BEFORE THE ENVIRONMENT COURT

Decision No. [2017] NZEnvC 209

IN THE MATTER	of the Resource Management Act 1991
AND	of an application for declarations under s 311 of the Act
BETWEEN	AUCKLAND COUNCIL
	(ENV-2017-AKL-000105)
	Appellant
AND	JANICE BUDDEN, MARK GITTOS AND MICHAEL ROWE AS TRUSTEES OF THE LONDON PACIFIC FAMILY TRUST
	Respondent

Court:	Principal Environment Judge LJ Newhook Environment Judge JJM Hassan Environment Commissioner RM Dunlop Environment Commissioner IM Buchanan
Hearing:	13 & 14 December 2017
Appearances:	L Muldowney and M Wakefield for Auckland Council A Galbraith QC for HC Trust, Ollerton Trust and J Farmer QC A Webb for London Pacific Family Trust C Kirman and A Devine for Ministry of Education, Minister for Environment, and Housing NZ Corporation D Minhinnick for Auckland International Airport Limited, Brookby Quarries Limited, Fulton Hogan Limited, Stevenson Group Limited and Winstone Aggregates (a division of Fletcher Concrete and Construction Limited) R Enright for Wiri Oil Services Limited S Janissen Amicus Curiae
Date of Decision:	19 December 2017
Date of Issue:	19 December 2017

INTERIM DECISION

A: Application for Declarations B and C declined (application for Declaration A withdrawn).

B: The making of the finally postulated declaration is necessary and appropriate (the declaration to be included in a second decision to issue).

REASONS

Introduction

[1] Auckland Council ('AC'/'Council') seeks a declaration under s 311 of the Resource Management Act 1991 ('RMA') as to the interpretation of certain provisions of the partly operative Auckland Unitary Plan ('AUP'). Its application initially sought three declarations as are set out as Declarations A, B and C in the Annexure to this decision (initially requested declarations). It then withdrew the request for Declaration A (pursuing Declarations B and C). For reasons we will explain, it now invites the court to make only one declaration and in materially different terms. It is as follows ('finally postulated declaration'): [1]

> Where a proposed activity is on a site located within both the Residential – Single House zone ("SHZ") and the Special Character Areas Overlay – Residential ("SCAR") of the partly operative Auckland Unitary Plan ("AUP") and requires a resource consent for a restricted discretionary activity in accordance with Activity Table D18.4.1 or, due to the infringement of a SCAR development standard pursuant to Rule C1.9(2):
>
> (a) It is a separate reason for resource consent pursuant to Rule C1.9(2) if the same activity infringes a SHZ development standard.

[2] While the Council sought endorsement for the interpretation it has been applying in various consent applications to date, it also responsibly acknowledged that the overriding priority is to secure the court's guidance on the correct interpretation to be applied. We were also told by counsel for the respondent, Mr Webb, that the application was to some extent prompted by a suggestion he made to the Council on behalf of his client. We commend the Council for the responsible and constructive course it has pursued.

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1 Transcript, p 126, and emailed to the Court following closing submissions. Noted to be "as amended from the version set out at paragraph 2.18 of the submissions for the HC Trust, The Ollerton Trust and James Alfred Farmer QC)".

[3] With the support of the Council and in accordance with suggestions made by counsel and Amicus prior to the hearing adjournment,[2] we intend to approach our task in stages:

(a) we have issued this first decision with urgency in response to the request by the Council (supported by other parties) given that there are various live disputes involving applications in train; and

(b) our second decision will follow early in the New Year and will make a declaration in materially the same terms as the finally postulated declaration. It may supplement the reasons we give in this decision. It may also make directions for further follow up actions as may pertain to the proper conclusion of these proceedings.

While that staged approach is somewhat unusual, it is considered appropriate for two reasons. One is the fact that the Council's closing submissions confirm that the initially wide gap between it and the respondent and other parties has significantly narrowed such that no procedural prejudice would arise from our intended course. Secondly, there is also no dispute that there is a sound public interest reason in assisting the Council, parties and the community on these important interpretation matters.

Background

[4] The AUP is a combined regional policy statement ('RPS'), regional plan and district plan for the Auckland region. It has a hierarchical policy framework with the RPS 'at the top' in the sense that the regional plan and district plan components are to give effect to it (as the Resource Management Act 1991 ('RMA') requires)[3]. The AUP broadly comprises six main type of provision — General Rules, Overlays, Auckland-wide provisions, Zones, Precincts and Standards.[4]

[5] The interpretation issue that arises here concerns the proper relationship between the following district plan components of the AUP:

(a) the 'Special Character Area Overlay — Residential ('SCAR') provisions;

2 Transcript pp 109, 122, 123.

3 RMA s 75(3).

4 Submissions on behalf of Auckland City, dated 13 December 2017, at [32] – [37].

(b) the General Rules; and

(c) the Residential – Single House Zone ('SHZ') provisions.

[6] The SCAR (as part of the Special Character Overlay Residential and Business) is one of no fewer than 27 Overlays in the AUP. As the word suggests, 'Overlays' are spatially mapped in the AUP. They serve to recognise, manage and protect particular values and resources across the Auckland region. As such, they can apply across parts of Zones and Precincts. The SCAR also includes objectives, policies and rules (including activity classifications and standards).[5]

[7] The SHZ is one of the residential Zones of the AUP. As is typical, it comprises objectives, policies and rules (including activity classifications and standards) on the use, development and protection of land shown as zoned Single House Zone on the AUP's zoning maps.

SCAR and SHZ activity classes and rules and related General Rules

[8] One illustration of the cross-overs between the SHZ and the SCAR is in the rules that each specify as to the activity classes for RMA consenting purposes (and permitted activities).

[9] The SCAR activity classes (in Rule D18.4 activity table D18.4.1) focus on works in relation to buildings. Within certain specifications, building alteration, demolition, removal, relocations and new buildings are treated as restricted discretionary activities (numbered A3, A4, A5 in the table). Understandably for a residential zone, the SHZ activity classes (in Rule H3.4 activity table H3.4.1) also encompass a range of land use activities, including non-residential ones. They also deal with construction, change or demolition of buildings.

