AUCKLAND UNITARY PLAN
INDEPENDENT HEARINGS PANEL

Te Paepae Kaiwawao Motuhake o te Mahere Kotahitanga o Tāmaki Makaurau

Procedural Minute No.14 by Chairperson of Independent Hearings Panel

Minute in relation to Hearings Process for Topics 080 and 081 Rezoning and Precincts

22 April 2016

Proposed Auckland Unitary Plan

Minute in relation to Hearings Process for

Topics 080 and 081 - Rezonings and Precincts

Procedural Minute No.14 by Chairperson of Independent Hearings Panel

I refer to the memorandum of counsel for the Auckland Council dated 21 April 2016 in relation to the declaration proceedings before the Environment Court relevant to framework plan provisions proposed by the Council as part of the proposed Auckland Unitary Plan.

The memorandum seeks guidance and possible directions from the Independent Hearings Panel in relation to how the proposed provisions, as amended in the course of the declaration proceedings, should be incorporated in the Plan and how further revisions to the rules relating to certain precincts might be dealt with.

The Panel has considered and discussed this memorandum. While appreciative of the opportunity that counsel are affording us, the Panel would be at risk of pre-determining its recommendations on the framework plan provisions if it were to make directions of the kind sought.

In terms of guidance, the Panel wishes to make three points:

1. The deadline for presenting our recommendations to the Council is 22 July 2016. The scheduled hearings of submissions on zonings and precincts are to conclude on 29 April 2016. Even if the Council were able to lodge revised precinct provisions dealing with framework consents by 6 May 2016, we expect that other submitters will want to participate in any process of considering these new provisions. Given other matters that the Panel has to attend to in order to meet its deadline, the Panel has very real concerns that it has insufficient time left to schedule further hearings on these provisions.

2. Referring to the second paragraph 16 of your memorandum, there is a lack of clarity as to the full extent of the issues listed there and the extent to which provisions addressing them would need to be “bespoke” in as many as 24 different precincts. Some of these issues would likely arise generally across all precincts so that it may be worthwhile considering whether these elements could be addressed as matters of discretion on some general basis.

3. The issue of notification is of concern to the Panel. It is not clear what analysis has been done on using notification as an incentive for one approach over another. The Panel presently has doubts about the appropriateness of treating the same land use or subdivision activity,

with the same effects, differently depending on which application process is chosen.

The Panel requests that the Council advise by 4 p.m. on 27 April 2016 what further steps, if any, it wishes to take in relation to framework plan provisions.

Dated at Auckland this 22nd day of April 2016

David Kirkpatrick
Chairperson, Hearings Panel for
proposed Auckland Unitary Plan

21 April 2016

To: The Auckland Unitary Plan Independent Hearings Panel

From: Auckland Council

Subject: Update on Declaration proceedings relevant to Framework Plan provisions proposed by the Auckland Council

Purpose

1. The Independent Hearings Panel (**Panel**) will be aware that the Auckland Council (**Council**) has already provided two memoranda to the Panel, dated 10 February 2016 and 22 February 2016, in relation to the "Framework Plan" provisions used in certain precincts in the Proposed Auckland Unitary Plan (**PAUP**). Those memoranda were intended to provide an update on the declaration proceedings brought by the Council in the Environment Court, and inform various procedural matters associated with hearing Topic 080 Rezoning and Precincts (General) (**Topic 080**) and Topic 081 Rezoning and Precincts (Geographical Areas) (**Topic 081**).

2. This memorandum relates to the Interim Decision dated 24 March 2016 (**Interim Decision**) and Final Decision dated 15 April 2016 (**Final Decision**) issued by the Environment Court (copies of both decisions **attached**) in respect of the "Framework Plan" declaration proceedings.

3. This memorandum provides an update of the outcome of the declaration proceedings, explains the key differences between the "Framework Plan" provisions that were proposed by Ms Dimery in her evidence for Topic 004 - Chapter G - General provisions (**Topic 004**) and the "Framework Consent" provisions approved by the Final Decision. It also seeks guidance from the Panel in relation to how the approved "Framework Consent" provisions (now revised) should be incorporated into certain precincts as part of hearing Topics 080 and 081, and also as part of Topic 004 (in relation to the Chapter G section of the provisions).

Background

4. As the Panel will be aware, the Council's initial application for declaratory orders was formulated on the basis of the "Framework Plan" provisions agreed between the parties in attendance during the mediation on Topic 004. These provisions became known, through the course of the proceedings, as the "Option A" provisions (**Option A**).

5. During the hearing of the applications (on 12 February 2016) the Court indicated to the Council and the other parties that it did not consider that it could issue any declarations on the basis of the original "Option A" provisions, as a result of uncertainties with the drafting of those provisions. At the close of the hearing the Court granted the Council an adjournment in order to undertake revisions to the initial "Option A" provisions in an effort to cure the perceived uncertainty.

6. This resulted in a revised version of the "Option A" provisions, and the development of an alternative set of provisions, referred to as the "Option B" provisions (**Option B**). The differences between those two sets of provisions are explained below. Consequential amendments were also made to the Council's application and the declaratory orders sought, as a direct result of the various revisions. The various declaratory orders sought by

the Council are prefaced in the application and referred to in the Court's decisions by letters of the alphabet. The Option A provisions became relevant to declaratory orders A, B, C and D and the Option B provisions became the subject of declaratory orders AA, B, C and D.

7. After receiving the revised provisions (and a succinct reply from the Council and memoranda from several of the other parties) the Court issued the Interim Decision which declined to make declaratory orders A, B and D. As declaratory order A was declined the Option A provisions were also refused.[1]

8. The proceedings were adjourned in relation to declaratory orders AA and C with the Court,[2] providing a further opportunity for the Council (and the other parties) to place material before the Court on which positive declarations could possibly be made, in relation to the Option B provisions.

9. A Minute was issued by the Court on 29 March 2016 (**Minute**), which directed the Council to file further submissions in response to several matters and a further revision of the Option B provisions for Chapter G and Chapter K (after consulting with the other parties, including Amicus Curiae).[3]

10. The Council filed a closing memoranda and further revisions to the Option B provisions on 7 April 2016 and the Final Decision was issued by the Court soon after which granted declaratory order AA in a (slightly modified) form, as follows:[4]

> On becoming an operative combined plan under the Local Government (Auckland Transitional Provisions) Act 2013 (LG(ATP)A) and Part 5 of the RMA (commencement), the Council's Proposed Auckland Unitary Plan (PAUP) may lawfully include a provision enabling an application for a bundle of land use consents under Part 6 of the RMA which authorise the key enabling works necessary for development associated with the first stage of urbanization and/or redevelopment of brownfield and greenfield land within identified specific geographical areas (precincts) as set out in the attachments to this decision marked "Chapter G" and "Chapter K".

11. The Final Decision approved slightly amended versions of the Chapter G and Chapter K provisions filed by the Council, and it is those which will now be adopted by the Council for the purposes of Topics 080 and 081 and the certain precincts which provide for "Framework Consents".

12. In order to assist the Panel, the Council considers that it would be helpful to explain the key differences between the notified PAUP "Framework Plan" provisions and the Court approved Option B provisions, as per the following paragraphs:

Terminology

a. Firstly, what was originally described as a "Framework Plan" is now called a "Framework Consent". During the hearing the Court indicated that the notified terminology was uncertain, as it gave the impression that consent was being obtained for a *plan* as opposed to an *activity*. In order to address this issue, the Council first amended the terminology to a "framework plan application" and, in response to the Interim Decision,[5] now uses "Framework Consents".

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1 Interim Decision, at [76]
2 Interim Decision, at [176].
3 Minute, at [7](a).
4 Final Decision, at A.
5 Interim Decision, at [142], [143].

b. The Final Decision records that the provisions now clearly differentiate between an "application for a framework consent" on the one hand and, following approval, "a framework consent".[6] There is no longer any issue with the description being uncertain.

Defining the land use activities required

c. One of the central issues for the Court was a concern that the initial provisions did not clarify the land use activities that must be sought as part of an application for a framework consent. The Interim Decision found that, as drafted, the land use activity rules were "arguably ultra vires s77A(1) and s77B(3) RMA as the activity for which land use consent is required is not identified".[7]

d. As a result, the Council revised both Chapter G and Chapter K to clarify that framework consents are resource consents that authorise key enabling works necessary for development of land. The association between a framework consent and specific land use activities and is now reflected in both Chapter G and at Chapter K, specifically in the activity table and at 3.1, where it is noted that:

> Applications for framework consents must seek land use consents for the following activities:

Declaratory order B

e. Declaratory order B sought to confirm that it was *intra vires* the RMA to classify an activity as either a non-complying activity or discretionary activity until after a framework plan had been approved, and thereafter classed something else (or in the case of the original provisions, a more permissive (restricted discretionary) activity status).

f. The Court declined to make that declaration, which was inherently tied to the Option A provisions. As a result of the various revisions, the incentive that presented itself in a change to activity status no longer exists in the framework consent provisions. The approved Option B provisions now classify all activities occurring within a precinct as restricted discretionary, and provide a different incentive that relies on reworked notification provisions.

Notification

g. The Option B provisions include amended notification provisions. These provisions provide for applications for resource consent for buildings (alterations and additions to buildings) and subdivision, made subsequent to the approval of framework consents, to be processed without the need for public notification. Limited notification may however be undertaken.

h. The provisions are designed to incentivise the making of applications for framework consents, as subsequent applications can then be processed on a non-notified basis. This incentive is designed to reflect the initial comprehensive nature of framework consent applications that determine the key enabling works that will influence the future development of certain precincts or sub-precincts.

i. The approved notification provisions differ from the notified approach in that they no longer apply to only those applications for resource consent that have a direct association with an approved framework consent. Resource consent applications for

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6 Final Decision, at [7].

7 Interim Decision, at [170].

buildings and subdivision that are not the subject of a framework consent will be subject to the normal tests of notification.

Assessment criteria/matters of discretion

j. In response to an indication in the Interim Decision that "consistency with a consent for a framework plan is a matter best left as an assessment criterion",[8] as well as other comments by the Court,[9] the Council has revised the Option B, template version of the Chapter K Precinct rules – Matters of Discretion and Assessment Criteria.

k. These revisions have deleted "consistency" with other resource consents (including framework consents) as a matter of discretion (formerly used in Chapter K, at 5.1(2)(b)) and substituted a new matter of discretion which refers instead to "The overall development layout, being the layout and design of roads, pedestrian linkages, open spaces, earthworks areas and land contours, and infrastructure location".

l. The Council's position is that this amendment has cured the concerns expressed by the Court in relation to a possible contravention of section 104C(1)(b) of the RMA, and also that the revised matter of discretion (and the revised assessment criteria) will allow for a broader assessment of any application for consent against the proposed development layout for a particular precinct or sub-precinct.

m. In order to ensure that some measure of "consistency" exists, a new assessment criterion has been approved which allows for a consideration of the "relationship of the matters requiring consent to activities authorised by other resource consents granted".

13. Throughout the Interim Decision and Final Decision the Court was cautious not to be drawn into addressing the possible content of the PAUP or the merits of certain aspects relevant to the subject provisions. Importantly, this was the case for the Council's declaratory order D and the issue of incentives with a framework consent.

