ENVIRONMENT COURT

Decision No. [2014] NZEnvC 070

IN THE MATTER	of four appeals under Clause 14(1) of Schedule 1 of the Resource Management Act 1991 (**the Act**)
BETWEEN	ENVIRONMENTAL DEFENCE SOCIETY INCORPORATED (ENV-2012-AKL000069)
	FEDERATED FARMERS OF NEW ZEALAND INCORPORATED (ENV-2012-AKL000072)
	KAWHIA HARBOUR PROTECTION SOCIETY INCORPORATED (ENV-2012-AKL000073)
	GOWER & OTHERS (ENV-2012-AKL000076)
	Appellants
AND	OTOROHANGA DISTRICT COUNCIL
	Respondent

Court: Environment Judge DA Kirkpatrick (sitting alone under s279 Resource Management Act)

Date of Decision: 27 March 2014

DECISION ON JURISDICTION TO MAKE CONSENT ORDER

A. **The Otorohanga District Council as respondent is to revise the draft consent order by amending the map of the Landscape Policy Area so that it no longer shows new areas of outstanding natural landscapes or outstanding natural features or landscapes of high amenity value that were outside the areas shown in the decisions version of the proposed District Plan.**

B. **The parties may then submit such a revised draft consent order with any supporting memorandum of consent for the Court's consideration.**

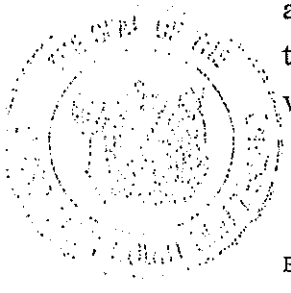
REASONS FOR DECISION

Introduction

[1] These four appeals relate to the treatment of natural landscape in the Otorohanga proposed District Plan ("**PDP**") and are being dealt with together. This decision addresses a contested jurisdictional issue concerning the scope of a draft consent order which has been submitted to the Court.

[2] The PDP records that the district of Otorohanga contains outstanding natural landscapes, outstanding natural features and high natural character areas. These are identified as "**Outstanding Landscapes**" on the planning maps. The objectives, policies and rules in the PDP seek to protect these from inappropriate subdivision, use and development, consistent with the obligations imposed by section 6(a) and (b) of the Act of the Otorohanga District Council ("**the Council**"). The Council recorded in the PDP that the district also contains a number of areas where the landscape elements and natural features combine to create "**Landscapes of High Amenity Value**" as identified on the planning maps. All these areas are contained within the Landscape Policy Area established in terms of section 2 of the Landscape chapter in the PDP.

[3] As a result of Court-assisted mediation on 25 November 2013 and a self-facilitated "without prejudice" meeting of the parties to these appeals on 28 November 2013, the parties reached an agreement as to a basis for amendments to certain provisions of the PDP, including both its text and its maps, on which all four appeals could be settled. A memorandum of consent to resolve the natural landscape topic in the PDP dated 20 December 2013, with a draft consent order, has been filed with the Court. All parties have signed that memorandum except for the appellant



Federated Farmers of New Zealand Incorporated ("**Federated Farmers**") and two parties under s274: Devune Enterprises and Te Koraha Farms Limited.

[4] Federated Farmers has raised a jurisdictional issue as to the scope of the agreement reached among the parties. As part of the process in reaching agreement to settle the appeals, the Council got its consultant planning expert and its landscape expert to do additional mapping. This mapping shows extensions of areas of Outstanding Landscapes and Landscapes of High Amenity Value onto parts of the district which were not mapped as such in the PDP either as publicly notified or as amended by the Council's decisions on submissions. Federated Farmers questions whether these amendments can properly be made. The Council contends that they can on the basis of the submission made by Federated Farmers on the PDP and the relief sought in its appeal.

[5] Both Federated Farmers and the Council have filed submissions in support of their respective positions. The other appellants in relation to this topic (Environmental Defence Society Inc, Kawhia Harbour Protection Society Inc and Gower & Ors) have stated that they support the Council's position. Devune Enterprises has stated that it supports the position of Federated Farmers. There has been no statement of position by or on behalf of Te Koraha Farms Ltd.

[6] Federated Farmers has also confirmed that, should the Court determine that the proposed settlement is within the scope of its submission and appeal, then Federated Farmers will confirm its support for the draft consent order, as lodged, to be made.