[10] Comparison of the various specified activities reveals that essential similar activities are, in some respects, given comparatively more enabling or restrictive treatment under the SCAR than under the SHZ. One example is that the SCAR specifies as a permitted activity minor alterations to the rear of buildings that use the same design and material as the existing building (D18.4.1), whereas the SHZ classifies alterations to

5 Submissions on behalf of Auckland City, dated 13 December 2017, at [33] – [43], affidavit of Linley Kim Wilkinson sworn 15 September 2017, [23], [24], [30], Agreed Bundle of Documents ('ABD'), 200.

an existing dwelling as a permitted activity subject to specified standards on height, height in relation to boundary ('HiRB'), building coverage, yards, impervious areas, landscape treatment, fences and walls (A35). The converse applies for demolition. It is a permitted activity in the SHZ (A32) but a restricted discretionary activity in the SCAR (A3). Similarly, additions in the SHZ internal ad external alterations and new accessory buildings are each permitted subject to compliance with specified performance standards (A33 — A36) whereas they are restricted discretionary activities in the SCAR.

[11] General Rule C1.6 deals with activity classifications in the AUP and is as follows:

> **C1.6. Overall activity status**
>
> (1) The overall activity status of a proposal will be determined on the basis of all rules which apply to the proposal, including any rule which creates a relevant exception to other rules.
>
> (2) Subject to C1.6(4), the overall status of a proposal is that of the most restrictive rule which applies to the proposal.
>
> (3) The activity status of an activity in an overlay takes precedence over the activity status of that activity in a precinct, unless otherwise specified by a rule in the precinct applying to the particular activity.
>
> (4) Where an activity is subject to a precinct rule and the activity status of that activity in the precinct is different to the activity status in the zone or in the Auckland-wide rules, then the activity status in the precinct takes precedence over the activity status in the zone or Auckland-wide rules, whether that activity status is more or less restrictive.

[12] It was not a matter of dispute that Rule C1.6(4) does not apply in that it is confined to Precincts, whereas the issues here concern the relationship of the SCAR, as an Overlay, to the SHZ as a Zone.

[13] Hence we take our lead from the applicable directions in Rule C1.6. That is, insofar as relevant, the overall activity status of a proposal to which the SCAR and SHZ activity status classifications applies:

(a) will be determined on the basis of all rules which apply to the proposal, including any rule which creates a relevant exception to other rules; and

(b) is that of the most restrictive rule which applies to the proposal.

[14] That would mean, for example, that activities such as demolition, alteration or other building activities would be restricted discretionary activities on land to which the SCAR applies, despite being classified as permitted activities in the SHZ. Conversely, minor alterations that are treated as permitted activities in the SCAR but that would

contravene specified SHZ permitted activity standards would generally be rendered a restricted discretionary activity under General Rule C1.9(2), relevantly as follows:

> An activity that is classed as a permitted ... activity but that does not comply with one or more of the standards applying to that activity is a restricted discretionary activity unless otherwise specified by a rule applying to the particular activity.

[15] Another area where there is a need to consider the interrelationship between SCZAR and SHZ rules concerns the rules that set performance standards.

[16] Mr Muldowney addressed this issue in some detail in his opening submissions by reference to the Council's affidavit evidence (particularly that of planner, Mr Mead). He started with an overview of the performance standards that apply in the SCAR, under Rule D18.4 and Table D18.4.1. He noted the significant duplication with SHZ standards, for instance in the fact that Rule D18.4 covers matters such as building height, HiRB, yards, building coverage, landscape areas, maximum paved area, fences, walls and other structures. We find helpful his description of these SCAR performance standards as follows:[6]

> Tailored standards have been placed on the use, development and demolition of buildings in order to manage changes in these special character areas. Assessment of proposals for development and modifications to buildings within special character areas are considered against the relevant objectives and policies, development standards and assessment criteria set out in the SCO, and the relevant special character area statements.

[17] The Council's opening submissions set out a helpful table comparing these SCAR performance standards with the equivalent performance standards in the SHZ. Its submissions record the following interpretation of how this overlap of performances standards is to be reconciled (court's **emphasis** added):[7]

> This uncertainty arises because in the context of residential development within the [SCAR]... the performance standards are a revised set of standards which correspond with the standards in the SHZ. They are a complete set of development standards which the Council considers represent a **replacement package** for the corresponding set of development standards contained within the underlying SHZ.

6 Submissions on behalf of the Council, dated 13 December 2017, at [73].
7 Submissions on behalf of the Council, dated 13 December 2017, at [83].

[18] It is that interpretation that was at the heart of the dispute in these proceedings (and in various live disputes concerning consent applications in train). As we shortly explain, the alternative interpretation on which all other parties and Amicus agreed, is to the effect that the SCAR does not nullify performance standards set out in SHZ rules but rather that all rules relevant to an activity or activities must be applied as directed by s 9(3) RMA.

SCAR and SHZ objectives, policies and purposes

[19] Before we turn to the various interpretations offered, it is helpful that we also summarise the respective purposes of the SCAR and SHZ (as these are described in introductory text to these chapters and associated objectives and policies), and also briefly note some other General Rules. In particular, district plan rules are for achieving the plan's objectives and policies (s 76(1) RMA).

[20] Chapter D of the AUP contains the various Overlay provisions. Part D18 of the chapter concerns the SCAR. It commences with explanatory text under the heading 'D18.1 Background'. In the first two paragraphs, there is the following explanation of purpose (partially quoted):

> The Special Character Areas Overlay - Residential and Business seek to retain and manage the special character values of specific residential and business areas ...
>
> Each special character area, other than Howick, is supported by a Special character area statement identifying the key special character values of the area.

[21] Reflective of that purpose, the SCAR objective in D18.2 reads (emphasis added):

> (1) The **special character values of the area, as identified** in the special character area statement **are** maintained and enhanced.
> (2) The physical attributes that define, contribute to, or support **the special character of the area are** retained, including:
> (a) built form, design and architectural values of buildings and their contexts;
> (b) streetscape qualities and cohesiveness, including historical form of subdivision and patterns of streets and roads; and
> (c) the relationship of built form to landscape qualities and/or natural features including topography, vegetation, trees and open spaces.
> (3) The adverse effects of subdivision, use and development **on the identified special character values of the area are** avoided, remedied or mitigated.

