BEFORE THE ENVIRONMENT COURT
I MUA I TE KOOTI TAIAO O AOTEAROA

Decision No. [2019] NZEnvC 111

	IN THE MATTER	of the Resource Management Act 1991
	AND	of an appeal pursuant to clause 14(1) of the First Schedule of the Act
	BETWEEN	TUSSOCK RISE LIMITED
		(ENV-2018-CHC-121)
		Appellant
	AND	QUEENSTOWN LAKES DISTRICT COUNCIL
		Respondent
Court:		Environment Judge J R Jackson (sitting alone under section 279(1) of the Act)
Hearing:		at Queenstown on 20 December 2018 (Final submissions received 26 April 2019)
Appearances:		G M Todd and B B Gresson for Tussock Rise Limited K L Hockly for the Queenstown Lakes District Council
Date of Decision:		21 June 2019
Date of Issue:		21 June 2019

PROCEDURAL DECISION

A: Under section 279(4) of the Resource Management Act 1991 the Environment Court refuses to strike out any parts of the appeal by Tussock Rise Limited.

B: Costs are reserved.

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REASONS

1. Introduction

1.1 The issues and the application to strike out

[1] A jurisdictional issue has arisen in an appeal lodged by Tussock Rise Limited ("TRL") against the Queenstown Lakes District Council's decisions on "Stage 1" of what is called the Proposed District Plan ("PDP"). The Council has applied under section 279(4) of the Resource Management Act 1991 ("the RMA" or "the Act") to strike out the relief sought by TRL in this appeal.

[2] The stated grounds for the Council's application are that[1]:

(a) the relief sought does not satisfy the prerequisites of subclauses 14(1) and (2) of Schedule 1 of the RMA, in that the relief does not relate to a provision or matter either included in, or excluded from, the Council's decisions on Stage 1 of the PDP, and *that the submission by Tussock Rise was not 'on' Stage 1*; and

[1] Notice of motion seeking strike out of appeal dated 2 November 2018 at [1.1].

(b) as a result, the Tussock Rise appeal discloses no reasonable or relevant case, amounts to an abuse of process and is frivolous or vexatious in the sense that it lacks the requisite jurisdiction.

[italics added]

In fact, the case put forward by the Council at the hearing was confined to the italicised words: whether TRL's appeal was 'on' the relevant parts of the PDP.

[3] Reflection on the case has thrown up some rather unusual facets of the Council's district plan review which may have implications for the Council's application. First, the "proposed district plan" is at law a series of plan changes to the operative district plan ("ODP"); second, it is unclear what provisions[2] of the ODP are proposed to be replaced by the PDP; third, now that most of the hearings on Topics 1 and 2 (Strategic Issues) of "Stage 1" of the PDP have been heard, there is as yet minimal evidence that the guiding strategic objectives of the PDP have ever been tested under section 32 RMA against the provisions they are (presumably) replacing in Section 4 (District-wide provisions) of the District Plan. Fourth, the Council is not proposing to amend the industrial provisions of the ODP despite the fact that they appear to be inconsistent with the National Policy Statement on Urban Development Capacity ("NPS-UDC")[3].

[4] Those difficulties with the review process and their relevance to the Council's application will be elaborated on below.

1.2 The steps leading to the appeal

[5] The proceeding relates to a block of land now owned by TRL at the end of Connell Terrace, Wanaka being Lot 3 DP 417191 (Otago Registry)[4] ("the site"). TRL is successor to the Gordon Family Trust, the original submitter in relation to the site.

[6] On 17 April 2014 the Council resolved[5] to review parts of the ODP under section 79(1) RMA.

[7] "Stage 1" of a proposed district plan was notified in August 2015. The public

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2 See 79(1) RMA.

3 See *Bunnings Limited v Queenstown Lakes District Council* [2019] NZEnvC 59 at [46].

4 The notice of appeal records Lot 2 DP 477622 but all other relevant documentation has it as stated here. I suspect an error in the notice.

5 Memorandum of counsel for Queenstown Lakes District Council dated 26 April 2019 lodged in *Upper Clutha Environmental Society Incorporated v Queenstown Lakes District Council* (ENV-2018-CHC-56).

notification commenced:

> **PUBLIC NOTIFICATION OF THE PROPOSED QUEENSTOWN LAKES DISTRICT PLAN (STAGE 1)**
>
> The Council has completed the first stage of the District Plan review and is now notifying the Proposed Queenstown Lakes District Plan (Stage 1) for public submission pursuant to Schedule 1 Clause 5 of the RMA.
>
> There are many differences between the current Operative District Plan and the Proposed District Plan. The Proposed District Plan affects all properties in the District and may affect what you and your neighbours can do with your properties. You should take a look to see what it means for you.
>
> In summary, some of the key substantive changes include:
>
> - A new Strategic Direction chapter that sets out the overall approach to ensuring the District's sustainable management in an integrated manner.
> - An Urban Development chapter that sets out a growth management direction for the District, and introduction of Urban Growth Boundaries around urban areas.
> - A Landscape chapter that sets out how development affecting the District's valued landscapes will be managed – including the mapping of lines that identify Outstanding Natural Landscapes and Features.
>
> ...

[8] The notice was, I assume, sent to all ratepayers and residents of the District under clause 6(1A) Schedule 1 RMA and also published in local newspapers. It may be important that the public notice records that the PDP "...affects all properties in the District".

[9] After providing further detail about the proposed plan, how to view it and make submissions on it, the public notification concluded:

> **The closing date for submissions is Friday 23 October 2015.**
>
> **What happens next?**
>
> After submissions close:
>
> - we will prepare a summary of decisions requested by submitters and publicly notify the availability of this summary and where the summary and full submissions can be inspected;

- people who represent a relevant aspect of the public interest or have an interest greater than the interest of the general public may make a further submission, in the prescribed form within 10 working days of notification of the summary of decisions sought, supporting or opposing submissions already made;
- a copy of the further submission must also be served on the Council and the person who made the original submission;
- submitters may speak in support of their submission(s) at a hearing if they have indicated in their submission that they wish to be heard;
- following the hearing the Council will give notice of its decision on the Proposed District Plan and matters raised in submissions, including its reasons for accepting or rejecting submissions;
- every submitter then has the right to appeal the decision on the Proposed District Plan to the Environment Court.

Want more info or help understanding the proposals?

Visit www.qldc.govt.nz/proposed-district-plan to find a range of fact sheets and diagrams to help you understand some of the more technical parts of the Proposed District Plan.

A duty policy planner will also be available every workday until submissions close. Call 03 441 0499 (Queenstown) or 03 443 0024 (Wanaka).

This notice is in accordance with clause 5 of Schedule 1 of the Resource Management Act 1991.

[10] I note that while the Council purports to be acting under section 79(1) RMA so that Stage 1 is in effect a plan change to the ODP, Stage 1 reads as if it is a full review under section 79(4) RMA. That explains some of the submissions for TRL as I will explain later.

[11] For the Upper Clutha Basin, the Low Density Residential zone in eastern Wanaka is shown on Map 23 – Wanaka Rural – of the notified PDP. A copy is annexed marked "A". The attached "Legend" shows that:

- the beige colour describes "Low Density Residential";
- the dark blue colour describes "Industrial B zone (operative)".

The site is dark blue (i.e. it is "Industrial B zone (operative)") with a beige area adjacent and to the west.