Relevant Law

[7] The central question to be determined is whether the proposed outcome agreed on by the parties to these appeals and expressed in the draft consent order is within the scope of the PDP as publicly notified or as sought to be amended by an appellant's submission on it. The jurisdictional issue that the parties have raised before the Court is an essential one in the process for preparing or changing a District Plan.

[8] The starting point is that a District Plan must be prepared by the relevant territorial authority "*in the manner set out in Schedule 1*"to the Act.[1] Schedule 1 is a code for this process,[2] although important glosses have been added by case law.

[1] Section 73(1) RMA.
[2] ***Re Vivid Holdings Ltd*** [1999] NZRMA 467 at para (16).

[9] In accordance with Schedule 1: [3]

(a) a proposed plan must be evaluated in accordance with section 32 of the Act and publicly notified, with a copy of the public notice being sent to every ratepayer who is likely to be directly affected by the proposed plan (clause 5 (1) and (1A));

(b) any person (with certain restrictions on trade competitors) may make a submission on the publicly notified proposed plan which must be in the prescribed form (clause 6);

(c) the prescribed form requires a submitter to give details of the specific provisions of the proposed plan that the submission relates to, and to give precise details of the decision which the submitter seeks from the local authority (form 5, Schedule 1 to Resource Management (Forms, Fees, and Procedure) Regulations 2003);

(d) the local authority must prepare and give public notice of the availability of a summary of decisions requested by persons making submissions on a proposed plan (clause 7);

(e) any person representing a relevant aspect of the public interest, or any person that has an interest in the proposed plan greater than the interest that the general public has, or the local authority itself, may make a further submission in support or in opposition to any submission made under clause 6 (clause 8);

(f) the local authority must give decisions on the provisions and matters raised in submissions, which must include reasons and may include matters relating to any consequential alterations necessary to the proposed plan arising from the submissions (clause 10);

(g) a person who made a submission on a proposed plan may appeal to the Environment Court in respect of:

i. a provision included in the proposed plan; or

ii. a matter excluded from the proposed plan; or

[3] As it stands since the latest amendments which came into force on 1 October 2009, prior to notification of the PDP.

iii. a provision that the decision on submissions proposes to include in or exclude from a plan;

but only if the appellant referred to the provision or the matter in the appellant's submission on the proposed plan, and the appeal does not seek the withdrawal of the proposed plan as a whole (clause 14); and

(h) the Environment Court must hold a public hearing into any provision or matter referred to it (clause 15).

[10] The Environment Court has the same power, duty and discretion in regard to an appeal made under clause 14 in respect of the decision appealed against as the local authority had under clause 10, and may confirm, amend or cancel the decision to which the appeal relates.[4] Although not directly applicable to my present consideration of the jurisdiction to make a particular order by consent, it is pertinent to this review of the relevant legislation to refer to the Court's powers:

(a) In section 292 of the Act, to direct a local authority to amend a plan to which proceedings relate for the purpose of remedying any mistake, defect or uncertainty or giving full effect to the plan; and

(b) In section 293, to direct a local authority to prepare changes to a proposed plan to address any matters identified by the Court (such as, for example, that a proposed plan departs from a higher-order statutory planning document to which it must give effect or with which it is inconsistent).

[11] A careful reading of the text of the relevant clauses in Schedule 1 shows how the submission and appeal process in relation to a proposed plan is confined in scope.[5] Submissions must be on the proposed plan and cannot raise matters unrelated to what is proposed. If a submitter seeks changes to the proposed plan, then the submission should set out the specific amendments sought. The publicly notified summary of submissions is an important document, as it enables others who may be affected by the amendments sought in submissions to participate either by opposing or supporting those amendments, but such further submissions cannot introduce additional matters. The Council's decisions must be in relation to the provisions and matters raised in submissions, and any appeal from a decision of a council must be in respect of

[4] Section 290 RMA.
[5] See also the more extensive discussion of these provisions and their legislative history in ***Federated Farmers of New Zealand (Inc) MacKenzie Branch v MacKenzie District Council*** Decision No. [2013] NZEnvC 257 at [24]-[51].

identified provisions or matters. The Environment Court's role then is to hold a hearing into the provision or matter referred to it and make its own decision on that.