14. The Court did not decline declaratory order D in isolation, instead choosing to decline it on the basis of it being contextually over-arched by declaratory order A. The Final Decision indicates that there may be situations where incentivised development rights can be provided for,[10] subject to the rules being subject to a full consideration of the actual and potential effect on the environment of activities, as required by section 76(3) of the RMA. The Council suggests that the assessment of such rules and merits of any incentives is a matter that is best addressed by the Panel, particularly as the Panel has already heard evidence from submitters in relation to precincts.

Council's position in relation to framework consents

15. The Council remains of the view that framework consents will be a useful mechanism to ensure integrated development within certain precincts and supports the inclusion of the approved Option B provisions for the precincts listed below as part of the PAUP.

16. There are 24 precincts that currently include framework consent provisions. Those precincts are:
    a. Wairaka;
    b. Cook Street Depot;
    c. Downtown West;
    d. Quay Park;
    e. Wynyard;

8 Interim Decision, at [167].
9 Interim Decision, at [173].
10 Final Decision, at [28].

f. Bayswater Marina;
g. Devonport Peninsula;
h. Gulf Harbour;
i. Hobsonville Corridor;
j. Hobsonville Point;
k. Huapai North;
l. Kumeu;
m. Long Bay;
n. Orewa 2;
o. Silverdale North;
p. Smales 2;
q. Franklin (sub-precinct H, now renamed Te Toro precinct);
r. Babich;
s. Westgate;
t. Three Kings;
u. Avondale 1;
v. Avondale 2;
w. Albany 9; and
x. Akoranga 1.

16. As a result of the Court approving only a template version of the Chapter K provisions, there are a number of issues that will still need to be addressed by the Panel, including: development benefits associated with framework consents, the appropriateness of the notification provisions, defining the land use consents that must be sought as part of a applications for framework consents and determining the rules applying to those land use consents for each precinct. The determination of those issues may require assistance from both the Council and submitters involved in the Topic 080 and Topic 081.

Guidance

17. Before receiving the Interim Decision and Final Decision, the Council's approach was that to treat the relevant provisions as on-hold until a final decision on the declaratory orders had been received from the Court. This position was reached on the basis that any positive declaratory orders would likely result in revisions to the proposed PAUP provisions. This has proven to be the case, with the Option B provisions being in an amended form from those originally prepared by the Council.

18. The Council now seeks guidance from the Panel in relation to how the approved Option B provisions should be incorporated into the PAUP and, also, how the Council (and submitters) can assist with the further revisions that will be necessary for the Chapter K precinct provisions.

19. Appreciating that the bulk of the Topic 080 and Topic 081 hearings have now been concluded, the Council respectfully suggests that there are two alternatives for the Panel in terms of possible directions:

    a. direct that the Council complete the required revisions to the Chapter K provisions for those precincts that provide for framework consents and file those, along with the approved Chapter G provisions, with the Panel as soon as possible, or

    b. direct that the Council complete revisions to the relevant Chapter K precinct provisions to remove the former framework plan provisions and file those with the Panel as soon as possible.

20. In order to assist, the Council considers that the required revisions to the Chapter K precinct provisions will for most precincts be largely technical and should be capable of being completed by Friday, 6 May 2016. It is noted that the Chapter K precinct provisions

will need to include bespoke provisions for land use activities and other aspects, but given that the bulk of the bespoke drafting (and reasons for those) has already been done by the Council planners in their evidence for Topics 080 and 081, this work is not anticipated to be overly time consuming. In the event that there is a merits assessment involved in the revisions to the provisions, the Council will be able to highlight that for the Panel as part of its filing of the revised provisions (potentially by way of a covering memorandum for each precinct, or as part of its Topic 081 closing remarks).

21. The Council is aware that submitters with an interest in certain precincts may wish to respond to any revisions to the Chapter K provisions prepared by the Council, including by filing their own revisions to those provisions. The Council respectfully requests guidance from the Panel as to how that matter should be managed.

M Dickey / D Hartley / J Caldwell / J Hassall
Counsel for Auckland Council
21 April 2016

BEFORE THE ENVIRONMENT COURT

Decision No. [2016] NZEnvC 056

IN THE MATTER of an application for declarations under Part 12 of the Resource Management Act 1991 ("RMA")

BY AUCKLAND COUNCIL

(ENV-2015-AKL-000138)

Applicant

Hearing at: Auckland on 12 February 2016; further materials and submissions lodged with the Court's leave up to and including 8 March 2016.

Full Court: Principal Environment Judge L J Newhook
Environment Judge B P Dwyer
Environment Judge J E Borthwick

Counsel: J Hodder QC and M G Wakefield for Applicant
T Daya-Winterbottom for Viaduct Harbour Holdings Ltd, in support
W S Loutit and K M Stubbing for Fletcher Construction Developments, Tamaki Redevelopment Co and Kauri Tamaki Ltd, in support
D R Clay and A F Theelen for Ngati Whatua Orakei Whai Rawa Ltd, in opposition
R B Enright for Wiri Oil Services Ltd, in opposition
K R M Littlejohn and K and D Schweder, in opposition
Dr R J Somerville QC as *Amicus Curiae*

Date of Decision: 24 March 2016

Date of Issue: 24 March 2016

INTERIM DECISION OF FULL COURT OF THE ENVIRONMENT COURT ON APPLICATION BY AUCKLAND COUNCIL FOR DECLARATIONS REGARDING THE LAWFULNESS OF FRAMEWORK PLAN PROVISIONS IN THE PROPOSED AUCKLAND UNITARY PLAN

REASONS FOR DECISION

Introduction and key issue

[1] Auckland Council has applied to the Court for four declarations under Part 12 of the RMA concerning the lawfulness of inclusion of Framework Plan ("FP") provisions in its proposed Auckland Unitary Plan ("PAUP"). These provide that consent is required to be sought for the FP itself, and the activity status of land use activities will differ depending on whether that has first been done. That question is (in summary) the key issue.

[2] The issue is of quite widespread interest nationally because numbers of councils have been including similar provisions in plans (called, somewhat inconsistently, by several different names like "structure plans", "concept development consents" "comprehensive development plans", "outline development plans" and "management plans"), and in recent times there have been Court challenges to them. Given the national importance of the issue, the Principal Judge assigned a Full Court of three Environment Judges to hear the case.

[3] The PAUP has been promulgated by Auckland Council under the Local Government (Auckland Transitional Provisions) Act 2010 ("LGATPA") which expressly provides for the development of the first combined plan by Auckland Council.

[4] Submissions on the PAUP are currently being heard by a specialist Independent Hearings Panel. During the course of their hearings, questions have been raised about the lawfulness of the Framework Plan provisions, and expressly as to whether they might be *ultra vires* the RMA.

The declarations sought

[5] These were:

A: On becoming an operative combined plan under the Local Government (Auckland Transitional Provisions) Act 2013 (LGATPA) and Part 5 RMA (commencement), the Council's proposed Auckland Unitary Plan (PAUP) may lawfully include the provisions proposed for Framework Plans (FPs) – for specified geographical areas (precincts) – as set

out in Annexures 'H' and 'I' to the affidavit of Rachel Claire Dimery filed in this proceeding, and also attached to the Council's application dated 14 October 2015, to be assessed as an activity and sought by means of a resource consent application for a land use under Part 6 of the RMA *(FP Application)*.

B: On commencement, the PAUP may lawfully provide that an activity in a precinct may be classed (in terms of section 77A and 87A of the RMA) as a non-complying activity or as a discretionary activity until an approved FP exists for that precinct and thereafter classed otherwise.

C: On commencement, the PAUP may lawfully provide that, in assessing and determining a resource consent application for an activity in a precinct, the consistency of that activity with an approved FP for that precinct is, in terms of section 104 of the RMA, a matter to which regard must be had by the consent authority.

D: On commencement, the PAUP may lawfully include provisions designed to include FP applications for precincts, which provisions are more advantageous for resource consent applications if an approved FP exists for that precinct than would otherwise be applicable.

Background

[6] There is no question (and none was raised) that the Court has the appropriate statutory jurisdiction to consider and determine the application for declarations under s311 RMA.

[7] The key question is regarded as highly important by the council, other parties, and the Independent Hearings Panel. Hence the allocation of a Full Court bench, and allocation of a priority fixture without the need for formal application for same.

[8] The key issue was regarded as sufficiently important by the Independent Hearings Panel that it sought legal advice from Dr R J Somerville QC. With the consent of the parties, we subsequently appointed Dr Somerville as *Amicus Curiae*. At the commencement of case management, party status was accorded those who had lodged submissions on the topic in the PAUP, without formal process being required. The proceedings were served by the council as directed by the Court, and the parties whose appearances are recorded above variously lodged notices of support for, or of opposition to, the application.

[9] The application was supported by affidavits by Mr J M Duguid, the council's General Manager – Plans and Places, and a consultant planner Ms R C Dimery, previously a Principal Planner in the Unitary Plan Team at the council.

The cases of the parties as first presented

[10] Somewhat regrettably, but perhaps understandably given the views of certain parties as to the usefulness of this type of planning, we were treated to a great deal of evidence about alleged merits on the one hand, and problems on the other. For example, a good deal of the evidence on behalf of the council, notably in the affidavit and exhibits of Ms Dimery, focused heavily on alleged benefits of using the Framework Plan technique, while affidavit material filed on behalf of parties in opposition, focused on alleged problems.

[11] We were at pains during the course of the hearing to emphasise that the nature of our enquiry is strictly one of legal interpretation, and that matters concerning the merits of the technique are the province of the Independent Hearings Panel, not this Court. We took the trouble to consider all materials, but found it important to focus on a relatively small part of what was placed before us, in particular legal submissions and some of the cited authorities.

What are Framework Plans in the PAUP context?

[12] We start with two provisions of the PAUP that are at the core of the debate, the definitions of *"Framework Plan"* and *"approved Framework Plan"*. They are as follows:

> Framework Plan[1]
>
> A voluntary resource consent that establishes the location and form of land use, sub-division and/or development for a land area specified in the Unitary Plan rules. If approved, the Framework Plan authorises land uses such as the transport network, open spaces and infrastructure or as otherwise prescribed in the Unitary Plan rules.

[1] Adding to the complexity of matters in this case, Mr Hodder announced late in the hearing that the Council had deleted this definition from the latest version of the provisions under consideration by the Independent Hearings Panel, ostensibly get rid of confusion because it "replicated some erroneous material in the Plan". See Transcript 143-144.

Approved Framework Plan

A Framework Plan that has been granted consent by the Council and the consent has commenced under s116 of the RMA. In addition, where Comprehensive Development Plans have been approved under previous district plans prior to the Unitary Plan rules requiring a Framework Plan taking legal effect, those Comprehensive Development Plans are deemed to be an approved Framework Plan for the purposes of this definition.