[12] There is no explanation on Map 23 of what an operative zone is. To understand that, one has to turn to a different Legend at the start of the volume of planning maps. That page contains six columns. The first column is headed "Operative Plan". A note at the top of the first column reads:

> Operative Plan
> Operative zones are shown across sites that are not being reviewed in Stage 1 of the District Plan Review, or where the Zone has been specifically reserved for review in Stage 2.

The Council relied on that "note" as advice to the public that parts of the "operative plan" were not the subject of "Stage 1" of the PDP. The note is troubling for two reasons. One is that it is so small – how were readers of the plan to know its importance? Second, the words are not on the notified Map 23 which has its own legend (which does not refer to any note).

[13] The Gordon Family Trust wished to respond to Map 23 of the notified PDP. Its original submission[6] is dated 23 October 2015. After giving contact details and identifying the site, the submission states (relevantly):

> Specific provisions / of the proposal that my submission relates to are:
> 1. The proposal to zone part of the Submitters' land shown on Proposed Planning Map 21 located off Gordon Road and Connell Terrace Wanaka, which is legally described as Lot 3 Deposited Plan 417191 Wanaka (the "Submitters' Land"), Industrial B zone.
> 2. The proposal to make all subdivision applications a Discretionary Activity.
>
> My submission is / include whether you support or oppose the specific provisions or wish to have them amended, and the reasons for your views.
> 1. I oppose the proposed zoning of the Submitters' land in part as Industrial B.
> 2. I oppose the proposal to classify all applications for subdivision consent a Discretionary Activity.
>
> ...
>
> I seek the following from the local authority ...
> 1. That part of the Submitters' land be rezoned as Low Density Residential (as per the attached plan).
> 2. That subdivision of land zoned Low Density Residential be a Controlled Activity.

[14] The Council's[7] notified summary of submissions stated (relevantly):

6 Given reference no. 395 by the Council.
7 Under clause 7 Schedule 1.

Point Number	395.1 Provision: 138-7 Low Density Residential
Position:	Oppose
Summary of Submission:	Opposes the Industrial B zoning of that part of the Submitters' land described as Lot 3 DP 417191 and as shown on the plan attached to this submission and submits that it be rezoned Low Density Residential.

Point Number	395.2 Provision: 7-Part Seven – Maps > 7.25-Map 23 – Wanaka
Position:	Oppose
Summary of Submission:	Opposes the Industrial B zoning of that part of the Submitters' land described as Lot 3 DP 417191 and as identified on the plan attached to this submission and submits that it be rezoned Low Density Residential.

[15] The Council's decision was received by TRL – which I infer, by then had an interest in the land – on 4 May 2018. TRL appealed in June 2018. The notice of appeal contests:

> (a) the zoning of the appellant's land at Connell Terrace, Wanaka, legally described as [sic] Lot 2 Deposited Plan 477622[8] ...;
>
> (b) the determination of the Council that the appellant's submission seeking a rezoning of the [site] from Industrial B Zone to Low Density Residential Zone was not part of Stage 1 of the plan and subsequently no decision was made on the submission.

[16] The stated reasons for the appeal are:

> (a) the land was included in the notified maps for Stage 1 of the plan and was noted as being zoned "Industrial B (Operative)".
>
> (b) the residential zone provisions were also notified in Stage of the plan. For submitters seeking residential zones for their properties they would have to submit as part of Stage 1, being the same time the provisions of the residential zones were notified.
>
> (c) If they did not submit at that time this would create a vacuum whereby they potentially could not seek a residential zoning for that land at subsequent stages of the plan, given the provisions and zoning for residential land had already been decided as part of Stage 1.
>
> (d) given (a)-(c) above it was not an option for the Council to come to the conclusion that the submission was not on Stage 1 of the plan and to that end the decision was unlawful.
>
> ...

8 See footnote 4 above.

[17] It appears that the Council has endeavoured to place the site beyond the scope of its review. It now argues the court has no jurisdiction to consider TRL's appeal on "Stage 1" of the PDP.

1.3 The section 32 analysis and the superior policy framework

[18] Each notified chapter – or at least each general issue covered by "Stage 1" – was accompanied by a section 32 evaluation report. These were not referred to at the hearing, but they are public documents and are relevant as part of the context of this proceeding. The most relevant reports[9] to this proceeding were those on "Strategic Directions" (corresponding to Chapter 3 of the PDP) and on the "Low Density Residential" zone. The section 32 evaluation report on the Low Density Residential describes the rapid growth of the district and its effects on housing affordability. It makes no direct assessment of development capacity. Its conclusion on that issue is one sentence[10]:

> The Low Density zone generally retains its existing spatial extent, with a limited number of specific new areas to be included within the zone – either to reflect the density of development which has already occurred, or to include land with further housing potential within urban growth boundaries.

I also note that the section 32 report does not say anything about the effect of demand for residential land on the demand for industrial land or vice versa. Nor does the report appear to consider that housing capacity could be provided from other existing zones, e.g. Industrial.

[19] The policy framework in higher order statutory instruments may not be relevant to consideration of whether a submission or appeal is 'on' an isolated plan change with its more defined geographical or legal limits. However, in my view the policies of any relevant superior statutory instrument may be relevant to consideration of whether a submission is on a provision 'in' a proposed plan change when further stages in the review of an operative plan are contemplated.

[20] I should not overlook either that there are challenged higher order provisions in the (strategic) Chapter 3 of the PDP[11]. Thinking about those in relation to the application

9 These are all searchable online on the Council's website.

10 ERLD section 32 Report, p 12 (https://www.qldc.govt.nz/planning/district-plan/proposed-district-plan-stage-1/section-32-documents/).

11 And in Chapters 4-6 of the PDP to the extent that they include strategic objectives and policies also.

before me, I have realised that there is potentially a problem with the way the Council has gone about preparing its plan (changes) given that both the ODP and the PDP have (very different) strategic chapters[12] which set strategic objectives and policies for the entire plan[13]. The difficulty is this: if there are changes to the (strategic) Chapter 3 of the PDP as a result of appeals then there may of necessity need to be changes to subsequent sections of the PDP. That suggests the Council's decision to notify other sections of the PDP -- or at least to decide the submissions on them -- may have been premature.

[21] The court has looked at this type of problem surprisingly infrequently. The issue did arise many years ago in *Campbell v Christchurch City Council*[14] where I observed:

> ...It appears that changes to a plan (at least at objective and policy level) work in two dimensions. First an amendment can be anywhere on the line between the proposed plan and the submission. Secondly, consequential changes can flow downwards from whatever point on the first line is chosen. This arises because a submission may be on any provision of a proposed plan. Thus, a submission may be only on an objective or policy. That raises the difficulty that, especially if:
>
> (a) a submission seeks to negate or reverse an objective or policy stated in the proposed plan as notified; and
> (b) the submission is successful (that is, it is accepted by the local authority)
>
> -- then there may be methods, and in particular, rules, which are completely incompatible with the new objective or policy in the proposed plan as revised. It would make the task of implementing and achieving objectives and policies impossible if methods could not be consequentially amended even if no changes to them were expressly requested in a submission. The alternative -- not to allow changes to rules – would leave a district plan all in pieces, with all coherence gone.