[12] The rigour of these constraints is tempered appropriately by considerations of fairness and reasonableness. In the leading case of ***Countdown Properties (Northlands) Ltd v Dunedin City Council***[6] a full court of the High Court considered a number of issues arising out of the plan change process under the Act, including the decision-making process in relation to submissions.[7] The High Court confirmed that the paramount test is whether or not the amendments are ones which are raised by and within the ambit of what is reasonably and fairly raised in submissions on the plan change. It acknowledged that this will usually be a question of degree to be judged by the terms of the proposed change and the content of the submissions.[8]

[13] In analysing such amendments, the High Court approved of the Planning Tribunal's categorisation[9] of them into five groups, the first four of which are permissible:

(a) Those sought in written submissions;

(b) Those that corresponded to grounds stated in submissions;

(c) Those that addressed cases presented at the hearing of submissions;

(d) Amendments to wording not altering meaning or fact;

(e) Other amendments not in groups (a) to (d).

[14] The High Court rejected the submission that the scope of the local authority's decision-making under clause 10 is limited to no more than accepting or rejecting a submission, holding that the word "regarding" in clause 10 conveys no restriction on the kind of decision that could be given. The Court observed that councils need scope to deal with the realities of the situation where there may be multiple and often conflicting submissions prepared by persons without professional help. In such circumstances, to take a legalistic view that a council could only accept or reject the relief sought would be unreal.[10]

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[6] [1994] NZRMA 145.
[7] *Ibid.* at 164-168.
[8] *Ibid.* at 166.
[9] ***Foodstuffs (Otago Southland) Properties Ltd v Dunedin City Council*** (1993) 2 NZRMA 497 at 524-529.
[10] ***Countdown Properties (Northlands) Ltd (supra)***at 165.

[15] The High Court also considered other possible tests, including what an informed and reasonable owner of affected land should have appreciated might result from a decision on a submission. While not rejecting that approach, the Court held that it should not be elevated to an independent or isolated test, given the danger of substituting a test which relies solely on the Court endeavouring to ascertain the mind or appreciation of a hypothetical person.[11]

[16] While clause 10 has been amended several times since 1994 and no longer uses the word "regarding" in relation to decisions on submissions, the current language does not alter the substance of the provision or otherwise render inappropriate the High Court's approach in ***Countdown Properties (Northlands)*** to the application of this provision.

[17] In summary, as Panckhurst J observed in an oft-repeated dictum in Royal Forest & Bird Protection Society Inc v Southland District Council:[12]

> ... it is important that the assessment of whether any amendment was reasonably and fairly raised in the course of submissions, should be approached in a realistic workable fashion rather than from the perspective of legal nicety.

[18] A review of the relevant subsequent case law shows that the circumstances of particular cases have led to the identification of two fundamental principles:

(i) The Court cannot permit a planning instrument to be appreciably amended without real opportunity for participation by those potentially affected;[13] and

(ii) Care must be exercised on appeal to ensure that the objectives of the legislature in limiting appeal rights to those fairly raised by the appeal are not subverted by an unduly narrow approach.[14]

[19] There is obvious potential for tension between these two principles. As observed by Fisher J in ***Westfield (NZ) Ltd v Hamilton City Council,***[15] the resolution

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[11] *Ibid.* at 166-167.
[12] [1997] NZRMA 408 at 413.
[13] ***Clearwater Resort Ltd v Christchurch City Council*** (unreported: High Court, Christchurch, AP34/02, 14 March 2003, William Young J) at para [66].
[14] ***Power v Whakatane District Council & Ors*** (unreported: High Court, Tauranga, CIV-2008-470-456, 30 October 2009, Allan J) at para [30].
[15] [2004] NZRMA 556 at 574-575.

of that tension depends on ensuring that the process for dealing with amendments is fair, not only to the parties but also to the public:

> [72] I agree that the Environment Court cannot make changes to a plan where the changes would fall outside the scope of a relevant reference and cannot fit within the criteria specified in ss292 and 293 of the Act: see ***Applefields, Williams and Purvis,*** and ***Vivid.***[16]
>
> [73] On the other hand I think it implicit in the legislation that the jurisdiction to change a plan conferred by a reference is not limited to the express words of the reference. In my view it is sufficient if the changes directed by the Environment Court can fairly be said to be foreseeable consequences of any changes directly proposed in the reference.
>
> [74] Ultimately, it is a question of procedural fairness. Procedural fairness extends to the public as well as to the submitter and the territorial authority. Adequate notice must be given to those who might seek to take an active part in the hearing before the Environment Court if they know or ought to foresee what the Environment Court may do as a result of the reference. This is implicit in ss292 and 293. The effect of those provisions is to provide an opportunity for others to join the hearing if proposed changes would not have been within the reasonable contemplation of those who saw the scope of the original reference.