[22] From the highlighted words, it is readily apparent that the SCAR has a singular and confined focus, in terms of resource management focus. That focus is the special character values of the area as are identified by the applicable special character statement in the associated AUP Appendix.

[23] There is a similar singular focus in the related policies in D18.3. For example, Policy D18.3(1) is:

> Require all development and redevelopment to have regard and respond positively to the identified special character values and context of the area as identified in the special character area statement.

[24] Notable by its absence from the objective or any of the several policies under D18.3 is any recognition of the direction in s 7(c) RMA to have particular regard to the 'maintenance and enhancement of amenity values' in achieving the RMA's s 5 purpose. 'Amenity values' is defined (in s 2(1) RMA) to mean:

> Those natural or physical qualities and characteristics of an area that contribute to people's appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes.

[25] Turning to the SHZ, the focus in equivalent explanatory statements and related objectives and policies is predominately on amenity values.

[26] The SHZ zone description (in H3.1) includes the following, for example (emphasis added):

> The purpose of the Residential – Single House Zone is to **maintain and enhance the amenity values of established residential neighbourhoods** in a number of locations. The **particular amenity values of a neighbourhood may be based on special character** informed by the past, special sites with some large trees, a coastal setting or other factors such as established neighbourhood character....

[27] That intention is clearly reflected in Objective H3.2(1) and (3) (emphasis added):

> (1) Development maintains and is in keeping with the **amenity values of established residential neighbourhoods including those based on special character** informed by the past ...
>
> (3) Development provides quality on-site residential amenity for residents and for adjoining sites and the street.

[28] It is also reflected in related Policy H3.3(2)(a) and (4) (emphasis added):

> (2) Require development to:
>
> (a) be of a height, bulk and form that maintains and is **in keeping with the character and amenity value of the established residential neighbourhood** ...
>
> (4) Require the height, bulk and location of development to maintain a reasonable level of sunlight access and privacy and to minimize visual dominance effects to the adjoining sites.

[29] We pause at this point to observe that there is clear recognition in these SHZ provisions of the capacity for special character to inform amenity values. That suggests an intention that an integrated approach be applied where a proposal in the SHZ is also subject to the SCAR.

Other General Rules

[30] Finally, we note the following relevant General Rules:

(a) C1.1(1) is to the effect that the General Rules apply across the AUP except the RPS or where 'a rule specifically provides otherwise';

(b) C1.1(2) is to the same effect as s 9(3) RMA, namely that no person may contravene a rule in the AUP unless expressly allowed by a National Environmental Standard, resource consent, or existing use rights;

(c) C1.4(c) relevantly provides:

> Where a proposal will take place... on a site which is partially affected by an overlay ... then the proposal must comply with the overlay, zone and precinct rules applying to the particular part of the site in which the relevant part of the proposal is located.

(d) C1.8(1) relevantly provides:

> When considering an application for resource consent for an activity that is classed as a restricted discretionary activity ... the Council will consider all relevant overlay, zone, Auckland-wide and precinct objectives and policies that apply to the activity or to the site or sites where that activity will occur.

The process leading to the Council's finally postulated declaration

[31] A comparison of the initially requested declarations (in the Annexure) with the finally postulated declaration (in [1]) shows that the Council has significantly shifted its position from its initial declaration application to what it sought in closing submissions.

[32] It is proper that we set out the chronology leading to this:

(a) The application for the initially requested declarations was filed in July 2017.

(b) A pre-hearing conference was convened on 18 August 2017. As the associated minute[8] records, the parties supported the court's suggestion that Amicus be appointed with a brief that included consultation with parties known to have representative interests concerning the relevant aspects of the AUP.

(c) On 10 October 2017, the Council filed a memorandum of counsel withdrawing Declaration A of its initially requested declarations.

(d) The hearing, scheduled for three days, commenced on 13 December 2017. This was confined to legal submissions as no party sought to cross-examine witnesses on their affidavits (which were pre-read). During the course of the first day of the hearing, the Court heard opening submissions for the Council (in support of its then remaining Declarations B and C) and submissions from other parties.[9] What then remained was for the court to hear from Amicus and from the Council in reply. Prior to the first day adjournment, the court made the following observation to counsel:[10]

> THE COURT: JUDGE HASSAN
> Mr Muldowney, just to indicate it to you that the Court did have a few observations at this stage and these are the collective view of the panel, of the Court here, in terms of things for you to reflect on for your reply.
>
> The first thing is that the Court appreciates the fact that the Council's primary interest here is in terms of ensuring that the community is given proper and clear guidance on the matters in issue by way of a reasoned counsel, beg your pardon, a reasoned Court response to your application. And the Court has certainly heard, through the course of the day, there are two dimensions to this in that regard. One is a general one in terms of how the plans properly are considered in these areas. And the other

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8 Minute of the Environment Court for Pre-hearing Conference held 18 August 2017.

9 Prior to the hearing, leave was granted to Transpower New Zealand Limited to not attend the hearing as per its Memorandum of Counsel dated 16 October 2017. That was similarly the case for the Board of Airline Representatives (as per its Memorandum of Counsel dated 20 November 2017), Auckland International Airport Limited ('AIAL') and specified Quarry Operators (as per their Memorandum of Counsel dated 17 November 2017). Counsel for AIAL and the Quarry Operators attended the start of the hearing to inform the court that they supported the submissions of Amicus. That was similarly the position of Wiri Oil Services Limited who were granted leave to appear in a watching capacity.

10 Transcript, pp 98, 99.

one is the site specific matters that have an urgency associated with them for the reasons described, for example, by Mr Galbraith.

Now you would have no doubt heard on behalf of the Council the various questions that the Court has posed to everyone in terms of these matters and it is proper for you to take guidance from that in terms of how the Court is seeing things.

There's clearly a high public interest need for reasoned guidance to be given by the Court, whatever the result. One dimension to that, and it comes back to this urgency point, is whatever the form of guidance issued by the Court it is important for the Council to consider now, and perhaps be in a position, well not perhaps, the Court is seeking that the Council come back with its proposed implementation timetable in its closing submissions. They're not to let these matters sit, for the various reasons that have been put in submissions by, for example, Mr Galbraith.