[13] Rule 1.2, *'Activities'* provides in relevant part as follows:

The type, form and scale of different activities are managed by rules in the Unitary Plan. All rules within the Unitary Plan have the force and effect of a statutory regulation. One of the Council's functions is to implement rules, and matters to which rules may pertain are outlined in s30 and s31 of the RMA. They include the following:

- to manage the effects of land use and development;
- to encourage the efficient use and development of natural and physical resources;
- to maintain and enhance the quality of the environment;
- to ensure appropriate development on land subject to natural hazards;
- to prevent and mitigate adverse effects associated with hazardous substances;
- to control the sub-division of land;
- to control the emission of noise and to mitigate the effects of noise;
- to maintain and enhance amenity values.

There follows a description of the classification of activities by status as prescribed by the RMA.

[14] Rule 2.6 in Part 3 – Chapter G: "General Provisions" offers lengthy provisions which were summarised by Mr Hodder concerning the essential features of a Framework Plan as follows:

(a) A voluntary resource consent;
(b) Applies within specific precincts;
(c) Land within Brownfield and Greenfield development areas that are proposed to be urbanised or intensified;
(d) Enables landowners to demonstrate and achieve integrated development and or sub-division of such areas;
(e) Authorises the location and physical extent of roads/open spaces, transport network, infrastructure and a range of land uses and subdivision activities;

(f) Generally applied for as a restricted discretionary activity, without public notification; and

(g) Operates as an assessment criterion for the subsequent development/sub-division consent applications (although these may be accompanied by an application to amend or replace the FP).

[Emphasis supplied by us]

[15] Also provided is that if a person makes an application for development or subdivision consents without having made a prior Framework Plan application, or without lodging a contemporaneous one, a more onerous activity status will apply, asserting that this will "allow the full consideration of potential effects and modification subject to the usual RMA tests".

[16] A particular feature of Rule 2.6, and the subject of complaint by Messrs K and D Schweder, is that:

> An application for a Framework Plan must apply only to land of which the applicant is the owner, or the owner's nominee, unless otherwise specified in the precinct. The Council encourages the preparation of joint Framework Plans. Where this opportunity is not taken up by landowners, the Unitary Plan requires the Framework Plan for individual sites or multiple sites held in single ownership to demonstrate how the development or subdivision integrates with neighbouring sites and achieves the objectives of the precinct.

[17] As against that, the council was keen to point out through the submissions of Mr Hodder, that it considered Rule 2.7.3 highly relevant. That rule requires compliance with other information requirements as well as plans and information on overall context, in relation to existing buildings, open spaces, context for site contour changes, location of streets, cycle and pedestrian routes, public open spaces, infrastructure, landscaping concepts, historic heritage or natural features, and staging of developments (in relation to infrastructure and services in the wider area).

[18] We understand that these objectives might be considered laudable by some, but we reiterate that the merits are not for consideration by us in these proceedings.

[19] Mr Hodder pointed to some provisions proposed in the PAUP for a precinct known as the Hobsonville Corridor, from which he noted the following:

(a) the status of an application for a Framework Plan complying with clause 3.2 will be restricted discretionary (RD) – and without such compliance will be non-complying (NC);

(b) the status of a development in conjunction with a Framework Plan will be RD – but if not in such conjunction it will be NC;

(c) an application for a Framework Plan (or for amendment or replacement thereof) will be considered by the council without notification, although limited notification may be undertaken;

(d) a Framework Plan must apply to the whole of a sub-precinct, and apply only to land where the applicant is the owner (or if there is joint application by all landowners);

(e) a Framework Plan must seek consent for specified (and limited) land uses – earthworks, public open spaces, roads and pedestrian linkages, stormwater management devices, and vehicle access ways and slip lanes;

(f) applications for resource consents for buildings, development or subdivisions (RD) within an area subject to an approved Framework Plan will be subject to the council discretion (restricted – principally to consistency with the Framework Plan);

(g) consistency with an approved Framework Plan will be relevant to consideration of a RD activity consent application in relation to design, location and scale.

[20] Drawing on these provisions as an example, Mr Hodder stressed that the method was valuable in seeking to achieve the integrated management of physical and natural resources, a key plank of the RMA in his submission. The context in which he said this was occurring was that the FP has a dual role as a planning tool (not amounting to a consent "to do something") and also a conduit to a consent for a bundle of land uses and activities.[2]

[21] Mr Hodder submitted that the provisions fitted comfortably with the statutory architecture of the RMA, particularly Parts 5 and 6. He submitted that there was nothing in the Act to proscribe the flexibility and purpose of Framework Plan provisions.

[2] See Transcript 10-11.

[22] Given that the first of the four declarations sought is over-arching in nature, Mr Hodder advanced his submissions as to declarations B, C, and D, before turning to A.

Declaration B: FP impact on activity class

[23] Declaration B as sought, was, to reiterate:

> On commencement, the PAUP may lawfully provide that an activity in a precinct maybe classed (in terms of section 77A and 87A of the RMA) as a non-complying activity or as a discretionary activity until an approved FP exists for that precinct and thereafter classified otherwise.

[24] Mr Hodder submitted that the essential legal question here was whether the categorisation of an activity in terms of those two sections of the RMA must be fixed in a plan or may be changed (made less onerous) by the existence of an approved FP.

[25] By sections 67(1) and 75(1) RMA, a plan must state the objectives for the relevant area, the policies to implement the objectives, and rules (if any) to implement the policies. In contrast, Mr Hodder submitted, s77A(1) provides that a local authority may (not 'must') categorise activities and make rules in a plan for each class of activity. He submitted that therefore the classification of activities is discretionary rather than closely prescribed. As a result, he submitted, the focus of a plan should relate to its purpose or objective of 'integrated management'. He reiterated that a FP would provide a major platform for integrated management [once again a matter we find going to the merits, not legal interpretation]; and that therefore the "state of affairs is not objectionable or unlawful, but is sensible, desirable and consistent with the RMA".

[26] Mr Hodder noted that the relevant categorisation for an activity will be that set by s88A, that is at the time of making an application for consent. He submitted that having regard to all of these provisions, together with ss104B and 104C, the provisions of Part 6 are:

> designed to ensure that activities are, at some point (initial categorisation and related consent process) considered by reference to the overall purposes of the RMA, not least the integrated management of the natural and physical resources of an area.

[27] He submitted that the categorisation of activities is a means to that end, but that the legislation authorises flexibility about categorisation of an activity, so was not explicitly or necessarily implicitly, constrained.

[28] Mr Hodder submitted that from a 'rule of law prospective', there was nothing problematic in a landowner contemplating a resource consent application for an activity classed in one way at a point where no FP was approved, with a reconsideration of status if an approval were to occur.

Declaration C: Relevance of FP to resource consents

[29] Declaration C as sought, was, to reiterate:

> On commencement, the PAUP may lawfully provide that, in assessing and determining a resource consent application for an activity in a precinct, the consistency of that activity with an approved FP for that precinct is, in terms of section 104 of the RMA, a matter to which regard must be had by the consent authority.

[30] Mr Hodder submitted that the essential legal issue was whether any aspect of the RMA prevented consistency with an approved FP being a valid consideration for a consent authority in assessing and determining a resource consent application for an activity in the relevant precinct. Noting again the "integrated management functions" of councils under ss30 and 31 RMA, he submitted that s104 provided ample authority for an approved FP to be a relevant consideration in the assessment of a resource consent application, and illustrated the importance of the relevant PAUP provisions in such an assessment. In this, he identified the provisions of subsections (b)(vi), and (c), of s104(1) RMA.[3]

[31] Mr Hodder noted the evidence of Ms Dimery in her evidence in chief4 that the PAUP FP provisions were revised significantly in light of the decision of the Environment Court in *Queenstown Airport Corporation Ltd v Queenstown Lakes District Council.*[5] He submitted that the essential feature of those revisions was to remove any indication that an approved FP would be a precondition to any ground of

[3] Matters to be had regard to on considering an application for a resource consent and submissions received, include, by (b)(vi), a plan or proposed plan; and by (c) any other matter that consent authority considers relevant and reasonably necessary to determine the application.
[4] Paragraphs [39]-[44] and [56].
[5] [2014] NZEnvC 93.

resource consent in the precinct, while providing for consistency with a FP as a discretionary consideration.

[32] Mr Hodder noted (by way of obiter) that the Court had offered helpful suggestions about potential amendments to the Outline Development Plans under consideration in that case. He then however made the submission that "beyond that historical but important role, the Queenstown Airport judgment is not of direct relevance to declaration C – nor to the other declarations sought".

Declaration D: Encouragement of FPs

[33] To reiterate, declaration D, as sought, was:

> On commencement, the PAUP may lawfully include provisions designed to encourage FP applications for precincts, which provisions are more advantageous for resource consent applicants if an approved FP exists for that precinct then would otherwise be applicable.

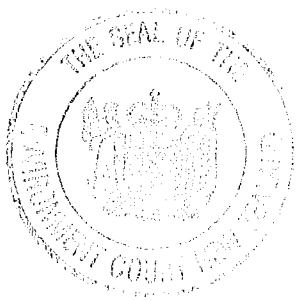
[34] This declaration undeniably addresses the merits; likewise Mr Hodder's submissions on it.

[35] Mr Hodder submitted that there was nothing in the RMA prohibiting the inclusion in the PAUP of such provisions. We reiterate that we cannot delve into the merits, and we will not make findings about whether FP provisions are "more advantageous for resource consent applicants.

Declaration A: The general validity of FPs

[36] To reiterate, declaration A sought by the council is that:

> On becoming an operative combined plan under the Local Government (Auckland Transitional Provisions) Act 2013 (LG(ATP)A) and Part 5 of the RMA (commencement), the Council's proposed Auckland Unitary Plan may lawfully include the provisions proposed for Framework Plans – for specified geographical areas (precinct) – as set out in Annexures "H" and "I" to the affidavit of Ms Dimery filed in this proceeding and also attached to the Council's application dated 14 October 2015, to be assessed as an activity and sought by means by means of a resource consent application for a land use under Part 6 of the RMA (FP Application).



[37] Mr Hodder's simple submission was that given that he considered the declarations B, C and D could appropriately be made, the FP provisions are valid and are an

important methodology for delivering the council's integrated management obligations and thus the RMA s5 purpose.

[38] Leaving aside the merits argument which emerges once again, Auckland Council seemed to accept that declaration A stands or falls with declarations B, C and D.

The cases in support of the Auckland Council application

Ngati Whatua Orakei Whairawa Ltd ("Whairawa")

[39] Counsel for Whairawa indicated a neutral stance in relation to declaration B (having previously opposed an aspect of it), and support for declarations A, C and D.

[40] Whairawa is the commercial entity of Ngati Whatua Orakei and is responsible for managing their commercial assets and advancing the commercial aspirations of that Iwi. This includes Quay Park in central Auckland, a 20 hectare piece of commercial land owned by Ngati Whatua Orakei. The land is subject to plan provisions called the Quay Park Precinct ("QPP"), including a sub-precinct to which a FP applies.

[41] In addition to offering commentary on the desirability of such provisions from the point of view of integrated management and serving the purpose of the Act in s5, Counsel largely supported the legal submissions on behalf of Auckland Council. He submitted that the decision of the Environment Court in the *Queenstown Airport* case was not directly applicable because the council proposes to amend the relevant PAUP provisions. He did not elaborate on that point.