[22] I also pointed out the fairness issues that result[15]:

> The danger in the proposition that a change to an objective or policy may lead to changes in methods -- including rules which are binding on individual citizens -- is that citizens may then subsequently protest with some justification that they had no idea that a rule which binds them could result from a submission on an objective.

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12 Section 4 (District wide issues) ODP: Chapter 3 (Strategic directions) PDP.
13 This may be slightly inaccurate for the PDP because parts of the ODP are not to be reviewed but somehow incorporated into the PDP.
14 *Campbell v Christchurch City Council* [2002] NZRMA 332 at [20].
15 *Campbell v Christchurch City Council* above n 14 at [21].

An answer would appear to be to resolve the strategic section of a district plan first, including appeals, and only then to continue with reviewing other sections. Perhaps jurisdictional challenges on later chapters of the PDP should have been deferred until Chapter 3 is settled.

[23] A more authoritative, but with respect abstract, analysis of permissible consequential changes was given in the High Court's decision in *Albany North Landowners v Auckland Council* (*"Albany North"*). I discuss this case below[16].

[24] It may not be illegal for the Council to adopt the process it has. However, the process certainly has implications as to fairness both to landowners such as TRL in this case and to other unknown persons potentially affected. For example, some consideration of an appeal on Chapter 3 of the PDP may show that the strategic objectives or policies concerning urban development may need to be altered to give effect to the NPS-UDC referred to above and discussed later. That in turn could mean that TRL's submission and notice of appeal become directly[17] on Stage 1 of the PDP.

2. The law and the issues

2.1 Preparation and renewal of district plans

[25] Since the PDP was notified in 2015 the relevant form of the RMA is at the last amendment, i.e. the Resource Management Amendment Act 2013. The Resource Legislation Amendment Act 2017 does not apply.

[26] District plans are prepared under section 73 RMA. This states (relevantly):

> **73 Preparation and change of district plans**
> (1) There shall at all times be one district plan for each district prepared by the territorial authority in the manner set out in Schedule 1.
> (1A) A district plan may be changed by a territorial authority in the manner set out in Schedule 1.
> (1B) A territorial authority given a direction under section 25A(2) must prepare a change to its district plan in a way that implements the direction.
> (2) Any person may request a territorial authority to change a district plan, and the plan may be changed in the manner set out in Schedule 1.

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16 *Albany North Landowners v Auckland Council* [2017] NZHC 138.
17 E.g. under clause 16A RMA.

(3) A district plan may be prepared in territorial sections.
...[18]

The Council now claims[19] that Stage 1 of the review was confined "... to the territorial area notified", so section 73(4) RMA, which states that a proposed plan (or change) may be "... prepared in territorial sections", has some importance.

[27] "Proposed plan" is defined separately in section 43AAC RMA. That states:

> **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; 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.

The four ways of replacing an operative plan

[28] There are (at least) four ways that an operative district plan under the RMA may be replaced in whole or part:

(1) preparation of a new proposed plan under Schedule 1;
(2) by way of full review under s 79(4) RMA;
(3) by plan change under s 79(1) to (3) RMA;
(4) by privately initiated plan change under Schedule 1.

The fourth is not relevant here and I say no more about it.

[29] The first is by preparation of a new (proposed) plan under Schedule 1 to the Act, without reference to any operative district plan. The RMA does not contain a specific reference to any general relationship between such a new plan and the previously operational plan. Rather, Schedule 1 simply specifies how a new plan is commenced by

18 Sections 73(4) and (5) relate to giving effect to a regional policy statement and so are not relevant here.
19 Memorandum of counsel for QLDC dated 26 April 2019 at [15].

preparation of[20] a provisional plan, followed by consultation[21], inclusion of[22] designations in operative plans, notification[23] etc. The relationship between the new plan and the old plan is specified indirectly by clause 20 Schedule 1, which empowers the local authority to publicly notify the date on which the new plan is to become operative. Implicitly, the old plan lapses at that date. In fact, there are specific provisions in subpart 7 of Part 5 of the RMA as to the legal effects of rules, so that rules "...must be treated as operative" at an earlier date if, for example, there are no submissions in opposition or appeals filed[24]. In that case, "any previous rule" (presumably a rule in an operative plan) is treated "as inoperative"[25]. In addition, rules in a proposed plan may have legal effect at an earlier stage[26], but in that case they appear to apply alongside the operative plan so that two resource consents may be required (although the position is quite obscure).

[30] The second method by which an operative district plan, or parts of it, may be replaced is by way of review under section 79(4) RMA. This method – the closest to preparing an entirely new plan under Schedule 1 – is to conduct a full review of an operative plan under section 79 RMA. This enables[27] a district council to review and change its operative district plan section by section. "Section" [of the plan] is not defined in the RMA, but in this context it means a "chapter" in the ODP rather than a "territorial section", that is, a geographical area as referred to by section 73(3) RMA.

[31] Section 79 RMA states:

> **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 Parts 1, 4, or 5 of Schedule 1 and

20 Clause 2(1) Schedule 1 RMA.
21 Clauses 3 et ff RMA.
22 Clause 4 Schedule 1 RMA: this is notable for containing the only reference to a "new district plan" in all of Schedule 1.
23 Clause 5 Schedule 1.
24 Section 86F(1)(a) RMA.
25 Section 86F(1) RMA includes the phrase "...(and any previous rule as inoperative)...".
26 Sections 86B and 86D RMA.
27 Section 79(4) RMA.

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 Parts 1, 4, or 5 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:
  ...
  (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 Parts 1, 4, or 5 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 Parts 1, 4, or 5 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.

[32] In effect section 79 RMA broadly allows for two types of plan review:

(a) a full review of the sections of (or plan changes to) an entire district plan under section 79(4); or

(b) review of a "provision" (or provisions) of a district plan as set out in section 79(1) ("partial review").

[33] The partial review under section 79(1) to (3) RMA is the third way of replacing (at least in part) the provisions of an operative district plan. The principal differences between a standard one-off plan change (e.g. adding some objectives, policies and methods or simply methods to an operative plan) and a section 79(1) to (3) review are the compulsory nature of the latter, and its review of specific provisions (or sets of provisions) in the operative plan. The fourth method is by a private plan change under section 73 and Schedule 1 to the RMA.

What is meant by "provision" in section 79(1)?

[34] Provision seems to include an objective (see section 32). At first sight a "provision" in a plan is different from a "section" (which loosely corresponds to a "chapter" or (possibly) a "territorial section" under section 73(3) RMA). In her memorandum of 26 April 2019 Ms Hockly submitted that "... the differing use of language in section 79(1) compared to section 79(4) ... is not intended to indicate any distinction between the different types of review"[28]. That leaves the question "then why did Parliament use different language?"

[35] The standard view is that different language is unusually intended to convey a distinction in meaning. Another set of paired provisions is sections 12 and 13 of the RMA. Section 12 refers to several restrictions in the coastal marine area. It states (relevantly):

12 Restrictions on use of coastal marine area

(1) No person may, in the coastal marine area, —
...
  (c) disturb any foreshore or seabed (including by excavating, drilling...)...
...

(2) No person may...
...
  (b) remove any sand, shingle, shell or other natural material from that area.
...

(4) In this Act,—
  ...
  (b) **remove any sand, shingle, shell, or other natural material** means to take any of that material...[so that] the holding of a resource consent, a licence or profit à prendre to do so would be necessary.