[20] The consideration of procedural fairness was discussed in some detail by the High Court in ***Palmerston North City Council v Motor Machinists Limited*** [2013] NZHC 1290. That case was principally concerned with the related issue of whether a submission was "on" a plan change, but Kós J examined that question in its context of the scope for amendments to plan changes as a result of submissions by reference to the bipartite approach taken in ***Clearwater***:[17]

(i) Whether the submission addresses the change to the status quo advanced by the proposed plan change; and

(ii) Whether there is a real risk that persons potentially affected by such a change have been denied an effective opportunity to participate in the plan change process.

[21] Laying stress on the procedures under the Act for the notification of proposals to directly affected people, and the requirement in s32 for a substantive assessment of the effects or merits of a proposal, Kós J observed that the Schedule 1 process lacks those safeguards for changes to proposed plans as sought in submissions. The lack of

[16] ***Applefields Ltd v Christchurch City Council*** [2003] NZRMA 1; ***Williams and Purvis v Dunedin City Council*** (Environment Court, CO22/C002, 21 February 2002, Judge Smith); and ***Re Vivid Holdings Ltd*** [1999] NZRMA 467.
[17] *Supra*, fn 13.

formal notification of submissions to affected persons means that their participatory rights are dependent on seeing the summary of submissions, apprehending the significance of a submission that may affect their land, and lodging a further submission within the prescribed timeframe.

[22] In particular, his Honour noted that a core purpose of the statutory plan change process is to ensure that persons potentially affected by the proposed plan change are adequately informed of what is proposed. He observed:[18]

> It would be a remarkable proposition that a plan change might so morph that a person not directly affected at one stage (so as not to have received notification initially under clause 5(1A)) might then find themselves directly affected but speechless at a later stage by dint of a third party submission not directly notified as it would have been had it been included in the original instrument. It is that unfairness that militates the second limb of the *Clearwater* test.

The present case

[23] In the present case, the Council notified the PDP including planning maps which identified outstanding landscapes and landscapes of high amenity value.

[24] Federated Farmers lodged a substantial submission in relation to numerous provisions in the PDP. The first provision it addressed was "*Identification of outstanding landscapes*". Because of its central importance to the present issue, I set out the whole of the relevant part of the submission by Federated Farmers:

> Federated Farmers supports the Otorohanga District Council's approach of identifying outstanding landscapes on the planning maps. Their identification of outstanding landscapes provides resource users with certainty as to where the provisions will apply, and does not extend unnecessary protection to landscapes that are not considered outstanding.
>
> Federated Farmers considers that the proposed District Plan needs to be consistent with terminology used in the RMA. Section 6(b) of the RMA discusses *Outstanding Natural Features and Landscapes*, and that only landscapes and features that are considered to have a high level of naturalness and outstanding qualities are to be protected. The terminology used in the proposed District Plan needs to be changed from outstanding landscapes, to outstanding natural landscapes.
>
> The methods for identifying, assessing and classifying landscape types at a territorial level are well defined in case law. During an assessment of the District's landscapes the Federation encourages the use of existing methods in order to provide certainty and clarity. In addition, the Federation strongly urges Council to consult with landowners, both collectively and individually, on this matter.

[18] At [77].

> Federated Farmers considers that it is vital that only landscapes with true outstanding qualities and naturalness are identified, so that land used for primary production and normal farming activities do not become unreasonably captured by the provisions.
>
> **Relief sought**
>
> - That only natural features and natural landscapes that have demonstrable outstanding and natural qualities are identified and mapped;
> - That correct RMA terminology is used throughout the Plan, and that the term Outstanding Landscapes is replaced with Outstanding Natural Landscapes.

[25] The second item in Federated Farmers' submission related to landscapes of high amenity value, and sought that areas identified as such be deleted from the planning maps and that any rules pertaining to those areas be deleted from the PDP. Similar relief was sought by Gower and others in their appeal.

[26] The draft consent order filed by the parties would alter the text of the PDP in relation to both outstanding landscapes and landscapes of high amenity value. It would not delete the provisions relating to the latter, but would split the areas of landscape of high amenity value in the district into two: hinterland and coastal, with different provisions in relation to each. There would be some consequential amendments to the controls on earthworks. There does not appear to be any issue as to the Court's jurisdiction to make those changes to the text of the PDP.