An aspect that you'll no doubt, your client will no doubt reflect upon in the mix of others is what to do about the Practice Note. Now if it is the case, and appreciating the first point that I made to you, and that is that the Court fully understands that the Council is seeking clarity on these matters, it's not seeking to drive a policy agenda of any kind, but simply to ensure that these things are properly read on behalf of the community. Given that's the Council's objective position on things, it's quite proper, if the Council does so, to reflect on its position overnight and indeed if it is the case that it finds itself moving somewhat towards the positions of other parties, that would also be in keeping with the proper purposes of this application process. And so that is also encouraged in that it still allows for a properly reasoned guidance to be issued by the Court, which is in everyone's interest and in the public interest.

As I say, associated with that, an implementation timetable on behalf of the Council as to how things will be followed through and therefore I would encourage you also strongly to consult with Amicus. Ms Janissen will present before you present your closing tomorrow.

(e) At the start of the second day of the hearing, Mr Muldowney responded to these observations. He informed us that the Council's position was that, if the court considered the Council has misinterpreted in the AUP, it would be grateful for that to be expressed.[11] He emphasised that, while the Council would find such a determination 'disappointing', its 'prize' or 'ultimate goal' (and objective of coming to the court in the first place) is 'certainty'.[12] Responsibly emphasising that, Mr Muldowney submitted:[13]

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11 Transcript pp 103, 104.
12 Transcript, p 107.
13 Transcript, p 107.

> So, it's not about necessarily, you know, digging in and being dogmatic about the approach, the approach has been put, but the real goal here and the main prize is achieving a good degree of certainty and direction from the Environment Court and its specialist jurisdiction in terms of the administration, the plan and also the question of what, if any, plan change might be required.

He went on also to responsibly submit that the proper course, rather than 'folding in', was to get the benefit of a reasoned decision.[14] In particular, in that context, he referred to the Council's Practice Note (which, as we will discuss shortly, is framed on the interpretation underpinning the Council's initially requested and now abandoned declarations A – C (see Annexure)). He submitted:[15]

> I think the point there is that if the Court is concerned about the current guidance note that's out there and the fact that it may be erroneous and needs correcting. It may be that that immediate concern can be addressed through some sort of interim minute from the Court or guidance which issues in relatively short order signaling that the council is not minded to grant the declarations its sought with some degree of information or support around the principle reasons why not which could then immediately be used by council to then get back out to the recipients of the guidance note and reset the course.
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> ...
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> But council's view is that maximum value from this process is delivered to its plan users and itself is an administrator and ... in terms of the investments made in this process through a decision of the Court which really as best it can offers clarity on all of the range of matters that have been touched upon, particularly general rule section C and its application and its relationship to the overlays.

(f) The court enquired as to whether the Council had conferred with HC Trust, the Ollerton Trust and James Alfred Farmer, given the alterative declarations sought by that group of parties (the 's 274 Trust'). Mr Muldowney indicated he had not at that stage done so but that he could signal that:

> ... the thinking from council's perspective on that issue of the alternative declaration is that it may be that if we get the maximum value from the decision that we're seeking in terms of the way the rules work and the way the plan works but that will be taken care of in the decision and so that was, I would submit, the position that council took.

14 Transcript, pp 107, 108.
15 Transcript, p 108.

> So rather than a site-specific declaration we get the benefit of the more broader decision of the Court which will influence the outcome.

(g) After hearing submissions of Amicus, the court allowed an extended morning recess so as to allow further time for discussions to continue between the Council, the s 274 Trust and Amicus.

(h) After the resumption, Mr Muldowney informed the court as follows (partial quote):[16]

> ... The report is positive so there's been good work done in terms of refining and fine-tuning a declaration which has as its basis the draft declaration sitting within the submissions of the ... Trust interests. So, we've looked at that and I think I'll make a couple of points.
>
> The first is that the final part of that declaration deals with rule C 1.93, I think everyone agrees is slightly problematic and that it does potentially give rise to that wider implication question that sends us all off on a broader enquiry. So, we've dropped that out and we've stayed with the starting body of the paragraph which is set out in the draft declaration and then the first sub-paragraph. ... And we've refined it to a formulation which council is on board with ... So we've got an agreed wording ...

Mr Muldowney also explained that he had had discussions with other parties and Amicus and understood all parties are comfortable with what had then emerged as a materially different proposed declaration. He then read the jointly requested declaration into the transcript, and confirmed he would provide a copy of it by email. This is in the form set out at [1] ('finally requested declaration').

Legal principles

[33] The legal principles are straightforward and were not contentious.

Jurisdiction

[34] Starting with our jurisdiction, we may make a declaration as to the existence or extent of any function, power, right, or duty under the RMA (s 310(a)). That clearly

16 Transcript, pp 125, 126.

encompasses the proper interpretation of the AUP provisions in issue. We are not constrained to making or declining the declaration in an application, as our power extends to making any other declaration the court considers necessary or desirable (s 313 RMA). In circumstances where the finally postulated declaration has superseded the initially requested declarations, and there is no opposition to making it, we are satisfied there are no procedural, natural justice or other impediment to making a declaration in those terms (or materially similar ones).

[35] While the final postulated declaration is essentially not opposed, we are satisfied that the court has a sound foundation for making it. That is in view of the contested process that has informed it (both in terms of evidence and legal submissions) and the guidance of Amicus,

Interpretation of subordinate statutory instruments

[36] The principles for the interpretation of a subordinate RMA planning instrument are also well settled and not contentious. We are guided by the Interpretation Act 1999 ('IA'), particularly s 5 on purposive interpretation. The principles are also as set out in the leading Court of Appeal authorities of *Rattray*[17](decided pre-RMA) and the more recent decision in *Powell*[18] (where *Rattray* was applied and interpreted in relation to an RMA district plan matter). In particular, we apply the approach described in the following passage in *Powell*:[19]

> [35]...While we accept it is appropriate to seek the plain meaning of a rule from the words themselves, it is not appropriate to undertake that exercise in a vacuum. As this Court made clear in *Rattray*, regard must be had to the immediate context... and, where any obscurity or ambiguity arises, it may be necessary to refer to the other sections of the plan and the objectives and policies of the plan itself. Interpreting a rule by rigid adherence to the wording of the particular rule itself would not, in our view, be consistent with a judgement of this Court in *Rattray* or with the requirements of the Interpretation Act.