Section 12 covers both disturbance of the seabed **and** removal of the material "disturbed".

[36] In contrast, section 13 reads more simply:

13 Restriction on certain uses of beds of lakes and rivers

(1) No person may, in relation to the bed of any lake or river,—
  ...
  (b) excavate, drill, tunnel, or otherwise disturb the bed; ...

[28] Queenstown Lakes District Council memorandum dated 26 April 2019 at [15].

There is no equivalent to section 12(4) RMA. Section 13 is silent about removal from the area of the material "disturbed" (by excavation or otherwise) from the river or lake bed.

[37] In *Christchurch Ready Mix Concrete Limited v Canterbury Regional Council ("Ready Mix (EC)")*[29] I wrote[30]:

> Section 13, while it refers to excavation and other disturbance of the river bed, makes no allowance for taking of gravel. That is a sharp and important contrast with section 12(4)(b) of the RMA. The reason for that difference is that the removal of resources (such as gravel) – which have previously been excavated – from the bed of a river or lake is controlled by common law property rights as I discussed in *Brooklands Properties 2000 Limited v Road Metals Company Limited*[31]. That is presumably why a resource consent under section 13 is called a "land use consent"[32]. That description shows that this section – like section 9 – is designed to work with existing land law.

[38] I refused to make a declaration about the priority of an application for disturbance of the river bed and "all aspects of extraction of gravel" on the premise (inter alia) that removal of gravel from riverbed was not covered by section 13 RMA because its wording differed from section 12 RMA. *Ready Mix (EC)* was held to be wrong in *Christchurch Ready Mix Concrete v Canterbury Regional Council ("Ready Mix (HC)"*[33] for some other reason attributed to the Environment Court. So there may be some implicit authority for the proposition that different wording in similar sections of the RMA is not meaningful although Fogarty J's decision never referred to the distinction between sections 12 and 13 RMA. In my opinion *Ready Mix (HC)* should therefore be confined to its facts.

[39] As I have said, the conventional view is that there is a statutory canon[34] (or at least a rule of thumb) that a term used in a statute more than once is usually to be given the same meaning throughout. In *New Zealand Breweries Limited v Auckland City Corporation*[35] FB Adams J wrote (for the Court of Appeal):

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29 *Christchurch Ready Mix Concrete Limited v Canterbury Regional Council* [2011] NZEnvC 195.
30 *Ready Mix (EC)* above n 29 at [29].
31 *Brooklands Properties 2000 Limited v Road Metals Company Limited* C164/2007.
32 Section 87(a) RMA.
33 *Christchurch Ready Mix Concrete v Canterbury Regional Council* (HC) Christchurch CIV 2011-409-1501 at [28].
34 See Burrows and Carter (2015) *Statute Law in New Zealand* 5th edition, LexisNexis p 260.
35 *New Zealand Breweries Limited v Auckland City Corporation* [1952] NZLR 144 (CA) at 158 as adopted in *Elders New Zealand Limited v PGG Wrightson* [2009] 1 NZLR 577 (SCNZ) at [30] per McGrath L.

> While there is no general rule that the same meaning must be given to an expression in every part of a statute ... it is reasonable to suppose that the meaning will be same throughout.

[40] Burrows *Statute Law in New Zealand* (5th ed) cites that and other cases and continues[36]:

> ... there is a presumption that the drafter has used words consistently throughout the Act. This presumption may have added strength when a word or expression is used many times in the Act. "A 'pick and mix' approach to the single word 'offence' defies the normal approach to interpretation". Likewise, it may be presumed that different expressions bear different meanings. Contrasting different provisions is sometimes enlightening.[37] However, like all general rules of construction, these should not be "ridden too hard"; they are very far from infallible.[38]

[41] It is more difficult to find authority for the proposition that the same general formula used with some different words is usually intended to have a different meaning but as *Burrows* notes above that appears to be the logical converse to the first canon. I therefore hold it is likely that "provision" includes "objective", "policy" and "method including a rule" and may include an "issue"; on the other hand, "sections" in section 79(5) means whole sets of "provisions" (or chapters) of operative plans. The difference is that section 79(1) appears to require a one-to-one correspondence between the provisions being altered and the replacement provision, or at least that every provision being changed is identified. In contrast, section 79(5) can simply replace an operative plan, chapter by chapter.

2.2 The contents of a district plan

[42] A district plan must contain objectives, policies and rules (if any)[39]. It may contain other matters.

[43] There is a tendency these days to have an overarching strategic section in district plans, setting objectives and policies to which other sections are more or less subservient. On the whole, that is a useful trend in that it assists in integrated management of the district's resources by identifying the more important objectives of

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36 Burrows and Carter (2015) *Statute Law in New Zealand* 5th edition, LexisNexis p 260,
37 *Hawkes Bay Hide Processors of Hastings v Commissioner of Inland Revenue* [1990] 3 NZLR 313 (CA).
38 *Mayor of Wanganui v Whanganui College Board of Trustees* (1906) 26 NZLR 1167 (CA).
39 Section 75(1) RMA.

the plan. However, having such a chapter does lead, logically, to problems with preparing plans in one swoop. In particular, how far can subsequent, subordinate sections of a proposed plan be resolved until the strategic section is settled?

[44] Questions of coherence have arisen here. In 2016 the question of consequential changes arose in the report of the Independent Hearings Panel ("IHP") on the Auckland Unitary Plan. The IHP wrote[40]:

> It is essential to the effectiveness of the Unitary Plan that it promotes the purpose of the Resource Management Act 1991 in an integrated way. As section 32 requires, the appropriateness of objectives must be evaluated in terms of achieving that purpose; then other provisions, being the policies, rules and other methods, must be evaluated in terms of achieving the objectives. This vertical relationship of the Unitary Plan with the Resource Management Act 1991 is repeated across all of the aspects of the environment in Auckland. ... This context means that amendments to support integration and to align provisions where they are related could be in three dimensions[41]:
>
> (i) down through provisions to give effect to a policy change;
>
> **(ii) up from methods to fill the absence of a policy direction; and**
>
> (iii) across sections to achieve consistency of restrictions or assessments and the removal of duplicate controls.
>
> (Emphasis added)

With respect, the position described in (ii) is a case of the tail wagging the dog[42]. On principle that seems wrong: objectives and policies should drive methods, not the other way around.

[45] That part of the IHP's report was appealed to the High Court. In *Albany North*[43] Whata J held that the IHP:

> ...
>
> (e) Identif[ied] types of consequential change:
>
> i. Format/language changes;
>
> ii. Structural changes;
>
> iii. Changes to support vertical/horizontal integration and alignment, to give effect to policy change, **to fill the absence of policy direction**, and to achieve

40 Auckland Unitary Plan IHP Report to Auckland Council – Overview of recommendations on the proposed Auckland Unitary Plan, 22 July 2016, section 4.4.3.

41 I note that the dimensional metaphor is not as useful as first appears, since the IHP only describes two lines in two dimensions ("up" and "down" are in one dimension).

42 *Shaw v Selwyn District Council* (NZEnvC) Decision C183/2000 at [27].

43 *Albany North* above n 16 at [96].