[42] Counsel took us through relevant provisions relating to the QPP, which for present purposes bore some similarity to the Hobsonville provisions described above. Notably, activity status alters significantly between situations in which there is not a previously or contemporaneously approved FP (non-complying), and when there is (restricted discretionary once again); and application may be made for consent to a Framework Plan as though it were a land use activity, in addition to one or more of some listed activities including buildings, subdivision, transport network, infrastructure, public open space network, earthworks, and contamination removal.

[43] The objectives and policies set up a policy framework for those controls.

[44] It was submitted that FPs address relevant and valid planning in environmental matters, directly relevant to the purpose of the Act and scope, and the council's powers and functions to include provisions in plans to address integrated management, environmental effects, and achieve sustainable management. Reliance was again placed on s104(1)(b)(vi), and s104(1)(c). It was submitted that matters for assessment when considering and determining FPs are comprehensive and wide in scope, similar to information requirements for consent applications. It was also submitted that such matters are directly relevant to the additional development potential within the precinct (a matter, we consider, going to the merits).

[45] Interestingly, Counsel submitted that FPs are justified as a "use" or "activity" for which resource consent is required under section 9, either as a specific example of the definition of "use" in the RMA (e.g. roads or earthworks) or under the generic reference to "any other use of land".

[46] We tested Counsel on this submission, because we observed that we thought that the definition of "use" in s2 of the Act did not allow of that sort of extended connotation.[6] Having regard to what we record in footnote 6 below, we are confirmed in our view that the suggested extended connotation advanced by counsel is wrong.

Tram Lease LTD, Viaduct Harbour Holdings Ltd and Viaduct Harbour Management Ltd ("VHHL")

[47] Counsel for VHHL, Mr Daya-Winterbottom formally adopted the written submissions on behalf of Auckland Council. He described the general nature of FP provisions in the PAUP against the backdrop of the same provisions of the RMA as discussed by Mr Hodder, and described a Framework Plan in place over land owned by

[6] We had in mind the well known canon of construction *"ejusdem generis"* providing that when general words follow the enumeration of persons or things of a specific meaning, the general words will be construed as applying only to persons or things of the same general class as those enumerated; see for instance Garner's Dictionary of legal usage, 3rd edition 2011. Note also in relation to District Plans that s9(3) RMA provides that no person may use land in a manner that contravenes a district rule unless the use is expressly allowed by a resource consent or is allowed by s10 or is an activity allowed by s10A [emphasis supplied]; and referring to the decision of the Environment Court *Re Anzani Investments Ltd* decision number A076/00, which held that "use" essentially encompasses dynamic activities on land and does not relate to consents (if a proposed activity would alter the status of adjoining land, such as by vesting recreation reserve as road reserve, the future circumstances applicable to the site should be examined). Subsequent to the hearing we have recalled that the Court of Appeal held in 1998 that *"'Activity' is not a defined term but in general appears to have the same meaning as "use", as can be seen from ss 9 and 10":* see *Bayley v Manukau City Council* [1999] 1 NZLR 568; [1998] NZRMA 513 AT 515; (1998) 4 ELRNZ 461.

his clients in central Auckland's Wynyard precinct. The provisions concerning that precinct clearly operate, once again, in a similar way to others drawn to our attention, and it is clear that VHHL supports that approach (a matter going to the merits and beyond our jurisdiction in this case). The provisions here derive in large measure from legacy Auckland City Council district plan provisions.

[48] Concerning relevance of FPs to resource consents, counsel submitted that the cascade approach effectively addressed the concerns raised by the Court in the *Queenstown Airport* decision. He submitted that there was no constraint on permitted activities or on resource consents being obtained for non-complying activities, and that the assessment criteria provided in the relevant rule are "likely to be relevant when deciding whether the proposed activity passes the gateway tests in s104D(1) of the RMA".

[49] Counsel noted that there are incentives relating to increased building height and floor area in the majority of sub-precincts. He nevertheless submitted that FPs are a valuable method for integrating management whether or not incentives are present (once again a merits matter).

[50] Counsel submitted that the provisions were fully tested under a plan change process called Plan Modification 4 in the Operative Plan, but acknowledged to the Court that they were not tested in any Court hearing, because the precinct provisions were ultimately the subject of a Consent Order under seal of the Court (one party having indicated that the validity of the provisions would be tested, which did not occur because that party withdrew from the appeal process). Counsel also submitted that the provisions had been subjected to close scrutiny under s32 RMA during the Plan Modification 4 process, but we find that factor also straying into the merits which are not before us. There followed discussion of the "relative ease" with which the proposed provisions operate in the precinct, again a matter going to the merits with which we cannot concern ourselves.

Fletcher Construction Developments, Tamaki Redevelopment Co, and Kauri Tamaki Ltd

[51] Mr Loutit appeared on behalf of these three parties, adopting the written submissions for Auckland Council, describing the property development operations of his clients, and stressing the importance of the Framework Plan approach for them.

Amongst other things relating to the merits, he submitted that the FP approach promotes best practice in master planning, and that the technique was critical for this to occur: the only alternative under the RMA being for a landowner seeking to achieve integrated development, to apply for a private plan change. His clients favoured the certainty provided by a FP process, and the "development uplift" importantly achieved. He identified that a shorter time frame would be experienced for obtaining resource consents compared to the private plan change process.

[52] Mr Loutit addressed the issue of determining activity status from the plan, noting that the *Queenstown Airport* decision expressed concern about a proposed permitted activity rule where the classification of the activity proceeded from the exercise of the consent authority's discretion whether to grant a limited discretionary activity consent for an Outline Development Plan. Counsel before us stressed that the PAUP FP provisions had been drafted to refer to the "existence of an approved Framework Plan", and not compliance with a plan as in the *Queenstown* case. He submitted that the key issue was whether the rule was certain, and that "the existence of a FP will be a matter which is certain". He submitted that it was not unusual to have to refer to other documents or to check aspects of a proposal or development when determining activity status.

Cases in opposition to the application

Wiri Oil Services Ltd ("WOSL")

[53] On behalf of WOSL Mr Enright offered a mix of submissions addressing the law and the merits. We must differentiate between the two.

[54] Mr Enright submitted that while FPs might be a useful tool in achieving integrated management, they are not a necessary feature of integrated management; and that there is no reference to them in the RMA, whether in s30, s31, or elsewhere. The recognised methods include plan rules and assessment criteria, plan change processes, many forms of staged resource consent, deferred zoning and LGA development contributions. He submitted that plan change processes allow for greater public input into integrated development.

[55] Mr Enright explained WOSL's interest in the proceedings deriving from its concern about reverse sensitivity impacts on regionally significant infrastructure that it owns and operates, storing and supplying petroleum and aviation fuel, receiving supply via pipeline from the Marsden Oil Refinery, and supplying Auckland Airport by pipeline, amongst other modes of transportation. The company opposed the use of resource consents to achieve an outcome that could (and Mr Enright submitted should) otherwise be achieved by a plan change along with more onerous notification and public input requirements. He submitted that the status of an activity should not depend on the existence of a privately held consent.

[56] Mr Enright focused on the terminology of declarations B and D requiring that an approved Framework Plan "exists" for a precinct, with activity status being delegated to a council consent process. He submitted that the putative reason that a consent must "exist" was to avoid the validity issue identified in the *Queenstown Airport* decision. He considered that compliance at any time might be difficult to assess and require evaluative judgement, and that the status of an activity would require prior exercise of consent authority discretion (that is whether or not to grant a FP consent).

[57] He submitted that if a consent holder failed at any point to "comply" with the resource consent, then activity status might revert back to discretionary or non-complying, and there would be no certainty at any point in time as to activity status. He submitted that the alternative was that activity status should be fixed by [definitive] rules in a plan.

[58] Mr Enright submitted that there had been an attempt to side-step the validity issue identified in *Queenstown Airport*, resulting in the council creating a fresh species of error. The "existence" of a consent would still require the exercise of a discretionary power, and create a loophole in consequence. He submitted that it should be treated as invalid for the same reasons as recorded in *Queenstown Airport*.

[59] Mr Enright submitted that if the "existence" of an approved Framework Plan is the sole requirement, there would be nothing to stop a consent holder from obtaining a FP consent but not exercising it. In reliance on such "existence", a developer could then apply for and obtain subsequent consents, but not be bound by the FP consent (which

would exist but might not be exercised). The consent holder would then receive the benefit of reduced activity status, but not the burden of compliance.

[60] That the last submission tended in part to address the merits as well as the *vires* question, was we thought, confirmed by the following observation from Mr Enright that the presence of this loophole suggests that council's argument that FPs achieve integrated management, is overstated. We consider that both the council position, and Mr Enright's observation, address the merits as much as the validity issue.

[61] Mr Enright returned to relevant matters in supporting the submission of *Amicus* that a Framework Plan should more properly be included as a condition of consent or an information requirement in the plan provisions, but not as a rule defining activity status. He also supported the submission that a FP consent is not an "activity", rather it is a "plan about an activity", as submitted by *Amicus*.

[62] Mr Enright also advanced concerns about PAUP provisions creating grandfather status for Comprehensive Development Plans contained in predecessor District Plans, by deeming them to be approved Framework Plans. He submitted that there was an invalidity under the RMA on account of the creation of a factual fiction, while at the same time excluding assessment of relevant environmental effects, citing *Hawkes Bay and Eastern Fish and Game Councils v Hawkes Bay Regional Council.*[7] The factual fiction identified in this case by Mr Enright was that it is deemed that the CDP had been created ("granted") having regard to all the PAUP Framework Plan criteria including provision of infrastructure, open space and roading; this could not be correct because it could be demonstrated that each had been granted under different operative plan criteria. He submitted that CDP consents should instead simply rely on existing use rights under s10 RMA.

K and D Schweder

[63] Mr K Schweder filed an affidavit explaining the opposition of himself and D Schweder. He alleged that they are affected by notification in the PAUP of something called the Pukekohe Hill Precinct. Their land is in a FP area along with land that they do not control. His concern was with provisions that restrict applications for resource

[7] [2014] NZHC 3191, at [189], [193] and [195].

consent for a Framework Plan (or amendments thereto) to situations in which the application must apply to a whole precinct or a whole sub-precinct, and possibly apply only to land that the applicant owns, or to sites in multiple ownership where all land owners make a joint application. He was concerned that development of his land could not proceed without agreement of other landowners within his sub-precinct.

[64] Furthermore, he expressed concern that one of his properties, over 8ha of land, had been "arbitrarily cut in half for no good reason, thereby allocating it to two different Framework Plan areas and consequently requiring the owner to deal with even more neighbours".

[65] The matters the subject of Mr Schweder's affidavit are essentially matters going to the merits which we cannot address in these proceedings. However the Schweders engaged counsel, Mr Littlejohn, who offered submissions primarily addressing the legal validity issue in a focused and helpful way.

[66] Mr Littlejohn reiterated the reasons for his clients' anxieties, and although they primarily addressed the merits of the situation, we have recorded them above for completeness.

[67] Mr Littlejohn submitted that an approved FP consent does not authorise any activity to occur on the land. He said the approval of new titles and any development work to create them requires further subdivision and possibly other resource consents. His explanation for this submission was that the vesting of roads, or the definition and creation of easements for piped (and unpiped) infrastructure, could occur within a resource consent (i.e. by a survey and deposition of a land transfer plan etc...), merely by the offer of the landowner and the acceptance of the benefactor of the grants. He submitted that therefore the rule merely prescribes a process, the outcome of which is a plan to then be paid heed to in the course of the actual use and development of a land, which may still require other resource consents to be obtained.