[37] We add that, for subordinate legislation, where examination of the immediate context of the plan leaves some uncertainty, it is also permissible to consider provisions in light of the purpose they fulfil in the authorising legislation (in this case, the RMA). Similarly, the fact that a district plan is to give effect to a RPS can make the latter of some

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17 *J Rattray and Son Ltd v Christchurch City Council* (1984) 10 NZPTA 59 at 61.
18 *Powell v Dunedin City Council* [2005] NZRMA 174 (CA).
19 *Powell*, at [35].

relevance to the interpretation of the former.

[38] The Council's opening submissions also cited the High Court decision of *Nanden*[20] and the Environment Court decision of *Landco*[21]. However, with respect, these decisions essentially apply the well-settled approach in these matters in all relevant respects. *Landco* also acknowledges that the history of a legislative instrument can help inform its interpretation. We acknowledge that to be so particularly where meaning cannot be clearly found in the words in issue. We also note that the Council draws its interpretation to some extent from its understanding of the intentions of the Independent Hearings Panel ('IHP'). However, for the reasons we set out, we find recourse to that history in this case neither necessary nor informative.

Summary of the competing interpretations in submissions

[39] In the circumstances, we can cover these matters succinctly.

The Council

[40] As noted, the Council's opening submissions in support of its then-requested Declarations B and C, were that the SCAR operated as a 'replacement package' of performance standards for activities. In essence, this would be to the effect of cancelling out equivalent performance standards in the SHZ.

[41] It submitted that this interpretation:[22]

(a) is consistent with the overall scheme of the AUP, referring to General Rule 1.6 as to 'Overall Activity Status' which it submitted "implicitly places Overlay rules above Auckland-wide and zone rules in the event of overlap"; and

(b) fits with the purpose of Overlays as being intentionally more restrictive in some aspects and more enabling in others (as compared to the SHZ).

[42] The Council also argued that 'special character' is a matter of regional

20 *Nanden v Wellington City Council* [2000] NZRMA 562 (HC).
21 *Landco Mt Wellington v Auckland City Council* A101/05.
22 Synopsis of submissions on behalf of the Council, dated 10 November 2017, at [8](a).

significance and the SCAR is the primary means of giving effect to this aspect of the RPS. It argued that the RMA requirement for the district plan to give effect to the RPS would be defeated unless the SCAR was given precedence. Further, it argued that the AUP does not allow for "integrated assessment" that led to outcomes being balanced under two separate resource consent applications for restricted discretionary activity.

[43] More broadly, it submitted that an approach that applied both the SCAR and SHZ performance standards would be inefficient and impractical and result in anomalous outcomes. Overall, it argued that the interpretation it applied best suits the RMA's purpose and other relevant Part 2 RMA matters.

Section 274 Trust and the respondent

[44] For the s 274 Trust, Mr Galbraith QC submitted that the Council's approach amounted to treating the SCAR as a replacement zone, rather than what one ordinarily understands an 'Overlay' to be. He submitted that the Council's interpretation was contrary to s 9(3) RMA and to General Rule C11 (which functions to reflect s 9(3)). He argued that treating SCAR standards as cancelling out SHZ standards would give rise to significant amenity and other effects for neighbours. He illustrated this with reference to consent application plans showing the rearward extend of a dwelling redevelopment at 21A Logan Terrace, Parnell. Given the potential for effects to occur well removed from a streetscape that the SCAR seeks to protect, he submitted that it is invalid for the Council to argue that amenity factors would be included in the mix when the Council applied its mind to the SCAR assessment matters. Rather, it left neighbours with no ability to have their concerns considered, particularly when the Council's approach resulted in a non-notified application.[23]

[45] Given this significant 'gap', acknowledged in the Council's own evidence, he submitted it is strange that the Council was building its case on 'inference' to effectively negate express rules in the AUP. He submitted that this is a "step too far", invalid in terms of statutory interpretation principles, and wrong constitutionally. He observed that, despite the Council characterising this 'gap' as giving rise to 'unintended consequences', the Council had not made any commitments to the court about what it intended to do about it by way of plan change.[24] On the matter of constitutional impropriety, Mr Galbraith

23 Transcript, p 67.
24 Transcript, p 69.

noted particular concern about the Council's Practice Note, in effect to misguide its officers and independent commissioners to take a narrow, restrictive and unsound approach to the relationship of the Overlays to the zones.[25]

[46] He submitted that it was appropriate and workable to simply apply all relevant rules and undertake an integrated assessment as the AUP says and plainly intends.[26] His client, the s 274 Trust, sought alternative declarations in essence consistent with the interpretation it advanced and focused on the matters of particular concern in regard to its property.

[47] In his brief oral submissions for the Respondent, Mr Webb adopted the s 274 Trust's submissions. The Respondent's synopsis of submissions is substantially similar.

Government s 274 parties

[48] The Minister for the Environment, Housing New Zealand Corporation, and the Ministry of Education ('Government s 274 parties') noted the dangers in the court ruling on the General Rules of the AUP without considering the implications on other Overlays.[27] They submitted that the Council's interpretation, on the Council's own evidence, would lead to perverse outcomes. They illustrated this with reference to the Volcanic Viewshaft Overlay (where the building height is 9m) and the SHZ (where the same height limit is 8m). They noted, with reference to the affidavit evidence of their planning witness (Ms Linzey) that these height limits are to achieve quite different AUP purposes, namely viewshaft protection for the Overlay standard and residential character and amenity value protection for the SHZ standard.

[49] They submitted that the proper interpretation of the General Rules is that the most restrictive activity class applies and consent is still required for any breach of the rules unless the activity class precludes this.[28]

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25 Transcript, p 71.

26 Transcript, p 72.

27 Legal submissions on behalf of the Minister for the Environment, Housing New Zealand Corporation and the Ministry of Education, dated 13 December 2017.

28 Legal submissions on behalf of the Minister for the Environment, Housing New Zealand Corporation and the Ministry of Education, dated 13 December 2017, at [2.6].