> consistency of restrictions or assessments and the removal of duplicate controls; and
>
> iv. Spatial changes, for example where a zone change for one property raises an issue of consistency of zoning for neighbouring properties and creates difficulty in identifying a rational boundary.
>
> (f) On changes supporting vertical integration, following a top down approach so that consequential amendments to the plan to achieve integration with overarching objectives and policies, which were drawn from higher level policy statements. Given the logical requirement for a plan to function in this way, these changes would normally be considered to be reasonably anticipated.
>
> ...
>
> (h) Assessed consequential changes in several dimensions, being:
>
> i. Direct effects: whether the amendment would be one that directly affects an individual or organization such that one would expect that person or organization to want to submit on it.
>
> ii. Plan context: how the submission of a point of relief within it could be anticipated to be implemented in a realistic workable fashion; and
>
> iii. Wider understanding: whether the submission or points of relief as a whole provide a basis for others to understand how such an amendment would be implemented.
>
> (Emphasis added, citations omitted)

[46] The Environment Court observed of those decisions in *Federated Farmers v Mackenzie District Council* (Eleventh Decision)[44]:

> It will be seen that the phrase "absence of policy direction" is used at [96](e)(i) but the full phrase in the IHP report "... up from methods to fill the absence of a policy direction" is not used by Whata J.
>
> Whata J held that "[t]he IHP's integrated approach to scope noted at [96](a)(iv)(f) and (g) accords ... more broadly with the orthodox top down and integrated approach to resource management planning demanded by the RMA"[45]. We accept (and are bound by) that. However, we respectfully disagree with the IHP that methods can drive policies to fill a policy vacuum. In our view the policies and rules should be driven from the top down. Policies are to implement objectives and methods to give effect to policies. That is what the High Court described as the orthodox approach and we can see no justification for departing from it. Indeed, it seems to be the only principled approach: anything else would leave the RMA – criticised for its open textured language as it already is – open to almost any application that people want to give for their convenience: think of a rule that suits a special interest or the Government and then write a policy to justify it.

44 *Federated Farmers v Mackenzie District Council (Eleventh Decision)* [2017] NZEnvC 53 at [176] and [177].

45 *Albany North* above n 16 at [114].

[47] Those problems arose in relation to new plans. They are also meaningful, in my view, on a partial review of an operative district plan for this reason. A partial review is intended to be provision-by-provision. Of course, a territorial authority may choose to review all the provisions of a section in a plan. If it chooses to review all the provisions of a strategic chapter (e.g. Section 4 (District-wide) of the ODP of the QLDC) then the Council cannot know in advance what subsequent sections of the ODP need to be consequentially changed.

Implications for the "PDP"

[48] All this has implications for the process followed by the Council. Its public notice and PDP look like a "full review", and indeed a new plan has been prepared. That suggests there has not been a provision-by-provision review despite the fact that the documents quoted earlier show that the Council intended that. If there is intended to be a provision-by-provision, or (since the singular includes the plural[45]) a set of provisions by set of provisions review, then proposed Map 23 may be premature. The reason is that if a top-down approach is to be followed then the provisions of Section 4 of the ODP appear to need to be reviewed or changed.

[49] Further, as I have observed, if a partial review of Section 4 (District-wide) of the ODP was intended, the Council could not know which of the subsequent sections of the ODP might or might not need to be changed until the review of Section 4 was complete. There are two problems with this: first there is minimal mention of Section 4 of the ODP in the section 32 Reports, and certainly no provision-by-provision 'review' as I have said. The Hearing Commissioners did allude[47] to evidence about Section 4 ODP, but their discussions did not say why specific provisions or even the whole of Chapter 3 PDP contained superior objectives to the ODP. Second, the Council has decided in advance that the Industrial sections of the ODP would remain the same. In my view, it simply could not do that until it knew whether Section 4 of the ODP was to be changed. It is beyond the Council's powers under the scheme of its plan, and under section 79(1) to (3) RMA to decide what subordinate (industrial) objectives and policies will remain in place until it has decided what the strategic objectives and policies are to be changed, and what are to remain. This, of course, has direct relevance to TRL's position, since it is concerned about the industrial zoning of its land.

46 Section 33 Interpretation Act 1999.
47 QLDC Chapter 3, Report of the Hearing Commissioners at [751] to [1107].

2.3 Moving from submissions to appeals under Schedule 1 RMA

[50] Once the local authority has chosen its method of giving effect to a review[48] and prepared a section 32 evaluation report, it must then follow the procedures set out in Schedule 1 RMA. After a consultation process there is notification of the proposed district plan to which interested parties may respond by lodging a submission. Clause 6(1) of Schedule 1 states:

> (1) Once a proposed ... plan[49] is publicly notified under clause 5, the persons described in subclauses 2 to 4 may make a submission on it to the relevant local authority. (emphasis added)

[51] Clause 14(1) of Schedule 1, which confers a right of appeal, begins:

> (1) A person who made a submission on a proposed ... plan [change] may appeal ... (emphasis added)

An appeal must be founded on a submission: *Option 5 Inc v Marlborough District Council*[50] (*"Option 5"*). The relief sought must be "fairly and reasonably" within the scope of a submission: *Countdown Properties (Northlands) Limited v Dunedin City Council*[51] ("*Countdown*").

[52] If an appeal is within jurisdiction then the Environment Court must hear[52] the appeal. Although not referred to in Schedule 1, the Environment Court's primary powers, duties and discretion are given in section 290 RMA. Complementing these, clause 15 Schedule 1 gives the court power to direct a local authority under section 293(1) RMA. Section 293(1) and (2) state:

> (1) After hearing an appeal against, or an inquiry into, the provisions of any proposed policy statement or plan that is before the Environment Court, the court may direct the local authority to—
> (a) prepare changes to the proposed policy statement or plan to address any matters identified by the court:
> (b) consult the parties and other persons that the court directs about the changes:
> (c) submit the changes to the court for confirmation.

48 Under section 79 RMA.
49 'Proposed Plan' includes a 'plan change'; section 43AAC(1)(a) RMA.
50 *Option 5 Inc v Marlborough District Council* (HC) CIV 2009-406-144.
51 *Countdown Properties (Northlands) Limited v Dunedin City Council* [1994] NZRMA 127 (FC).
52 Clause 15(1) Schedule 1 RMA.

(2) The court—

(a) must state its reasons for giving a direction under subsection (1); and

(b) may give directions under subsection (1) relating to a matter that it directs to be addressed.

When is a submission 'on' a plan change?

[53] Despite the wording of the strike out application which referred to the requirements of clause 14(1) and (2), the Council's actual argument referred to the authorities on the introductory words of clause 14. Because plan changes are usually circumscribed – often very carefully – by the party promoting them, a specific jurisprudence has sprung up about when a submission is 'on' a plan change. The word 'on' comes from the introduction to clause 14 of Schedule 1 as quoted above. The leading authorities on when a submission is on a variation or a plan change are *Clearwater Resort Limited v Christchurch City Council*[53], *Option 5 Inc v Marlborough District Council*[54] which emphasised[55] the need to consider the "scale and degree" of the alterations suggested by the submission, and *Palmerston North City Council v Motor Machinists Limited*[56] ("*Motor Machinists*").