[68] Mr Littlejohn illustrated his clients' concern with a hypothetical scenario. He postulated:

(a) sites 1 and 2 are within a FP area. Site 1 is owned by Party A, and Site 2 by Party B.

(b) Party A wishes to develop, but is unable to persuade Party B to lodge a joint Framework Plan Consent Application (FPCA) for sites 1 and 2.

(c) Party A proceeds to lodge a FPCA for the whole FP area as required by the rules (i.e. for both sites 1 and 2). As applicant, she promotes a design that favours her development aspirations (in terms of lot yield) and locates public infrastructure on Party B's land.

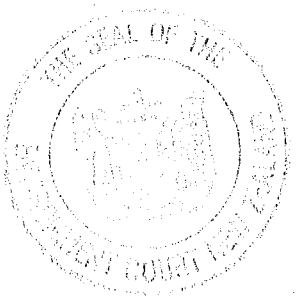
(d) Party B is notified of the application on a limited basis because of being potentially adversely affected by the application (s95B of the Act), and makes a submission in opposition.

(e) at the hearing, or any subsequent appeal the decision-maker determines the application and approves a FPCA for the FP area, consistent with that sought by Party A.

(f) Party A completes development in accordance with her FP consent. Party B remains opposed to the approved FP. To advance development of site 2 inconsistent with the FP consent he must either proceed on a non-complying basis, or seek to amend the FP consent. However unless he can solve the reliance of site 1 on his land for public infrastructure, he will struggle to amend the FP.

[69] Mr Littlejohn submitted that in the absence of landowner agreement, there was no District Plan method that can fairly adjudicate competing aspirations of landowners so as to achieve the purpose of the Act. She who controls the FPCA, controls the FP Area, and also what her neighbours can and cannot do. Conversely, her rights under the FP consent could be frustrated by what her neighbours choose to do, or not do.

[70] He submitted that Part 6 RMA procedures were simply not designed to resolve the appropriate planning outcome for areas in multiple ownership: that is what Part 5 processes are for.



[71] Mr Littlejohn noted some uncertainty in the council's position as to whether the rules provide (or might be changed to provide) that the owner of some of the land within

a FP Area can make a complying FPCA for only their land, or not. If the former, his clients' anxiety would recede to some degree.

[72] Turning to strict issues of legality, Mr Littlejohn noted that the council had submitted that propositions B, C and D can be answered in the affirmative, and that consequently the over-arching proposition A can similarly be answered in the affirmative. He decried the lack of legal analysis put forward to support proposition A, and we noted for ourselves that Mr Hodder's written submissions on proposition A were remarkably brief.

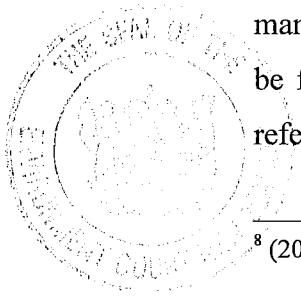
[73] Mr Littlejohn submitted that the logic was flawed, relying on the premise that the provisions are prima facie lawful to answer the 2 subsidiary propositions (B and C) and then using the outcome of that analysis to assert the validity of the initial premise. He submitted that the reasoning was unhelpfully circular.

[74] As have we, Mr Littlejohn noted the emphasis in the council submissions on the allegedly laudable provisions about integrated management, utility, and other perceived benefits. He submitted that those intentions of themselves were not relevant in the determination of their lawfulness. He cited an observation of the High Court in *Western Bay of Plenty District Council v Muir*:[8]

> Whilst of course the purpose of the Act is sustainable management of natural and physical resources and as a consequence rules must be necessary to achieve the purpose of the Act, simply because such a rule might be directed towards that purpose does not of itself make the rule lawful if the rule itself is *ultra vires*.

[75] The subdivision-related subject matter in the *Muir* case was different, but we consider that the quoted proposition is clear. It may be of relevance in the present case.

[76] Mr Littlejohn submitted that while the purpose of the Act is set out in Part 2, it is the duties and restrictions in Part 3 that form the scope (and scale) of the Act's management objective in its subsequent Parts 5 and 6; the Act sets out the procedures to be followed to create the regional and district rules and obtain the resource consents referred to in the Part 3 restrictions on activities affecting natural and physical resources.



[8] (2000) 6 ELRNZ 170 at [27].

Those processes are different. Rules to implement policies and objectives are included in plans that are rigorously developed by local authorities in accordance with the provisions of Part 5. They are then publically contested in accordance with First Schedule processes.

[77] Resource consents are sought for specific activities in relation to natural and physical resources. Section 87 RMA defines "resource consent" expressly by reference to the Part 3 restrictions on activities in ss9,11,12,13,14,15,15A, and 15B of the Act. Part 6 prescribes the process for their preparation, lodgement, processing and determination.

[78] Mr Littlejohn submitted that Part 5 plan-making procedures directly influence the Part 6 processes to be followed on a case by case basis by resource consent applicants. The outcome of the former (objectives, policies, rules) can dictate the extent of the procedural and substantive scrutiny brought to bear on the latter.

[79] He submitted that essential to the nature of a resource consent is that it enables activities to occur in relation to resources (that is to do things), specifically:

- use land – s9 (noting the definition in s2 that we have previously commented on);
- subdivide land – s11;
- use the coastal marine area – s12;
- use the beds and lakes of rivers – s13;
- take, use, dam or divert water – s14; and
- discharge contaminants into the environment – ss15, 15A, and 15B.

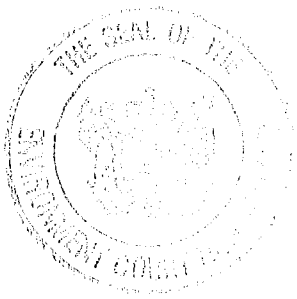
[80] Mr Littlejohn submitted that the Act does not contemplate resource consents being sought for permission to do things that do not involve an activity identified in s87 and Part 3. Such an application would not, by definition, be for a resource consent. He submitted that to do otherwise would be to purport to use the Part 5 plan-making process for purposes not contemplated by the scheme of the Act, namely to use the resource consent processes for plan-making purposes. He submitted that the provisions under scrutiny offended that simple principle.

[81] In answer to an opinion of Ms Dimery and submissions on behalf of the council, that FP consents would authorise uses of land including new roads and infrastructure and open space, Mr Littlejohn submitted that the requirements in the plan for the provision of supporting information for a FPCA, listed nothing relating to activities in the strict sense. Rather, they are concerned with context, topography of the land, the "location" of public infrastructure, and landscape concept and staging. He submitted that it was some sort of "information" that was required to be "approved".

[82] Put somewhat starkly, Mr Littlejohn submitted that in the guise of a District Rule, the council has essentially delegated its planning functions to landowners. He submitted that declaration A [the over-arching item] must be refused.

[83] We indicated to the parties towards the conclusion of the hearing that we thought that there was some force in these submissions.

[84] Mr Littlejohn proceeded to submit that if the over-arching provisions were invalid, then it was strictly unnecessary to consider propositions B and D. On the classification issue, he adopted the submissions of *Amicus* (which we shall come to), and agreed with his essential submission that the different activity classification proposal included in the FP provisions offended the principle in the decision of the Environment Court in *Queenstown Airport* that the status of an activity must derive from provisions of the Act and its subsidiary planning instruments, and not from a resource consent. The council having shifted its focus to the existence of a FP rather than the terms of the consent, Mr Littlejohn submitted nevertheless that they would still offend the principle in *Muir*, that the activity classification must not be expressed as contingent on another process beyond the plan being successfully finalised. He submitted that rules using classification of an activity status to incentivise applicants to follow certain procedures must, as a general proposition, be of questionable legality for the same reasons already advanced. That is, that they would not be a valid rule as they would not relate to any activity for which a resource consent can be sought.



[85] As to the council's submissions about consistency of a proposed activity with an existing FP consent being a matter to which regard is to be had by a consent authority

under s104 RMA when considering an application, Mr Littlejohn submitted that such did not expressly appear in s104.

[86] He noted that s104(1)(c) allows a consent authority to have regard to any matter it considers relevant and reasonably necessary to determine a resource consent application, and that this discretion is broad. He submitted however that a declaration about mandatory consideration of such matters in the FP context would not be appropriate, going beyond a simple discretion.

[87] Under s104(1)(a), Mr Littlejohn acknowledged that existing consents are potentially relevant to the extent that they are included in the existing environment (if likely to be implemented),[9] and have an impact on the assessment of actual and potential effects of the application seeking consent. He submitted however that this effects-analysis technique does not extend to an enquiry into consistency between existing and proposed consents. Furthermore, he submitted, as resource consents that do not allow a use of land, FP consents cannot generate any adverse effects on the environment that would be available for assessment in any subsequent proposal.

[88] As to s104(1)(b)(iv) RMA, Mr Littlejohn posed the question as to whether an existing resource consent is a "relevant provision of a district plan". He submitted that it was not. It is simply an extraneous document brought into existence after the promulgation of the plan in question and cannot be lawfully treated as a provision of it. That, he said, told against proposition C.

Submissions of Amicus Curiae

[89] Dr Somerville considered the Environment Court's *Queenstown Airport* decision in considerable detail, and updated us with subsequent changes in legislation and findings in subsequent decisions of the High Court and Environment Court.

[90] He set out with care the relevant provisions of the PAUP as attached to the affidavit of Ms Dimery, modified, so the council had submitted, in order to overcome the findings of the Court in *Queenstown Airport*. Following a careful analysis of the

[9] *Queenstown-Lakes District Council v Hawthorn Estates Ltd* (2006) ELRNZ 299.

changes the council had made, and considering the law as he submitted it to be, Dr Somerville submitted that the council had not succeeded.

[91] Dr Somerville took the particular example of the Hobsonville Corridor Precinct as placed before the Court by Ms Dimery. He summarised those provisions in the following way:

(a) Framework Plans which comply with rule 5.16.3.2 are restricted discretionary activities;
(b) subsequent new buildings and/or subdivision that are the subject of an approved Framework Plan are also restricted discretionary activities;
(c) a more onerous activity status (non-complying) is triggered for subsequent new building and/or subdivision depending on whether or not there exists an approved Framework Plan.

[92] Dr Somerville submitted that, following the reasoning of the Court in *Queenstown Airport*, a rule which requires the obtaining of resource consents for FPs does not come within the term "requirement" in terms of s87A RMA, and is therefore *ultra vires*. We record his reasoning, somewhat summarised, as follows.

[93] In the *Queenstown Airport* case, the instruments concerned, described in the provisions of Plan Change 19 (PC19), were called Outline Development Plans ("ODPs"). They contained the following features of relevance, amongst other things: ODP plans which delineate the performance standards and/or activities on an area of land; the relevant objective and policy were for the purpose of ensuring high quality and comprehensive development; a rule provided that it would be a prohibited activity to undertake any activity on the land until an ODP had been approved; an ODP itself was required by another rule to be approved by way of resource consent as a limited discretionary activity; other rules provided that permitted, controlled, limited discretionary, and discretionary activities each contained a requirement for the activity to be "in accordance with" an approved ODP for the area; any use of land which did not comply with a consent for ODP activities would be a non-complying activity.