[27] Also lodged with the draft consent order is a map of the whole district stated to be at a scale of 1:125,000 at A1, but provided to me at A3 and so effectively 1:250,000, or 1cm = 2.5 km. It shows a line to denote the "Coastal/Hinterland Divide" and has various areas shown in different colours to identify:

(a) "Landscape of High Amenity Value (Coastal)" in green;

(b) "Landscape of High Amenity Value (Hinterland)" in yellow;

(c) "Outstanding Natural Features" in orange;

(d) "Outstanding Natural Landscapes" in red; and

(e) "LHAV Removed through Mediation" in blue.

[28] This map also shows some of these areas with a hatched shading to denote "New ONFL/LHAVS (Outside Decisions Version)." The presently contested issue arises in relation to the shaded areas of Outstanding Landscapes. There is no issue in

relation to the shaded areas of Landscapes with High Amenity Value because the Council acknowledges in the memorandum of consent to resolve the landscape topic dated 20 December 2013 that "*[t]hose entirely new areas of LHAV which are cross-hatched* (sic) *on the map attached . . . and which had no Landscape Policy Area overlay in either the notified or the decisions version . . . are not within scope of the appeals on the topic of Natural Landscape*".

[29] In relation to the new shaded areas of Outstanding Landscapes, the Council relies on the content of the notice of appeal by Federated Farmers to establish jurisdiction for the changes sought to the planning maps. The relevant relief sought in Federated Farmers' notice of appeal is set out in the memorandum of consent to resolve the landscape topic dated 20 December 2013. I do not need to repeat it here, as in all material respects it accurately reflects the content of Federated Farmers' original submission quoted above. As identified above in the discussion of the relevant statutory provisions relating to the jurisdiction of the Environment Court, the ultimate source of jurisdiction for resolving appeals before the Court is either the content of the PDP as notified or the content of a submission seeking to amend it, or somewhere in between.[19]

[30] The memorandum dated 20 December 2013 also refers to the relief sought by other appellants, but other than an appellant in the Gower & Ors appeal named Chick, who seeks removal in its entirety of the landscape policy area overlay from the Chick properties, all of the other appeals appear to be focussed on the text of the PDP rather than its maps. None of the four appeals in relation to the landscape topic expressly seek the inclusion of additional areas identified as Outstanding Landscapes.

Federated Farmers' argument

[31] Federated Farmers submits that there is no jurisdiction for further areas of outstanding natural landscape now to be included in the planning maps of the PDP, for they were not so mapped in the notified version of the PDP. The position in relation to these Outstanding Landscapes is, it argues, the same as for the new areas of Landscapes of High Amenity Value, which were identified outside the scope of any Outstanding Landscapes or Landscapes of High Amenity Value identified in the PDP as notified. Federated Farmers and Gower & Ors sought in their appeals that these Landscapes of High Amenity Value all be removed, and in the memorandum dated 20 December 2013 the Council accepts that any Landscapes of High Amenity Value

[19] ***Re Vivid Holdings Ltd*** [1999] NZRMA 467 at para (19)

which is entirely new would require either a variation to the PDP or a future plan change in order to be included.

[32] Having traversed the relevant clauses of Schedule 1 and the relevant case law, Federated Farmers says that its submission and notice of appeal were limited to outstanding landscapes as already identified in the PDP as notified. However, counsel acknowledges that the documents do not include any particular limitation on scope, so that if "taken at face value" they might apply to areas not previously identified in the PDP as notified.

[33] Emphasis is laid on the principle identified in ***Countdown Properties (Northland)***[20] that the Council cannot grant relief beyond the scope of the submission lodged in relation to the PDP, and the focus must be on the submission rather than on the notice of appeal. Federated Farmers submits that there is a danger in going too far, as identified in ***Clearwater***.[21]

[34] Federated Farmers also submits that it would be unreasonable to read its submission as extending areas of protection for landscapes because that is not normally the position taken by it in these matters. I do not think I can rely on this point as having much determinative value. As observed by the High Court in ***Countdown Properties (Northland)***[22], there is a danger in endeavouring to ascertain the mind or appreciation of a hypothetical person. While Federated Farmers is far from hypothetical, I would prefer to discern any relevant intention of a person from the text of their submission rather than from the person's reputation or some inference drawn from knowledge of past events. Assumptions based on impressions of that sort are likely to lead the Court into error.