[54] In *Motor Machinists* Kós J summarised the relevant principles as follows:

> [53] ... William Young J applied a bipartite test.
>
> [54] First, the submission could only fairly be regarded as "on" a variation "if it is addressed to the extent to which the variation changes the pre-existing status quo". That seemed to the Judge to be consistent with the scheme of the Act, "which obviously contemplates a progressive and orderly resolution of issues associated with the development of proposed plans".
>
> [55] Secondly, "if the effect of regarding a submission as "on" variation would be to permit a planning instrument to be appreciably amended without real opportunity for participation by those potentially affected", that will be a "powerful consideration" against finding that the submission was truly "on" the variation. It was important that "all those likely to be affected by or interested in the alternative methods suggested in the submission have an opportunity to participate". If the effect of the submission "came out of left field" there might be little or no real scope for public participation. In another part of paragraph [69] of his judgment William Young J described that as "a submission proposing something completely novel".

53 *Clearwater Resort Limited v Christchurch City Council* (HC) Christchurch AP 34/02.
54 *Option 5* above n 50.
55 *Option 5* above n 50 at [42] and [43].
56 *Palmerston North City Council v Motor Machinists Limited* [2013] NZHC 1290; [2014] NZRMA 519.

> Such a consequence was a strong factor against finding the submission to be on the variation.

[55] *Motor Machinists* also emphasised two features of the RMA relevant to those tests: first the section 32 evaluation[57] and, second, the "robust, notified and informed public participation"[58] which is a theme of the RMA.

[56] The High Court authorities have been applied by the Environment Court in a number of cases. In *Well Smart Investment Holdings (NZQN) Ltd v Queenstown Lakes District Council* ("*Well Smart*") I observed that[59]:

> The *Clearwater* approach as explained by *Motor Machinists* now creates the situation that if a local authority's section 32 evaluation is (potentially) inadequate, that may cut out the range of submissions that may be found to be 'on' the plan change. While that does not seem fair to the primary submitters, I must not overlook that it is the fairness to persons with an interest greater than the public generally in the matters raised in a primary submission which I must consider here. Simply because a local authority may have put forward what is possibly an inferior section 32 evaluation at the initial step does not mean that a further wrong should be done to interested persons by denying them the right to participate.

[57] In that decision the court found that potential submitters were not given sufficient notice by the combination of the [section 32] evaluation and the Council's summary. I recorded that[60]:

> It seems potentially unfair that the right of submitters to be heard should be strictly circumscribed by the proponents of a plan change if [use of] those resources possibly should be one of the other reasonably practicable options which should have been considered under section 32 RMA...

However, I felt bound by the High Court's decision in *Motor Machinists* and held that the submission and appeal were beyond the scope of the plan change relating to Central Queenstown.

[58] In *Bluehaven Management Limited v Western Bay of Plenty District Council*[61] ("*Bluehaven*") Smith EJ and Kirkpatrick EJ (sitting together) took another approach. They

57 *Motor Machinists* above n 56 at [76].
58 *Motor Machinists* above n 56 at [77].
59 *Well Smart Investment Holding (NZQN) Limited v Queenstown Lakes District Council* [2016] NZEnvC 214 at [38].
60 *Well Smart* above n 59 at [41].
61 *Bluehaven Management Limited v Western Bay of Plenty District Council* [2016] NZEnvC 191.

did not refer to *Well Smart*, but succinctly set out the principles in the High Court decisions and then continued[62]:

> While accepting the usefulness of an approach which includes an analysis of the relevant resource management issues in the form the Council is required to undertake pursuant to s 32 to comply with clause 5(1)(a) of Schedule 1 to the Act, we respectfully consider that some care needs to be taken in assessing the validity of a submission in those terms. As Kós J expressly recognises, there is no requirement in the legislation for a submitter to undertake any analysis or prepare an evaluation report in terms of s 32 when making a submission. The extent and quality of an evaluation report under s 32 of the Act depends very much on the approach taken by the relevant regional or district council in preparing it. As provided in s 32A, a submission made under clause 6 of Schedule 1 may be based on the ground that no evaluation report has been prepared or regarded or that s 32 or 32AA[63] has not been complied with.

[59] They summarised the role of the section 32 evaluation in the *Clearwater* tests as follows[64]:

> Our understanding of the assessment to be made under the first limb of the test is that it is an inquiry as to what matters should have been included in the s 32 evaluation report and whether the issue raised in the submission addresses one of those matters. The inquiry cannot simply be whether the s 32 evaluation report did or did not address the issue raised in the submission. Such an approach would enable a planning authority to ignore as relevant matter and thus avoid the fundamentals of an appropriately thorough analysis of the effects of a proposal with robust, notified and informed public participation.

The court in *Bluehaven* then held that the section 32 evaluation in that case should have considered the appellant's land so the fact that it did not (fully) was not a jurisdictional bar to finding that the appellant's submission was beyond scope. This decision was subsequently followed in *Calcutta Farms Limited v Matamata-Piako District Council*[65].

[60] While *Bluehaven*[66] raises similar concerns of injustice to submitters as mentioned in *Well Smart* (thus raising questions whether a plan change (or variation) that is tightly confined by a limited section 32 report may lead to an inefficient use of resources) it does

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62 *Bluehaven* above n 61 at [34].

63 Since the coming into force of the Resource Management Amendment Act 2013 on 4 September 2013, a further evaluation in accordance with the requirements of section 32 may be required pursuant to section 32AA of the Act for any changes made since the first evaluation report was completed.

64 *Bluehaven* above n 61 at [39].

65 *Calcutta Farms Limited v Matamata-Piako District Council* [2018] NZEnvC 187.

66 *Bluehaven* above n 61.

not deal with Kós J's fundamental point in *Motor Machinists*[67] which is that if the section 32 report omits discussion of the alternative resources that the submitter wishes to refer to, then other potential submitters may be prejudiced because they will neither be aware of the alternative resources, nor of the evaluation of their use compared with that in the plan change (and section 32 report). *Bluehaven* appears not to deal with the question of fairness to persons who might have wished to lodge submissions (or on appeal give evidence to the court).

[61] In passing I note that one potential answer (in the Environment Court) to the unfairness to submitters of a limited section 32 report would, in principle, be to declare[68] that section 32 has not been complied with. However, any such course is (probably) precluded by section 32A which states that any challenge to a section 32 report may only be made in a submission. This suggests that it might be a useful precaution, in most submissions on a plan change, to allege that section 32 has not been properly complied with because it has not identified other reasonably practicable options for achieving the objectives.

Conclusions

[62] There appears to be a large difference between the strict rules of engagement prescribed by the High Court for submissions on plan changes and the much looser rules for submissions on new (replacement) plans. Much of that difference can be understood in the context of specific plan changes. For example, if a local authority wishes to change a rule in a plan, submissions on the operative objectives and policies would be beyond jurisdiction as not "on" the plan change. In contrast, on new plans almost everything may be open to challenge as in *Albany North*[69], although the strategic issues I have identified do then often arise.

[63] The courts have long recognised the complexities of the plan preparation process. In *Royal Forest and Bird Protection Society Inc v Southland District Council* ("*Forest and Bird*") Panckhurst J wrote[70]:

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67 *Motor Machinists* above n 56.

68 Under section 310 RMA.

69 *Albany North* above n 16 at [72].

70 *Royal Forest and Bird Protection Society Inc v Southland District Council* [1997] NZRMA 408 (HC) at p 10.

> The process of public notification, submissions, and hearing before the Council is quite involved. Issues commonly emerge as a result of the participation of diverse interest and the thinking in relation to such issues frequently evolves in the light of competing arguments.