[94] The PC19 provisions were required to be tested against s77B RMA, in force prior to the 2009 Amendment Act. That section relevantly provided:

77B Types of activities

(1) If an activity is described in this Act, regulations, a plan or proposed plan as a permitted activity, a resource consent is not required for the activity if complies with the **standards, terms, or conditions**, if any, specified in the plan or proposed plan.

...

(3) If an activity is described in this Act, regulations or a plan or proposed plan as a restricted discretionary activity, –

(a) a resource consent is required for the activity; and

(b) the consent authority must specify in the plan or proposed matters to which it has restricted its discretion; and

(c) the consent authority's powers to decline a resource consent and to impose conditions are restricted to the matters that have been specified under paragraph (b); and

(d) the activity must comply with the **standards, terms or conditions**, if any, specified in the plan or proposed plan

...

(5) If an activity is described in this Act, regulation, or plan or proposed plan as a non-complying activity, –

(a) a resource consent is required for the activity; and

(b) the consent authority may grant the consent with or without conditions or decline the resource consent. **[emphasis added]**

[95] The Court in *Queenstown Airport* considered that two questions should be posed in considering the *vires* of the provisions as against s77B:

(a) is a land use consent granting an ODP a "consent" within the meaning of the RMA?

(b) can the status of an activity be determined by a prior grant of consent?

[96] Under the relevant rule an application for an ODP had limited discretionary activity status. However the Court held that the term ODP does not constitute an "activity", and found as follows:[10]

> While at times Council and the planners spoke of Outline Development Plans as if they were an activity (i.e. the plan is an activity), we understand in this plan change the term "Outline Development Plan" means a consent granted for a bundle of activities. In the latter context, the QLDC and the planners also spoke about "Outline Development Plans" as being a consent

[10] [2014] NZEnvC 93 at [167].

> granted for the structural or structuring activities within the three activity areas. Assuming this is correct, rule 12.20.3.3(iii) does not actually identify the activities for which resource consent is required, rather, the reader is left to deduce from the matters to which discretion is limited under this rule and also from the relevant policies, the activities that are the subject of an application for resource consent.

[97] As to the second question, as to whether the status of an activity can be determined by a prior grant of consent, the Environment Court held in relation to permitted, controlled, restricted discretionary, and full discretionary activities, must derive from the Act and its subsidiary instruments, rather than from a resource consent.[11]

[98] The provisions were held to be *ultra vires* in terms of s77B RMA. It is clear from the discussion that the Court was considering, in particular (3)(d) which provides that a restricted discretionary activity must comply with the standards, terms and conditions specified in the plan or proposed plan.

[99] The legislative change we mentioned above, was the replacement of s77B by the new s87A in the 2009 Amendment Act. To assist comparison, the principal changes within relevant subsections was to replace the phrase "**standards, terms, or conditions**", with the phrase "**requirements, conditions, and permissions**". The change does not seem to us to be significant. What is of more significance however is that subsection (5), dealing with non-complying activities, brings in the requirement of compliance with these terms, unlike the replaced provision.

[100] Section 87A, which governs the situation placed before us, provides as follows:

> 87A Classes of activities
>
> (1) If an activity is described in this Act, regulations (including any national environmental standard), a plan, or a proposed plan as a permitted activity, a resource consent is not required for the activity if it complies with the **requirements; conditions, and permissions**, if any, specified in the Act, regulations, plan, or proposed plan.
>
> ...
>
> (3) If an activity is described in this Act, regulations (including any national environmental standard), a plan, or a proposed plan as a restricted discretionary activity, a resource consent is required for the activity and:

[11] *Queenstown Airport* at [158] and [183].

> (a) the consent authority's power to decline a consent, or to grant a consent and to impose conditions on the consent, is restricted to the matters over which discretion is restricted (whether in its plan or proposed plan, a national environmental standard, or otherwise); and
>
> (b) if granted, the activity must comply with the **requirements, conditions, and permissions**, if any, specified in the Act, regulations, plan, or proposed plan.
>
> ...
>
> (5) If an activity is described in this Act, regulations (including a national environmental standard), a plan, or a proposed plan as a non-complying activity, a resource consent is required for the activity and the consent authority may
>
> (a) decline the consent; or
>
> (b) grant the consent, with or without conditions, but only if the consent authority is satisfied that the requirements of section 104D are met and the activity must comply with the **requirements, conditions, and permissions,** if any, specified in the Act, regulations, plan, or proposed plan.
>
> **[emphasis added]**

[101] Based on the reasoning of the Court in the *Queenstown Airport* decision, classifying an activity as non-complying on the basis of an absence of a consent granted for FP activities, would arguably now be *ultra vires*.

[102] Dr Somerville submitted that the relevance of the *Queenstown Airport* decision in terms of his Question 1 was:

(a) the Court's finding that to come within s77B (now s87A), a resource consent must be for an activity, and an ODP is not an activity for which consent can be obtained;

(b) it would be artificial to seek resource consent for an ODP or FP. These are not activities for which consent can be obtained. Rather, consents should be sought for the land use and subdivision activities concerned;

(c) subsequent decisions have all recognised that granting resource consent for a plan was problematic because a plan is not an activity for which consent can be sought.

[103] We infer that Dr Somerville did not consider the above-mentioned slight change in terminology as between the sections to be of moment, and remained focused on

"requirements" etc as needing to be specified in the Act, regulations, a plan or proposed plan.

[104] We offered the parties the view at the end of the hearing that we considered this, amongst some other things, to be clear and correct.

[105] As to Question 2, Dr Somerville submitted that the council's attempt to deal with the *Queenstown Airport* decision by deleting reference in the proposed rules to the phrase "compliance with" [a FP], and instead frame them so as to relate to the "existence" of one, would not assist, because obtaining a consent for a FP would not in itself be a requirement specified in the plan (for the purposes s87A(1), (3) and (5)).

[106] Also the Court in *Queenstown Airport* held that the obtaining of an ODP would not be a "standard" within the meaning of the then legislation.

[107] Dr Somerville noted that the final outcome for QLDC's PC19 is set out in the Environment Court's final decision about it.[12] QLDC had by that stage changed its proposal to require an applicant to produce a Spatial Layout Plan ("SPL") as part of the information accompanying an application for land use consents or subdivision. SPLs were not in themselves to be activities for which consent was required. Further, the fact of filing a SPL by an applicant would change the activity status of either the land use or subdivision. This approach attracted the approval of the Court subject to removal of a reference to SPLs being "approved", as they comprise information accompanying an application for resource consent and not an activity for which consent is (or indeed can be) sought.[13]

[108] Dr Somerville offered submissions about some subsequent decisions of the High Court and Environment Court, as we have noted. We do not need to analyse those decisions in detail, but have considered them. The decisions are generally consistent

[12] *Queenstown Airport Corporation Ltd v Queenstown-Lakes District Council* [2014] NZEnvC 197.
[13] Final decision, *Queenstown Airport* at [63].

with the approach of the Environment Court in *Queenstown Airport*, with one minor qualification in relation to the last of the decisions (both High Court and Environment Court) that we list in the footnote below.[14]

[109] Dr Somerville concluded by submitting that, following the reasoning of the Environment Court in *Queenstown Airport*, and noting the various changes between the old s77B and s87A, a rule which provides that an activity is a restricted discretionary activity only if it is the subject of an approved FP, is unlawful in terms of the latter. He reiterated that it was not simply a matter of amending the FP provisions to remove any reference to "compliance with", as proposed by the council, because the underlying rationale for the findings in the *Queenstown Airport* case was that the status of an activity derived from the RMA, and not from another resource consent, and that obtaining a consent for an ODP or a FP is not in itself a standard or requirement that is specified in a plan or proposed plan.

[110] Dr Somerville offered three constructive options for a way forward if the council was prepared to make changes to the provisions. They were as follows:

(a) include objectives and policies relating to FPs and require an application to be accompanied by a proposed FP for the relevant area as part of the information accompanying the application. On this approach, there would no longer be any requirement for a FP to be approved through the resource consent process;[15]

(b) include objectives and policies relating to FPs and require applications for consent for activities to include a proposed FP as part of the conditions of a land use and/or subdivision consent. Again, there would no longer be any

[14] *Cook Adam Trustees Ltd v Queenstown-Lakes District Council* [2014] NZEnvC 117. Final report and decision of Board of Enquiry re *Ruakura Development Plan Change*, Hamilton, 15 September 2014. *Fountainblue Ltd v Mackenzie District Council* [2014] NZEnvC 209. *Appealing Wanaka Inc v Queenstown-Lakes District Council* [2015] NZEnvC 196. *Yovich v Whanagrei District Council* [2015] NZEnvC 199. *184 Maraetai Rd Ltd v Auckland Council* [2014] NZEnvC 105, followed by [2015] NZEnvC 213, where the EC had first proceeded on the basis that a certain rule and "comprehensive development consent" were assumed valid in a case that was focused on whether the CDC had been given effect to prior to its lapse date; with doubts nevertheless expressed about validity and the potential for complications.

[15] Dr Somerville considered that this mirrored the final solution reached in the *Queenstown Airport* litigation, although we are not so sure.

requirement for a FP to be approved through the resource consent process;[16]

(c) include as a zone standard the requirement that a FP address certain matters (such as requiring roading and cycleway links), so that a breach of the standard would render the activity discretionary or non-complying.

[111] Recognising that the council had placed some importance on incentivising applicants through imposing the more onerous activity status if a FP had not been previously or contemporaneously proposed, he submitted that there should be no need for this approach. He suggested that if a consent application did not meet the requirement that a FP be provided as part of the information requirements, the application could be rejected as incomplete under s88 RMA.

[112] Concerning declaration C (consistency of an activity with an approved FP), Dr Somerville submitted that providing one of his three suggested options was chosen, it could be lawful for the council to include assessment matters for consents that draw on information contained in the FP so as to assess how the activity contributes to those matters.

[113] Concerning declaration D (encouragement through provisions more advantageous where an approved FP exists), a rule providing (by way of example) for building height increases with an approved FP in place, would be *ultra vires* s76(3) RMA (which requires the council, when making a rule, to have regard to the actual or potential effect on the environment of activities, including any adverse effect).

Reply on behalf of Auckland Council

[114] Mr Hodder approached the prime issue of the structure of s87A in the following way. He rightly submitted (correctly in our view) that s87A should be considered in full context, noting that the section provides that for controlled, restricted discretionary, discretionary and non-complying activities where a resource consent is granted, the activity must also comply with the requirements, conditions, and permissions, if any specified in the Act, regulations, plan or proposed plan.

[16] Dr Somerville considered that this approach mirrored the approach adopted in the *Cook Adam,* and *Appealing Wanaka* cases.