Amicus

[50] Amicus reported on her consultation with potentially affected interest groups. She explained that she contacted a range of people with various interests to get a broad range of perspectives. Those she spoke to included members of special interest groups, resource users and various lawyers, consultants and other representatives. She noted that a common response from consultees was one of surprise and apprehension about the Council's interpretation. In particular, concerns were expressed as to the prospect that the Council could disregard infringements of key rules, especially on amenity values. Some also noted that the Council appeared to base its position very much on what it took to be the IHP's intentions, rather than what the AUP provisions actually say. Some consultees noted, in particular, that the Council's approach appeared to be in conflict with s 9(3) RMA and Rule C 1.1.2. A commonly expressed view was that the true effect of the AUP was that Overlays do not supplant Zone or Auckland-wide rules, but supplement them.[29]

[51] Apart from that, we do not need to summarise the Amicus' submissions. It is sufficient to record that we find her submissions entirely sound and very helpful and it can be observed that our reasons below strongly reflect them.

Discussion

[52] For the following reasons, the court is overwhelmingly satisfied on the evidence that:

(a) the initially requested declarations should be declined; and
(b) a declaration should be made materially in terms of the finally postulated declaration.

[53] We find that the interpretation of the relevant AUP provisions proposed by the Council in its opening submissions is unsound in being contrary to statutory interpretation principles.

[54] Fundamentally underpinning the Council's interpretation is its assumption that the SCAR's performance standards for its specified classes of activity are "a complete set of

29 Transcript, pp 11s – 115.

development standards" which represent a "replacement package" for corresponding standards in the SHZ. That assumption is flawed in that it fails to account for the immediate context of related General Rules and objectives and policies, contrary to *Powell.*

[55] The General Rules apply to the consideration of both the SCAR and SHZ, as Rule C1.1(1) specifies. In their following respects, these rules are strongly contrary to the Council's interpretation:

(a) Rule C1.1(2), in codifying s 9(3) RMA, makes clear that no person may undertake an activity that contravenes an AUP rule unless expressly allowed by a national environmental standard, resource consent or RMA existing use right. It does not allow an approach of treating the SCAR's performance standards as a "replacement package" such as to treat the SHZ's performance standards as nullified.

(b) Rule C1.4(2) is explicit that where a proposal will take place on a site which is "partially affected by an Overlay" then it must comply with the Overlay and Zone controls applying to the particular part of the site. When questioned, Mr Muldowney accepted that "partially" would extend to circumstances where most of a site was affected by an Overlay.[30] In the context of this rule, we consider it likely that reference to "partially" would extend to where an Overlay completely covered a site. In any case, for all circumstances in which Rule C1.4(2) applies, it is clear that all controls that apply to the relevant part of the site must be complied with; and

(c) Rule C1.6 makes clear that determination of activity status will be on the basis of "all rules which apply to" the proposal. It does not express any intention that the SCAR rules are to be treated as complete and in replacement of equivalent SHZ rules (by contrast to what is specified in Rule C1.6(3) for Precinct activity status rules where there are also Overlay activity status rules). It was not in dispute that Rule C1.6(3) does not apply here.

30 Transcript p 60.

[56] Further, we agree with the Government s 274 parties[31] and Amicus[32] that the Council's interpretation of Rule 1.6 conflates and confuses rules for the determination of activity status with those for the control of the effects of an activity. That is in the Council's submissions that Rule 1.6 "implicitly places Overlay rules above Auckland-wide and zone rules in the event of an overlap".[33] Rule 1.6 is explicitly a rule as to activity status. It is not, implicitly or otherwise, a rule for the regulation of the effects of activities in the nature of other Auckland-wide or Zone rules.

[57] Part of the Council's approach was to read down these rules by reference to their use of qualifying words such as "applying to" (C1.4(1)) or "apply to" (C1.6(1), (2)). In essence, it submitted that these rules are not offended because the proper construction of the SCAR performance standards is that these are a "complete" "replacement package" that cancels out the application of the SHZ performance standards and the application of these General Rules. However, the Council could not identify anything in the wording of the applicable SCAR or SHZ rules or other related provisions to the effect of explicitly cancelling the application of the SHZ performance standards and the General Rules where a proposal was also within the SCAR Overlay.

[58] The Council noted the effect of s 104C RMA in relation to restricted discretionary activities. It is relevantly to the effect that a consent authority's discretion will be restricted only to the matters to which the AUP provisions have restricted it. However, we find nothing in this provision to count against the interpretation we have applied to the various rules. In essence, General Rules C1.4(c) and C1.8(1) also pertain to the scope of available discretion under 104C RMA:

(a) where a proposal will take place on a site which is partially affected by the SCAR then the proposal must comply with the SCAR, SHZ and precinct rules applying to the particular part of the site in which the relevant part of the proposal is located (C1.4(c)); and

(b) when considering an application for resource consent for an activity that is classed as a restricted discretionary activity, the consent authority will consider all relevant SCAR, SHZ, Auckland-wide and precinct objectives

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31 Synopsis of legal submissions on behalf of the Minister for the Environment, Housing New Zealand Corporation and the Ministry of Education, dated 17 November 2017, at 1.6, CBD Tab 19.

32 Legal submissions by Amicus Curiae, dated 13 December 2017, at [65.7].

33 Synopsis of submissions on behalf of Auckland Council, dated 10 November 2017, at [8], CBD Tab 15.

and policies that apply to the activity or to the site or sites where that activity will occur (C1.8(1)).

[59] Applying *Powell*, it is also appropriate to read the various rules in issue in light of their related objectives and policies and associated explanatory statements. Here, the importance of considering these provisions is also reinforced by Rule C1.8(1), as summarised at [30]. We set relevant extracts out of objectives and policies at [20] –[28] of this decision. Our consideration of these provisions further reinforces our view that, for land encompassed by both the SCAR and the SHZ, the SCAR does not have the effect of nullifying SHZ performance standards:

(a) first the SCAR's objective in D18.2 is explicitly confined. It is not to the effect that all competing resource management considerations must give way to special character. Rather, it simply seeks that special character be maintained, retained, and enhanced (and adverse effects on it be avoided, remedied, or mitigated) in the way it expresses this. That confined intention is similarly reflected in Policy D18.3(1). It is to the effect that all development and redevelopment be required to have regard to identified special character in the context and to respond positively to it. That is not a policy to the effect that all competing considerations as may be the focus of SHZ performance standards must fall away;

(b) by contrast, as noted, SHZ Objective H3.2(1) and (3), Policy H3.3(2)(a) and (4) and the prefacing zone description in H3.1 each clearly reflect an acknowledgement that special character can inform amenity values, the latter being the primary focus.