Recognising that, Fisher J stated in *Westfield (NZ) Limited v Hamilton City Council*[71] ("*Westfield*"):

> [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 ss 292 and 293 of the Act: see *Applefields*,[72] *Williams and Purvis*[73], and *Vivid*[74].
>
> [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 implied in ss 292 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.

[64] Section 293 has been amended since then, and there is no direct power of notification, only of consultation with persons who might be affected. The court has power to direct the local authority to consult with both parties and other persons. The Environment Court has also held that to achieve fairness to parties not before the court, notification may be necessary: see *Federated Farmers of New Zealand Inc (Mackenzie Branch) v Mackenzie District Council*[75]. I consider that section 293, recognising the complexity of plan preparation, provides both a feedback loop and (potentially) a method to remedy any procedural unfairness to persons not before the court.

2.4 The issues

[65] The questions raised by the Council's application are whether TRL's appeal does

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71 *Westfield (NZ) Limited v Hamilton City Council* [2004] NZRMA 556 (HC) at [72] to [74].
72 *Applefields Ltd v Christchurch City Council* [2003] NZRMA 1.
73 *Williams and Purvis v Dunedin City Council* C022/C002.
74 *Re Vivid Holdings Ltd* [1991] NZRMA 467.
75 *Federated Farmers of New Zealand Inc (Mackenzie Branch) v Mackenzie District Council* [2013] NZEnvC 258 (Seventh Decision).

comply with the requirements of subclauses 14(1) and (2) of Schedule 1 RMA. I find that they do. Indeed, as I have recorded, at the hearing the Council did not maintain this line of attack. Rather, the issues for determination in this procedural decision are:

(1) whether the submission (and appeal) are "on" Stage 1 of the PDP?
(2) what are the relevant procedural and superior policy contexts relevant to the section 32 report?
(3) is the procedure fair to third parties (potential cross-submitters)?
(4) if the answer to (3) is no, are there potential remedies?

3. Consideration

3.1 Is the appeal 'on' the plan change?

[66] The Council says that this submission was not on the proposed plan, because TRL's land was expressly excluded from consideration in Stage 1 of the PDP. In support of that are two factors, first that the Note to Notification of Stage 1 of the PDP in the introductory Legend to the maps which expressly states that areas identified as "Operative Zone" are not being reviewed in Stage 1; secondly, that the Council may prepare its new plan in "territorial sections"[76]. The first point would be definitive unless TRL can bring itself within the exception identified by Kós J in *Motor Machinists*[77]:

> Yet the *Clearwater* approach does not exclude altogether zoning extension by submission. Incidental or consequential extensions of zoning changes proposed in a plan change are permissible, provided that no substantial further section 32 analysis is required to inform affected persons of the comparative merits of that change. Such consequential modifications are permitted to be made by decision-makers under Schedule 1, clause 10(2). Logically they may also be the subject of submission.
>
> ...
>
> Plainly, there is less risk of offending the second limb in the event that the further zoning change is merely consequential or incidental, and adequately assessed in the existing section 32 analysis...

[67] I hold that TRL can bring itself within the exception to some extent because its land is immediately adjacent to the proposed Low Density Residential zone. On the other hand, the Industrial B zone is not discussed in the section 32 analysis.

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76 Section 73(3) RMA.
77 *Motor Machinists* above n 56 at [81] and [83].

[68] With regards to the second point as to the review by territorial sections, although counsel did not argue initially this point, Ms Hockly submitted in her later (26 April 2019) submissions that TRL's land was in a territorial section not being covered by Stage 1, in an attempt to bring its "Stage 1" of the review within section 73(3) RMA. I would have needed to receive fuller argument on this before deciding to rule out TRL's appeal on this ground. The initial difficulties I see with Ms Hockly's argument are that:

(a) as indicated earlier the "sections" in section 73(3) RMA are "territorial sections" not "sections [of the plan]"[78] i.e. the ODP, as referred to in section 79(5) RMA;
(b) there is no indication in the public notification that the review of the ODP is being conducted in territorial sections only that it is being carried out in temporal stages;
(c) the omission of the Industrial zone from the review raises problems under the NPS-UDC as I elaborate on shortly.

[69] For present purposes I consider that the site, because it is adjacent to the proposed zone, comes within the consequential exception contemplated by Kós J.

3.2 The procedural and superior policy contexts

[70] As I have recorded, the notified PDP looks like a completely new plan (minus some parts which the Council seems to say it will carry over). TRL's submission and appeal have responded to that view of the PDP. That approach is justified by the statement in the public notification that the PDP "affects all properties in the District".

[71] A concern here is that the Council has not undertaken a provision-by-provision review as required by section 79(1) RMA. At first sight the Council has not even undertaken a section-by-section review, let alone a provision-by-provision review of the ODP but has simply drafted a new district plan without reference to the ODP.

[72] For a plan change under a section 79(1)-(3) to be valid, I would expect that:

(1) each provision in Section 4 ODP which is being changed to be identified; and

78 With respect to the Parliamentary draftsperson the word "section" is suffering from overuse in sections 73 and 79 and different synonyms might usefully be substituted.

(2) that each objective in Section 4 of the ODP being changed by the PDP corresponds to at least one objective in the PDP; that is, the set (or domain) of the Section 4 ODP's provisions being changed is injective with the provisions of the set (or co-domain) which is the (strategic) objectives of the PDP.

If the relationship between the ODP and PDP is not injective, then there will be objectives in Section 4 ODP which are not being changed. However, the PDP is completely silent on these issues.

[73] The implication of all this for the validity of the PDP as a whole are not for me to determine. However, since Chapter 3 of the PDP has not yet been determined as having "the most appropriate objectives", then all consequential implementing sections and provisions must logically be indeterminate at present.

[74] The whole process adopted by the Council appears to be contradictory and confused, so there are discretionary issues I should consider later.

[75] As I have indicated there are also further complications with the superior policy context of the review of the ODP. The establishment of objectives and policies to "ensure that there is sufficient development capacity in respect of housing and business land to meet the expected demands of the district" is a new function[79] of territorial authorities introduced by the Resource Legislation Amendment Act 2017. That is not applicable to this proceeding, but similar issues are raised by both the NPS-UDC which may apply to appeals on the PDP, and by the new Otago Regional Policy Statement which does apply.

[76] Since relatively flat (developable) land which is not valued for its rural landscape qualities (or as an outstanding natural landscape) is in relatively short supply in the Queenstown Lakes district, whether that land is used for housing or business (including industrial) or rural activities is a crucial issue. If a neighbour to a proposed residential zone submits that its land (however zoned in the ODP) should also be part of the proposed residential zone, then the Council's important integrated management function suggests that issue should be considered (and possibly resolved) sooner rather than later. It is an example of the kind of consequential "spatial change" identified by Whata J

79 Section 31(1)(aa) RMA.

in *Albany North*[60]. At least the issues raised by TRL should not be ruled out of Stage 1 as a jurisdictional matter *in limine*.

[77] While the court must accept that at present the Industrial Zones are not part of the 'very large plan change'[61] constituted by the PDP, the Environment Court recently observed in *Bunnings Limited v Queenstown Lakes District Council*[62] ("*Bunnings*") that the Industrial provisions in the ODP appear to be inconsistent with the NPS-UDC so it may be that the Council or, on the appeals, the court under section 293 may find it necessary to review those chapters of the ODP also.