Otorohanga District Council's argument

[35] At the outset, the Council seems to place some weight on the fact that Federated Farmers entered into mediation and an agreement arising out of mediation. In my view, any such agreement is not relevant to the issue before the Court. The jurisdiction of the Court to make an order authorising changes to a statutory planning document cannot be conferred by agreement. The Court's jurisdiction is established by the Act, and the boundaries of that jurisdiction are established by the relevant

[20] *Supra*, fn 11.
[21] *Supra*, fn 13.
[22] *Supra*, fn 11

statutory provisions referred to above. No agreement reached between the parties can confer additional jurisdiction and nor can it overcome any lack of jurisdiction in a matter such as this.

[36] The Council bases its argument that there is scope to include additional areas of Outstanding Landscapes on the submission by Federated Farmers set out at [21] above. The Council notes that the submission is broadly framed and did not specify any areas of Outstanding Landscapes (as distinct from Landscapes of High Amenity Value) to be removed. In making such a submission on the PDP, the Council submits that Federated Farmers left open the possibility that other areas may be mapped if the new landscape assessment methodology required it.

[37] The Council stresses the issue of workability in dealing with the process of reassessment of landscapes undertaken by the Council as part of its mediation and negotiations with the appellants. It notes the real possibility in that process that the Outstanding Landscapes would change, including the identification of additional areas. It argues that to expect only a reduction in the areas of Outstanding Landscapes would be to impose a "sinking lid" approach which was not sought by Federated Farmers and cannot be implied from its submission.

Further argument

[38] In reply, Federated Farmers expresses some concern about the disclosure of a mediated agreement, but it does not appear necessary for the Court to enter into that issue to resolve the question of jurisdiction. In any event, as noted above, Federated Farmers confirms that it will support the negotiated draft consent order if the making of such an order is within the scope of its appeal.

[39] Federated Farmers denies that it is pursuing a "sinking lid" approach, and submits that any additional ONL areas should proceed through the Schedule 1 process rather than be added at this stage.

[40] No additional matters are raised by the other appellants.

Discussion

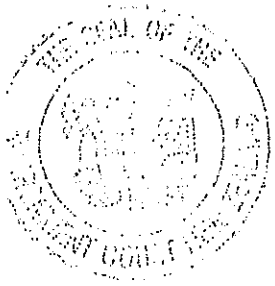
[41] The material before the Court includes a map of the district attached to the draft consent order showing the agreed mediated outcome for the landscape policy

area. The new Outstanding Landscapes and Landscapes of High Amenity Value which are outside the decisions' version of the PDP are shown on the map with hatched shading. At the scale of the map, I can do little more than observe that there are some substantial areas of Outstanding Landscapes that have been added. I do not know anything about those particular areas, including who may own or occupy them, or what they may be used for. I have not been presented with any information about the direct effects on persons with an interest in those areas or whether those persons may support or oppose the identification of their land on the map as Outstanding Landscapes. But it may not matter greatly that I do not have such information.

[42] The essential issue that I must determine is whether those hatched areas are within the scope of the submission by Federated Farmers on the PDP. Fundamentally, in determining a matter of jurisdiction, this is an objective assessment based on the text of the relevant documents rather than on the personalities of any participant or the circumstances of tenure or use of the land. While it might be thought possible to seek the agreement of affected persons at a later stage to address the issue of effects, such an *ad hoc* approach would not respond to the jurisdictional issue of the scope of amendments to a proposed plan which are permitted under Schedule 1.

[43] An objective approach, however, must yet allow a degree of latitude in its application so as to be realistic and workable rather than a matter of legal nicety. If it were obviously the case that the additional areas were of a scale and extent that could reasonably be considered to be incidental and consequential extensions, not requiring further substantial analysis of their likely effects or comparative merits, then that could be within the scope of amendments permissible in terms of the tests identified in ***Countdown Properties (Northland)*** and ***Clearwater*** and referred to above at [12] and [20].

[44] I do not consider it useful to assess this in terms of whether it is a "sinking lid" approach, with the apparent pejorative connotation attached to those words. Even with the latitude identified in relevant case law for the purpose of realistic workability, the Act imposes limits which have the effect of containing how far amendments may be made to a statutory planning document while it proceeds through the Schedule 1 process. If the result of that containment may be characterised as a "sinking lid", then it is a consequence of the boundaries set by the law rather than the approach of any party to these proceedings.