[115] He then proceeded to focus on the words "requirement" and "condition". We understood him to submit that the proposed FP provisions were not of the character of either of those things. He offered some case law from the Higher Courts about interpretation of limitations found in the RMA, both explicit and implicit, and to "participatory process" and "legislative status" in plans. In this, we understand that Mr Hodder was mindful of the distinction between subsections (3)(a) and (3)(b) of s87A, but was focussing on (3)(b). For ourselves we recall that the *Queenstown* decision was primarily concerned with the then equivalent of (3)(b), and it concerned us here that Mr Hodder was not squaring up to the provisions of (3)(a). This shortcoming was a major aspect of the indications we provided to the parties at the conclusion of our one day hearing.

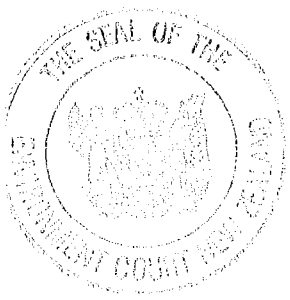
[116] Mr Hodder also submitted[17] that:

> The short response by the Council is that the PAUP has been framed in a manner quite different from that of the subject matter of the *Queenstown Airport* proceedings. Most notably there is much greater clarity and specificity about the nature and content of a Framework Plan, there is no constraint on permitted activities, there is no precondition created for other resource consent applications, and concurrent applications are expressly provided for.

[117] Relying on his earlier submissions as just recorded, he submitted baldly that the status of an activity under the PAUP did in fact derive from the Act and the terms of PAUP itself. Our inability to accept that proposition by the end of the hearing, also underpinned the thinking that we then outlined for the parties.

[118] Given that by the start of the hearing, we had pre-read all submissions and case materials, Mr Hodder's presentation essentially took the form of a question and answer session between the Bench and himself.

[119] Mr Hodder took the opportunity to develop what he considered to be a key proposition in relation to the over-arching declaration A, that a FP as contemplated



[17] In paragraph [8.15] of his submissions.

under the Unitary Plan has a dual role, i.e. it is a planning tool in addition to providing for consent to be granted to uses or activities.[18]

[120] Mr Hodder continued to advance the proposition that, having regard to the "architecture of the Resource Management Act", there would no objection to differentiation of activity status depending on whether a FP was in place. Regrettably, we considered that this seemed to sidestep the question of the apparently clear requirements of s87A.

[121] During the course of answering questions from the Bench, Mr Hodder, with assistance from Mr Wakefield, endeavoured to point out to us that the Framework Plan provisions under scrutiny contemplated application also being sought for some "activities" as defined in the Act; for instance he pointed to rule 3.2(1)(d) providing that a Framework Plan application must seek consent for earthworks, public open spaces, roads and pedestrian linkages, stormwater management devices, vehicle accessways and slip lanes.[19] He acknowledged that there was also a requirement that the application seek consent for a Framework Plan; and he returned to his theme about the provisions playing a "dual role", that is seeking consent for activities, and for a planning tool.[20]

[122] There then followed a series of questions and answers about the meaning of the *Queenstown Airport* decision, and as to whether the problem tentatively perceived by our Bench was semantic or structural. If the former, it was postulated that it could perhaps be cured by some redrafting of the provisions. Mr Hodder continued to submit that the problem would at most be semantic, with the members of the Court offering observations that it might instead be structural. These sentiments also underpinned our remarks at the end of the hearing, with Mr Hodder seeking and obtaining an adjournment and leave to attempt a redraft of certain provisions.

[123] By subsequent Minute, the Court directed that any re-draft lodged in Court should be accompanied by an amended application for declarations, given that the

[18] See Transcript 10-11.
[19] See Transcript 28.
[20] See Transcript 28-29.

application as first filed might no longer reflect materials exhibited to the affidavit of Ms Dimery.

[124] The council subsequently lodged an amended application for declarations, redrafted plan provisions, and supporting submissions. Pursuant to leave granted by the Court, the parties and *Amicus* have taken the opportunity to comment on the new material submitted.

The revised provisions

[125] In response to the Court's concerns Auckland Council revised Chapters G and K (the "revised provisions") and made consequential amendments to the declarations sought.[21]

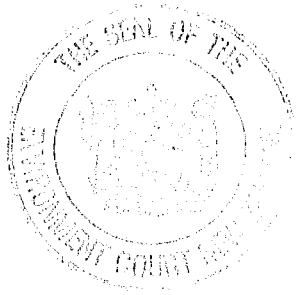
[126] The other parties were accorded an opportunity to make further submissions in response. We are grateful to those parties who did respond despite the very tight timeframe. While we have not summarised the individual submissions in detail, we assure the parties we have given them our close attention.

[127] In the next section we describe the essential features of the revised Framework Plan provisions.

Revised Chapter G: General Provisions

[128] It is now proposed to amend Chapter G to make it clear that the purpose of a framework plan is the authorisation of a range of land use activities within certain precincts.[22] Auckland Council regards the requirement to obtain consent for a bundle of specified activities as being necessary for the integrated development, urbanisation and/or redevelopment of land within those precincts.

[129] Framework plans are now referred to as "framework plan applications" or "approved framework plan applications". Chapter G helpfully sets out the purpose of "Framework plan applications" as follows:



[21] Amended application for declarations dated 1 March 2016.
[22] We understand these provisions may apply to a precinct, sub-precinct or where specified land other than a precinct. See Auckland Council memorandum dated 1 March 2016, footnote 1.

> The purpose of Framework plan applications is to enable full or staged development of brownfield and greenfield land to achieve integrated development and to obtain land use consent for key enabling works.

[130] While not directly stated we understand that the precincts are all either brownfield or greenfield sites.

[131] Unless special circumstances apply, an application for a framework plan is categorised as a restricted discretionary activity and will be assessed without the need for public notification. (The merits or otherwise of such an approach is not a question before us). Chapter G sets out the matters for discretion and the assessment criteria that apply when a framework plan application is considered by the council.

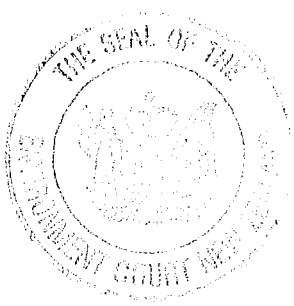
Revised Chapter K: Hobsonville Corridor precinct

[132] Chapter K contains the provisions that would apply to the Hobsonville Corridor precinct. The council presented two revisions for consideration; preferring the first of these, Option A. The second option, Option B, was requested to be considered only if the Court was of the view that Option A was *ultra vires* the Act. In the text that follows, Option A relates to Amended Declarations A, B, C and D; while Option B relates to an Amended Declaration AA that is sought if the Court refuses A and B.

[133] The important features of each option are summarised as follows :

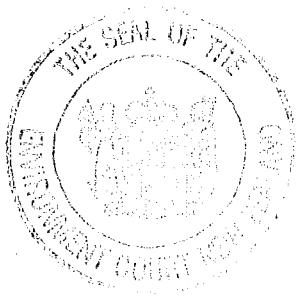
Option A

- a catch-all rule provides that unless otherwise stated the activities, controls and assessment criteria that apply to the underlying zones and separately the Auckland-wide rules, also apply to the precinct;
- an Activity Table identifies the status of certain activities within the particular precinct:



- where consent has been granted for a framework plan application, buildings[23] and subdivision on sites that are the subject matter of an approved framework application, are restricted discretionary activities;
- in all other cases applications for buildings and subdivision are non-complying activities;

- an application for a framework plan and separately, applications for buildings and subdivision that are the subject of an approved Framework Plan, will be considered without the need for public notification. Juxtaposed against this rule is the statement that limited notification may be required (2. Notification);
- the land use activities that comprise an application for a framework plan are set out in a rule (3. Framework plan applications). These activities are not included in the Activity Table;
- different development controls apply to buildings subject to whether consent has been granted for a framework plan application (4. Development Controls);
- framework plan applications are restricted discretionary activities (Activity Table). The council would restrict its discretion to matters listed in revised Chapter G (2.6.1) and any other matter listed in Chapter K. The assessment matters for an application for a framework plan include those set out in revised Chapter G (2.6.2);
- for buildings and subdivision on sites that are the subject of an approved framework plan, the matters of discretion include consistency with the approved framework plan (5.1 Matters of discretion). The assessment criteria for buildings also include their consistency with land uses that are the subject of an approved framework plan (5.2 Assessment criteria);
- an application for a framework plan is to be accompanied by certain information, the requirements of which are listed in this chapter (6. Special Information requirements).

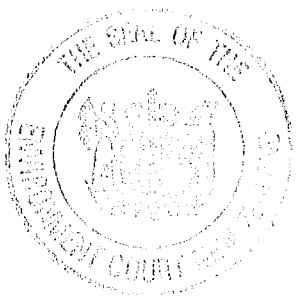


[23] When "buildings" are referred to in the revised Activity Table and Chapter K this means buildings, and alterations and additions to buildings on sites that are the subject matter of an approved framework plan application.

Option B

- a catch-all rule provides that unless otherwise stated the activities, controls and assessment criteria that apply to the underlying zones and separately the Auckland-wide rules, also apply to the precinct;
- an Activity Table identifies the status of certain activities within the particular precinct;
- in contrast with Option A:
  - the land use consents that comprise a framework plan application are identified in the Activity Table and are restricted discretionary activities;
  - all buildings and subdivision are restricted discretionary activities. (The status of these activities does not change);
  - buildings and subdivisions that are not the subject of an approved framework plan will be subject to the tests for notification under s 95 to 95H of the Act;
  - the matters of discretion for land use consent for buildings are the same as those for framework plan applications (Chapter G, 2.6.1). Two additional matters are listed. The first of these examines the relationship of the building location relative to roads etc and the second, the design, bulk and location of buildings;
  - the matters of discretion for subdivision consent include the relationship of the development layout relative to roads etc. Yet to be included in the revised chapter are the matters of discretion relevant to the other restricted discretionary activities listed in the Activity Table;

- in common with Option A:
  - an application for a framework plan and applications for buildings and subdivision that are the subject of an approved framework plan, will be considered as a restricted discretionary activity without the need for public notification. Juxtaposed against this rule is the statement that limited notification may be required;

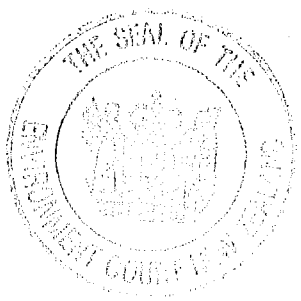


- the land use activities that comprise an application for a framework plan are set out in a rule (3 Framework Plan Applications). These activities are also included in the Activity Table;
- framework plan applications are restricted discretionary activities (Activity Table). The council would restrict its discretion to matters listed in revised Chapter G (rule 2.6.1), and any other matter listed in Chapter K. The assessment matters for an application for a framework plan include those set out in revised Chapter G (rule 2.6.2);
- different development controls apply to buildings subject to whether consent has been granted for a framework plan application (4 Development controls);
- the assessment criteria for buildings and subdivision are separately provided (5.2 Assessment criteria);
- an application for a framework plan is to be accompanied by certain information, the requirements of which are listed in this chapter (6 Special information requirements).