[60] As we further discuss at [68] – [72], those objectives and policies run counter to the view taken by the Council's planning witness, Mr Mead, to the effect that it would be inefficient and anomalous for a proposal to have to be considered against two sets of assessment matters on a footing that both the SCAR and SHZ rules apply.

[61] In support of its interpretation, the Council placed significant emphasis on what it considered to be the proper intention of the RPS component of the AUP. We accept that it is valid to consider the RPS as part of a contextual approach to resolving ambiguity or uncertainty in district plan provisions. That is clearly permissible in the sense that the RMA specifies that a district plan is to give effect to a RPS.

[62] The Council referred to various objectives and policies of the RPS including policies to the effect that place-based planning tools (in this case Overlays) will be used to recognise and provide for neighbourhood character. Its overall submission was that this clearly signals that special character "must be protected, maintained, and enhanced, and residential growth must address these requirements".[34]

[63] We do not need to make any findings on whether or not the Council's interpretation of the RPS's outcome intentions for special character matters is fully accurate. It is sufficient to simply observe that those intentions are not the singular intentions of the RPS. For example, the RPS also includes objectives and policies on matters that encompass residential amenity values, such as those in B2.3.1 on a quality built environment.

[64] Moreover, in simply logical terms, the Council's premise concerning the RPS does not inevitably support the interpretative conclusions it draws. The fact that Overlays, such as the SCAR, implement higher order RPS objectives (or, in some cases, ss 6 and/or 7 RMA ones) does not inevitably mean that SCAR rules must be treated as cancelling out SHZ ones. For one thing, to achieve special character outcomes does not dictate that all other considerations, such as amenity value ones, must fall away. Indeed the relevant SHZ objective and policies show that special character and amenity values can be inter-related.

[65] We accept that, at least conceptually, a district plan regime could seek to give preeminence to one set of values (such as special character) over others (such as amenity values). In that sense, for instance, s 7(c) RMA on the maintenance and enhancement of amenity values is stated simply as a matter to which decision-makers must have particular regard. It is not a statutory bottom line in a plan outcome sense. Hence, we accept it is at least conceptually possible for a district plan to set amenity values as subordinate to other values such as special character, including in a residential environment. However, while we understand that theory to be part of the Council's argument in support of the initially requested declarations, the flaw presented is that nothing in the AUP properly supports the Council's interpretation to that effect.

[66] What became more apparent from Court questioning of counsel is that the Council has based its interpretation on what it terms 'cues' (meaning inferences) rather

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34 Submissions for Auckland Council, dated 13 December 2017, at [110] – [114].

than on anything stated in any part of the AUP or related background documents. That is also the position for its reference to the intentions of the IHP. The same can be said for the theories advanced in the Council's affidavit evidence about these matters.

[67] Therefore, we agree with the other parties and Amicus in finding that the SCAR does not have effect in cancelling out SHZ performance standards as the Council has claimed. That finding is sufficient for us to reject the initially requested declarations and make a declaration in terms of the final postulated declaration. However, for completeness, we address some further matters.

[68] Part of the Council's argument is that treating the SCAR and SHZ performance standards as both applying would lead to administrative inefficiency, and "absurd" or "anomalous" outcomes.[35] Council planner, Mr Mead characterised the approach of requiring multiple consents for the same aspect of an activity as "unorthodox" and gave various examples reflecting the Council's concerns.[36] These included having "two different baselines" for effects' assessment. He referred to the consequence of having two sets of height limits, for instance, requiring two sets of shading diagrams. He referred to concerns about the consequences for notification of applications, given that the expectations of outcomes under the SHZ and SCAR could differ for those notified. He argued that the "more enabling" intentions of the SCAR would be effectively lost. Conversely, he observed that applying more permissive SHZ standards could undermine the more restrictive intentions of the SCAR. Overall, he expressed concerns about more complex AUP enforcement and costly administration.

[69] Integrated management underpins the Council's statutory planning function: s 31(1)(a) RMA. Integrated management is also reflected in Part 2 RMA, for instance in the placement of s 7(c) along with other matters in s 7 and together with the matters in ss 6 and 8, all subject to s 5, RMA. Related to that point, in our experience, it is fundamental to the processes of the RMA for multiple issues to be managed according to the directions given by plan objectives, policies and rules.

[70] As such, we do not agree that applying an integrated management approach would give rise to any untoward or unacceptable consequences. For instance, even in cases where SCAR values as identified in the various statements in the Appendix would

35 Submissions on behalf of Auckland Council, dated 13 December 2017, at [82] – [109].
36 Affidavit of David Mead sworn 15 September 2017, [63] – [71]. ABD 632.

be best advanced by specifying a higher building height or a smaller front or side yard clearance and so forth, that does not dictate a need to put aside competing amenity value considerations. Rather, it is in the essence of an experienced consent authority's task to consider those competing considerations on the evidence and in light of directions given by objectives, policies and other provisions, to come up with a sound and informed outcome.

[71] On the other hand, Mr Galbraith's submissions assisted to illustrate the potential for potentially very significant resource management impacts to go unchecked by consenting processes if the Council's approach were applied.

[72] In any case, the proper course for the Council in fulfilment of its statutory plan administration role is to monitor how the AUP is working and, if there are problems, to initiate a plan change to fix them. Self-evidently, administrative inefficiency concerns do not provide any sound basis for misinterpretation of the AUP or failing to duly enforce it.

The Council's 'Practice Note'

[73] That leads us to the 'Practice Note'.[37] We commend the Council for seeking guidance in this decision on this document so that it can inform recipients accordingly.