[45] As for the timing of the raising of this issue, while one may understand the sense of frustration that could develop when a jurisdictional point is raised at a late stage in proceedings which appear to be on course for settlement, that is irrelevant to the Court's consideration. Even if the point had not been raised by one of the parties, it could well have been raised by the Court itself in its review of the draft consent order to ensure, notwithstanding the agreement of the parties, that the order may properly be made in accordance with all relevant legal requirements and for the purpose of the Act. All officers of the Court have a duty to act in accordance with the law, including within the jurisdiction set by the law, at all times.

[46] So against that background, the question is whether the submission by Federated Farmers seeks, or otherwise creates scope for, the inclusion of additional Outstanding Landscapes in the landscape policy area of the Otorohanga PDP?

[47] I have set out the relevant text of the submission in full above at [21]. It is clearly a submission on the provisions of the PDP in relation to issues concerning landscape, so that no issue arises in terms of the first limb of the test as expressed in ***Clearwater***.[23] The submission commences by supporting the Council's approach of identifying outstanding landscapes on its planning maps, noting that clear identification provides users with certainty. The submission supports methods for identifying landscape types which are well defined in order to provide certainty and clarity. The submission also supports consultation with landowners. The relief sought is "*that only natural features and natural landscapes that have demonstrable outstanding and natural qualities are identified and mapped.*"

[48] It is notable that the text of the submission supports a methodology in terms of the whole district and does not refer to any particular areas or locations. The principal concern expressed in the submission is to achieve the clear and certain identification, by mapping, of natural landscapes and natural areas that are demonstrably outstanding. In abstract terms it is clearly possible that a submission that seeks an amended or new method for dealing with a resource management issue in a proposed plan could consequentially require other changes to the proposed plan resulting from the application of that method to the circumstances in the district. Where such consequential changes are foreseeable to the parties and do not extend to affect those who may have no notice of them, the case law discussed above indicates that incidental extensions are permissible. But on the face of the material before me, the extensions sought in this case are not within those limited bounds.

[23] *Supra*, fn 13.

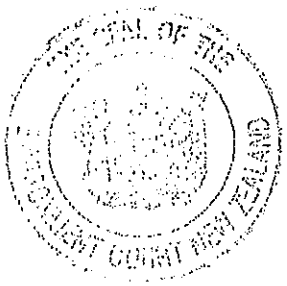
[49] It is not apparent that the submission by Federated Farmers required a full reassessment of the landscapes of the entire district, with all areas able to be considered for inclusion in what was to be identified on the maps as "outstanding." In terms of the relief sought, the use of the word "only" indicates a submission that the maps as notified may have included areas that did not warrant such identification rather than that there were areas that should have been so identified and were not. While the reassessment of the landscape within the district could obviously result in additional areas being identified, it is not explicit and, in my opinion, nor is it implicit that the submission sought to have any such areas included in the planning maps. The emphasis laid on consultation with landowners, at least, indicates that the submission sought a further process before additional areas could be included on the planning maps as Outstanding Landscapes.

[50] In my opinion, adding areas of outstanding landscapes that have not previously been shown either on the planning maps as notified nor identified or otherwise referred to in submissions is not within the scope of the submission by Federated Farmers. The approach taken by the Council to the treatment of the entirely new areas now mapped as Landscapes of High Amenity Value, being to require a variation to the PDP or a plan change once the PDP is made operational, is the correct approach and must also apply in relation to areas now identified as Outstanding Landscapes.

[51] For those reasons, I conclude that the Court does not have jurisdiction to approve any consent order seeking to include new areas of outstanding natural landscapes or outstanding natural features beyond those shown on the planning maps in the decisions version of the Otorohanga proposed District Plan.

Directions

[52] I direct the Otorohanga District Council as respondent to revise the draft consent order by amending the map of the Landscape Policy Area so that it no longer shows new areas of outstanding natural landscapes or outstanding natural features or landscapes of high amenity value that were outside the areas shown in the decisions version of the proposed District Plan.



[53] The parties may then submit such a revised draft consent order with any supporting memorandum of consent for the Court's consideration.

SIGNED at AUCKLAND this 27th day of March 2014

DA Kirkpatrick
Environment Judge