3.3 Is allowing the appeal to proceed fair to persons not before the court?

[78] The Council's strikeout is unfair to TRL as landowner. It is being left out of a hearing that it has consistently said it wants to be part of (to resolve the boundaries of the residential and industrial (or other) zones in this locality). It is not a fair or complete answer to say (as the Council does), that when the (operative) industrial zone is the subject of a subsequent stage, TRL can seek residential zoning then. The difficulty with that course is that the crucial arguments as to allocation of land with development capacity to either Residential or Industrial zoning, under the NPS-UDC may have already been resolved at the first stage.

[79] However, I also accept Ms Hockly's submission that the dominant consideration in relation to fairness must be the question of fairness to persons not before the court. Ms Hockly relied on the variation/plan change authorities – *Clearwater*[63] and *Motor Machinists*[64] – particularly the statement by Kós J in the latter that "to override the reasonable interests of people and communities by a submissional side-wind would not be robust, sustainable management of natural resources"[65].

[80] Mr Gresson submitted that *Motor Machinists*[66] is much less relevant to the jurisdictional issue on a "full review" of a plan and the resultant proposed new plan. That is, first, because on a full review all issues have to be the subject of analysis under section

60 *Albany North*, above n 16 at [96](e)(iv).
61 Report 1 of the Independent Commissioners 28 March 2018 at [31].
62 *Bunnings Limited v Queenstown Lakes District Council* above n 3 at [46].
63 *Clearwater Resort Limited v Christchurch City Council* above n 53.
64 *Motor Machinists* above n 56.
65 *Motor Machinists* above n 56 at [82].
66 *Motor Machinists* above n 56.

32 RMA at some time. Second, section 32, as relied on by the High Court in *Motor Machinists*[67], has been replaced since that decision was issued. Third, a new section 32AA has been added which adds an obligation for a "further evaluation" of "changes" (which are not "plan changes") to the PDP as a result of submissions. However, while as I have noted the PDP looks like Stage 1 of a full review, the Council has now produced its resolutions stating that its review was under section 79(1) RMA, not a full review under section 79(4) of the Act. Accordingly, Mr Gresson's argument cannot succeed on this point.

[81] A further argument for the Council was that the "Note" in the Legend for the planning maps may have suggested to persons interested in the use of TRL's site, that questions of the industrial zoning of the site would be left for a subsequent stage of the plan review. A member of the public might have looked at the summary of submissions and, on that basis, decided to lodge a cross-submission[68] only to decide it was not necessary on checking the note. However, why anyone would look at the initial Legend, when there is a separate legend on each planning map (including Map 23) of the PDP is an awkward question for the Council.

[82] If I proceed on the rather unlikely assumption that a reader of Map 23 of the PDP will find the "Note" on the general legend, and if a hearing is allowed to proceed in the Environment Court then a third party may have been left without an opportunity to be heard. That is a concern. However, there may be remedies as I discuss below.

3.4 Are there potential remedies?

[83] First, I consider that the understanding of any third party reading the Note to the Council's Legend is subject to an implicit proviso that a submission (under clause 6 Schedule 1 RMA) may seek to amend the boundaries of the proposed zone in the PDP. That is within the limited exception identified in *Motor Machinists*[69]. Further, in this case all the submissions, the Council's summary of decisions sought, and the notice of appeal are clear that TRL seeks a (low density) residential zone for the site. I do not see anything unfair, inaccurate or misleading about the summary[70]. I hold that it is fair notice to the public of the issues raised by TRL.

67 *Motor Machinists* above n 56.
68 Under clause 8 Schedule 1 RMA.
69 *Motor Machinists* above n 56.
70 See *Re Montgomery Spur* (1999) 5 ELRNZ 227 at (EnvC) at [15].

[84] A further course open to the Council, if concerned about fairness to neighbours or the wider public, would be to promote a (neutral) variation under clause 16A Schedule 1 RMA (proposing to include the site without supporting it) so that neighbours of TRL's land and the public are notified about its aspirations and may make submissions on them. But even without that a hearing of the TRL appeal can be managed in a way that is fair to persons not present before the court.

[85] If, after hearing the merits, the Environment Court agrees that third parties have (or would) be further prejudiced – either by a potential rezoning of the site to (low density) residential or by the loss of an industrial zoning – then the court can adjourn the final decision about TRL's land to the "industrial" stage hearing or (more accurately) to the hearing about land (including the site) which happens to be zoned industrial under the superseded ODP. If that occurs, then at least TRL has been heard from the beginning and there is an improved probability of an integrated approach being taken in relation to the conflict between residential and industrial uses for a limited land area from which to provide for development capacity, and second the notional third party will also have an opportunity to be heard.

[86] Fair treatment of third parties and the public could be further enhanced by ensuring that neighbours of the site are expressly notified of TRL's proposed change in zoning when public notice of the relevant stage of the PDP dealing with industrial land in general and the site in particular is given.

[87] An alternative (or indeed an additional) step might be for the court to direct consultation (and/or notification) under section 293 RMA. I note that in *Mt Christina Limited v Queenstown Lakes District Council*[91] ("*Mt Christina*") Hassan EJ stated that: "... it would be improper for the court to tolerate a jurisdiction[al] breach in order to position the court to later make section 293 directives". The reference to "position[ing]" the Environment Court to give directions under section 293 RMA is difficult to understand since section 293 is one of only two substantive powers the court has when hearing an appeal under clause 14 of Schedule 1. Indeed section 293 is the only power expressly conferred on such an appeal. The other power – and the one usually, if only implicitly, relied on by the Environment Court – is the general power on appeals conferred by section 290 RMA.

91 *Mt Christina Limited v Queenstown Lakes District Council* [2018] NZEnvC 190 at [20].

[88] Further, since the jurisdictional breach being considered on this type of application is not direct[92], but indirect (the effect of a submission on persons not before the court) it seems desirable, indeed necessary, to leave open consideration by the court of its substantive powers since they confer an opportunity to remedy any unfairness to 'third parties'.

[89] Consequently I do not think it is improper for the court to bear in mind, when deciding a jurisdictional question about the scope of an appeal, that there is a possibility that the Environment Court which hears the merits of the appeal may make orders under section 293 to remedy unfairness to persons not currently before the court. In my respectful view, *Mt Christina* does not recognise the complexities of the plan preparation process. I prefer to follow *Westfield*[93] in considering and leaving open the possibility of action under section 293 RMA as a relevant consideration when considering indirect jurisdictional issues.

[90] I am encouraged in that conclusion by consideration of the following uncertainties, in the past and current process:

- whether the whole process is *intra vires* as a section 79(1) "provision" by "provision" review;
- the fact that the strategic Chapter 3 PDP is not yet resolved with all the possible consequences and uncertainties for subordinate (non-strategic) objectives, polices and methods that implies;
- the fact that Section 4 ODP may or may not be completely replaced by Chapter 3 PDP;
- doubts over whether the Council can leave industrial zonings out of consideration (see *Bunnings*[94]); and
- the relationships between the demand curves for industrial and residential land as discussed in *Bunnings*.

92 For an example of a direct jurisdictional breach – where there is no founding submission – see *CSF Trustees Limited v Queenstown Lakes District Council* [2019] NZEnvC 24.

93 *Westfield* above n 71.

94 *Bunnings Limited v Queenstown Lakes District Council* above n 3.