[74] The Practice Note is dated 1 December 2016 and is in the form of an email from Peter Kensington ('point guard' in the Council's 'resolutions team' on the AUP) to 'GRP – AC Resource Consenting – All Resource Consenting' and copied to 'Practice & Training Team'. We were told that the document was provided to Council staff and managers with delegations and involved in resource consent processes, and to the Council's duty commissioners. Those include various independent commissioners responsible for making decisions referred to us as 'worked examples' in the Council's evidence and submissions. From the evidence, it would appear the advice has been followed in a number of cases, although not in one case involving an independent commissioner. We were also told that it has been tabled in meetings involving neighbours concerned about particular resource consent applications and that it has been more widely disseminated such that members of the planning community in Auckland are well familiar with it.[38]

37 Exhibit C, CBD, pp 47 – 48.
38 Transcript pp 83, 106.

[75] The core of the advice given in the document on the matters addressed in this decision is as follows (emphasis as per document):

> It has been decided that we will administer the AUP (OP) with the overlay provisions overriding the zone provisions (where applicable) – as per the AUP (OP) hierarchy.
>
> This means that:
>
> - we are unable to consider residential amenity effects for applications where the overall activity status is **restricted discretionary** under the SCO-R where amenity is not a relevant matter for discretion or within the assessment criteria; and
> - we are able to consider residential amenity effects for applications where the overall activity status is **discretionary** or **non-complying.**
>
> While there is obviously risk in adopting this approach, as third parties will not be able to participate in the consenting process, the practice is defendable in statutory interpretation terms. Please also remember to use your planning judgement and treat each application on a case-by-case basis as there may well be situations that arise which are outside the 'frame' of this general guidance.

[76] It will be apparent from this decision, that we find that the practice described above is not defendable in statutory interpretation terms or as a proper exercise of the Council's RMA functions. Therefore, the Practice Note should be immediately withdrawn and all recipients of it should be given a copy of this decision explaining why the Council is taking the step to withdraw it.

[77] At a broader level, we also note the issuance of the Practice Note reflects another concerning aspect of the Council's approach to plan administration that needs to be addressed. The Council's opening submission described this approach as being:[39]

> ... determining whether a rule is relevant and applicable requires a judgement to be made by the plan administrator, and this determination may or may not be straightforward, depending on the drafting of the plan.

[78] We do not find disproportionate Ms Janissen's observation that she was "shocked" to learn that the Council considered it had a valid statutory basis for simply electing to not apply certain rules of its plan. We accept Mr Galbraith's submission that it is unconstitutional of the Council to do so. Put another way, as a statutory functionary for RMA purposes, the Council has no authority under the RMA to take such an approach.

39 Submissions on behalf of Auckland Council, dated 13 December 2017, at [93].

Rather, the RMA directs the Council to administer and enforce the AUP.[40]

[79] We reiterate the Principal Judge's observation to counsel during the hearing:[41]

> Well just before you do I think I'll articulate the point that I was developing in my mind and I'm ready to do that now. I would offer the council – might be a slight solace but I'm not sure that it would be great solace. In addition to commending the council for having brought the proceeding, to say that approach was taken by regulatory authorities to try to streamline and simplify to use the famous words from 2009, processes for parties and potentially for itself and others. It might also be commended but they do need to be legally accurate of course.

[80] Related to this theme, counsel for the Government s 274 parties informed us of an issue that has arisen concerning the fact that the AUP is typically only available in electronic form. As explained to us, the issue concerns a part of the AUP that is in the process of being updated by a plan change, namely Plan Change 4. We were told by Ms Kirman that parties have been unsuccessful in being able to supply to the High Court a pre-Plan Change 4 version of the AUP because the electronic copy of the AUP is already updated to include the Change 4 changes (and delete the provisions it would replace).

[81] Given that these matters are before the High Court, we confine ourselves to making these obiter observations:

(a) Ss 35(3) – (5) impose a clear duty on Councils to keep reasonably available at their principal offices information relevant to the administration of regional policy statements and plans. Specifically, that information must include copies of their operative and proposed planning instruments. That clearly implies keeping full and accurate copies of such instruments and ensuring that they are publicly accessible. The fact that Councils may have an electronic plan does not relieve them of that duty.

(b) Public participation through the exercise of rights of application and submission is clearly fundamental to the RMA. Further, plans are the primary means of regulation under the RMA. Relevantly, s 35(3) describes as purposes of the duty of Councils to keep their planning instruments available to the public:

40 Section 84 RMA.
41 Transcript, p 105.

> ... to enable the public ... to be better informed of their duties and of the functions, powers, and duties of the local authorities; and ... To participate effectively under this Act.

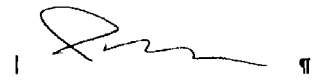
Conclusion

[82] A second decision will issue in the New Year making the declaration indicated, possibly expanding on these reasons, and possibly making associated directions to provide the requested follow up guidance.

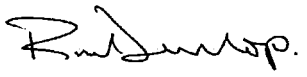
[83] Costs are reserved, with a timetable to be set by our second decision or Court minute.

For the court:

L.J. Newhook
Principal Environment Judge



J.J.M. Hassan
Environment Judge



R M Dunlop
Environment Commissioner

I M Buchanan
Environment Commissioner

Annexure

Declarations sought in Council's July 2017 application

Declaration A:

(a) The overall scheme of the ... [AUP] ... requires that the relationship between the provisions within an Overlay section ..., and the provisions within other sections of the ... [AUP] is determined in the following manner:

(i) First by reference to any specific provisions within the ....[AUP], and where no specific provisions exist or in the event of a conflict between specific provisions

(ii) The provisions within an Overlay shall take precedence over corresponding provisions within other sections of the ... [AUP] which similarly control the land use addressed by Overlay provisions.

Declaration B:

(b) In the context of the Height in Relation to Boundary (HiRB) standards included in the ... [SCO] ... and the HiRB standards included in the ... [SHZ] ..., the Council is properly carrying out its statutory functions under the RMA by requiring resource consent for activities that infringe HiRB standards set out in the ...[SCO] provisions only, and not the underlying SHZ provisions, regardless of whether the proposed activity infringes the HiRB standards in the SHZ.

Declaration C:

(c) In the same context, where a restricted discretionary activity infringes a rule or standard in the ... [SCO], the Council is correctly administering the ... [AUP] in accordance with section 87A(3) of the RMA by limiting its discretion to those matters prescribed in section D18.8.1 of the ... [SCO], and limiting the assessment criteria to that set out in section D18.8.2 of the ... [SCO], rather than applying any broader discretion and assessment criteria as may be prescribed for restricted discretionary activities in the general rules or zone rules.