Statutory provisions

[134] For convenience of reference in this section of our decision, we again set out the provisions relevant to restricted discretionary activities under Options A and B (with our emphasis shown):

> **77A Power to make rules to apply to classes of activities and specify conditions**
>
> (1) A local authority may—
>
> (a) categorise activities as belonging to one of the classes of activity described in subsection (2); and
>
> (b) make rules in its plan or proposed plan for each class of activity that apply—
>
> (i) to each activity within the class; and
>
> (ii) for the purposes of that plan or proposed plan; and
>
> (c) specify conditions in a plan or proposed plan, but only if the conditions relate to the matters described in section 108 or 220.
>
> (2) An activity may be—
>
> (a) a permitted activity; or
>
> (b) a controlled activity; or
>
> **(c) a restricted discretionary activity**; or



(d) a discretionary activity; or

(e) a non-complying activity; or

(f) a prohibited activity.

(3) Subsection (1)(b) is subject to section 77B.

77B Duty to include certain rules in relation to controlled or restricted discretionary activities

(1) Subsection (2) applies if a local authority makes a rule in its plan or proposed plan classifying an activity as a controlled activity.

(2) The local authority must specify in the rule the matters over which it has reserved control in relation to the activity.

(3) Subsection (4) applies if a local authority makes a rule in its plan or proposed plan classifying an activity as a restricted discretionary activity.

(4) The local authority must specify in the rule the matters over which it has restricted its discretion in relation to the activity.

87A(3) Classes of activities

...

(3) If an activity is described in this Act, regulations (including any national environmental standard), a plan, or a proposed plan as a restricted discretionary activity, a resource consent is required for the activity and—

(a) the consent authority's power to decline a consent, or to grant a consent and to impose conditions on the consent, is restricted to the matters over which discretion is restricted (whether in its plan or proposed plan, a national environmental standard, or otherwise); and

(b) if granted, the activity must comply with the requirements, conditions, and permissions, if any, specified in the Act, regulations, plan, or proposed plan.

104C Determination of applications for restricted discretionary activities

(1) When considering an application for a resource consent for a restricted discretionary activity, a consent authority must consider only those matters over which—

(a) a discretion is restricted in national environmental standards or other regulations:

(b) it has restricted the exercise of its discretion in its plan or proposed plan.

(2) The consent authority may grant or refuse the application.

(3) However, if it grants the application, the consent authority may impose conditions under section 108 **only** for those matters over which—

(a) a discretion is restricted in national environmental standards or other regulations:

(b) it has restricted the exercise of its discretion in its plan or proposed plan.

The questions for determination

[135] In support of the revised options Auckland Council posed four questions for determination. These are:

(a) what is a "framework plan application"?
(b) what are the statutory foundations for revised Chapters G and K?
(c) do the revised provisions require resource consent "approval" for something that is not an "activity"?
(d) is it unlawful for the categorisation of an activity to change on the approval of a framework plan application?

[136] While the other parties did not respond directly to all of the questions posed, we found the questions generally helpful in teasing out the arguments for and against the declaratory orders being made. Given this, we use these questions to frame the issues for the Court.

Question: What is a "framework plan application"?

[137] Auckland Council has clarified its intention that framework plan applications are for resource consents for certain land use activities. It is intended that the consents be obtained in such a way that will enhance integrated management of the relevant resources of the particular area.[24] We consider that if this intention is achieved by the provisions in the Unitary Plan it would satisfy many of the parties' concerns.

[138] With that in mind we return to definition of Framework Plan in the Unitary Plan, which the council proposes to delete.[25] For convenience we set out that definition again:

> Framework Plans
>
> A voluntary resource consent that establishes the location and form of land use, sub-division and/or development for a land area specified in the Unitary Plan rules. If approved, the Framework Plan authorises land uses such as the transport network, open spaces and infrastructure or as otherwise prescribed in the Unitary Plan rules.

[24] Auckland Council memorandum dated 1 March 2016 at [8].
[25] Auckland Council memorandum dated 7 March 2016 at [35].

[139] We are not surprised that the council proposes deletion of this definition given the definition's conflation of forward planning and land use consenting requirements. Under this definition the intent or purpose of a framework plan was quite uncertain.

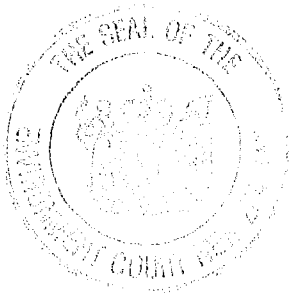
[140] It is Auckland Council's view that the definition of "framework plan application" is now adequately provided for in the first paragraph of revised Chapter G which reads:

> Framework plan applications are for resource consents that seek authorisation for land use activities (such as roads, public open space, infrastructure, e.g. stormwater and wastewater networks, earthworks, and buildings) that are necessary for the integrated development, urbanisation and/or redevelopment of land within identified precincts.

[141] WOSL submits that a definition should be included in the Plan. We agree with Auckland Council that there is no need to include a separate definition in the plan if the definition in Chapter G is clear and certain. But it is not.

[142] In context the phrase "[approved] framework plan applications" is somewhat clumsy and confusing.[26] The reader is required to interpret "[approved] framework plan applications" as either *an application for a framework plan* or as *the consent granted for a framework plan.* Read in this way, what is to be consented is a "plan" and <u>not</u> an application for a bundle of land use activities. Uncertainty remains. In that regard we generally accept the submissions of Messrs Littlejohn and Enright. The meaning of these terms is integral to the declarations sought. They are not matters strictly confined to the merits to be addressed by the Unitary Plan Independent Hearings Panel.

[143] Further, we are attracted to Mr Littlejohn's suggested rewording of Chapter G, as it expressly places the focus on the requirement to obtain land use consent for a bundle of activities, which he labels a "Framework consent".



[26]The court has not proof-read the revised Chapters but recommends that this be done. In addition to the matters raised by Mr Littlejohn, development yield (which we anticipate will be a controlling factor in decisions made about infrastructure) is treated as a matter of discretion in the untracked version of Chapter G. In contrast the tracked version of Chapter G has this as part of the assessment criteria.

Special Information Requirements

[144] On the related matter of special information to accompany an application for a framework plan, Auckland Council submitted the special information provided in support of an application for a framework plan does not form part of the "activity" to be "approved". The reference to the "approval of the framework plan application" is instead a convenient and sensible phrase which means the relevant land use consents and the context of the plans and other matters considered in the information requirements.[27]

[145] We find the requirement to provide special information in support of the application for a Framework Plan to be *intra vires* s75(2)(g) and (h) of the Act.

[146] While we may be persuaded to accept Auckland Council's submission in the context of its assessment criteria (5.2), we do not accept the submission in relation to the matters over which the council proposes to restrict its discretion (5.1). Auckland Council is proposing to restrict its decision-making discretion to consistency with information provided to support an application for consent but not forming part of the consent itself. Such a provision would be void for uncertainty as it assumes that the decision to grant consent was based on the correctness of that information.

Deemed consents

[147] WOSL remains concerned with the validity of a provision in a plan which deems consents granted under earlier ("legacy") planning instruments for equivalent framework plans ("outline development plans" and the like) to be an "approved framework plan" for the purposes of these rules.[28] We have not lost sight of this, and its concern could yet be satisfactorily resolved through further amendments to Chapter G (if undertaken to our satisfaction) or by the Court's decision declining to make declaratory Order A. If its concerns are not resolved by what follows, WOSL is granted leave to file further submissions on this matter.

[27] Auckland Council memorandum 1 March 2016 at [20].
[28] Submissions dated 3 March 2016 at [16]-[18]. Memorandum dated 24 February 2016 at [8]. Memorandum dated 4 March 2016 at [6]-[8].

Question: Do the revised provisions require resource consent "approval" for something that is not an "activity"?

[148] We accept the submission by Mr Littlejohn that a rule that provides for an integrated application for consents for all necessary land use activities associated with the physical preparation of land for (re)development would be *intra vires* the Act.[29] Indeed we do not understand any party to disagree with that proposition.

[149] The parties will recall the Court's concerns as to whether the land use activities said to comprise the framework plan application for the Hobsonville Corridor Precinct were activities for which consent is required under the Unitary Plan. We reiterate our four-fold concerns with the version of the Chapters annexed to Ms Dimery's affidavit:[30]

(a) the activities were not listed in the precinct Activity Table;
(b) the relevant rule stipulating the land use activities to be applied for as part of an application for a framework plan in the Hobsonville Corridor (3.2.d) might be void for uncertainty – it being debatable whether an activity labelled "roads and pedestrian linkages" or "public open space" is adequately described;
(c) land use and subdivision activities are conflated; and
(d) it was uncertain whether the activities listed in the rule were in fact the subject matter of either the underlying zone rules or Auckland-wide rules.

[150] We accept Mr Littlejohn's submission that the same activities in a District Plan may have a different status where consent for those activities is sought as part of an integrated application.[31] However, the poorly described activities in the version of Chapters G and K set out in Ms Dimery's affidavit created the strong impression that what was to be consented was a plan for future activities; and not a consent for land use activities.[32]

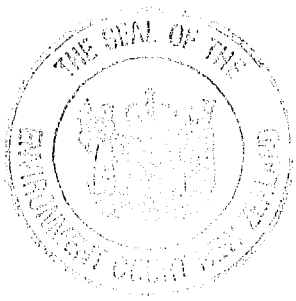
[29] At [5].
[30] Annexure J.
[31] At [7].
[32] Annexures G, H and J of Ms Dimery's affidavit.

[151] The Environment Court in *Queenstown Airport* at paragraph [168] held that a rule which did not specify the activities that are expressly allowed subject to a grant of consent would be *ultra vires* s77A(1) and s77B(3) of the Act. In that case a person could make an application for consent for outline development plan activities pursuant to rule 12.20.3.3(iii) of the plan change. This rule stated "Outline Development Plan requirement for development within Activity Areas C1 C2, and B2", but did not actually identify the activities for which consent was required.

[152] During the hearing the Court raised concerns about the identity of the activities for which land use consent is required under the Unitary Plan. Auckland Council responded, submitting generally (and as far as it goes, correctly), that a resource consent can only be required for an activity and that "activity" means physical activity or dynamic use of land.[33] However, the Court would have been better assisted had the council turned its mind to the drafting of the land use activities in the revised Chapters. Contrary to Mr Hodder's[34] and Mr Loutit's[35] submissions the framework plan provisions do not make clear that these are activities for which consent can be granted, although we acknowledge that that appears to be the council's wish.

[153] While the general subject matter of the activities for which land use consent is required as part of a framework plan application is identified under both versions of the Chapters considered by the Court, most of the detailed activities for which consent is required are not. To illustrate, in relation to the rule requiring resource consent for "roads" [a noun] it is arguable the provision is *ultra vires* s77A(1) and s77B(3) RMA as no activity in relation to roads is identified. Alternatively, the rule may be void for uncertainty.

[154] That said, with the focus now being on an integrated application for land use consents, we should leave the drafting (including content) of the land use activities for the Unitary Plan Independent Hearings Panel. That is because the land use activities that will comprise the applications for a framework plan will not be the same across all precincts.



[33] Auckland Council memorandum dated 1 March 2016 at [20(a)].
[34] Auckland Council memorandum dated 1 March 2016 at [26].
[35] At [3]-[6].

Question: What are the statutory foundations for Chapters G and K?

Question: Is it unlawful for the categorisation of an activity change to be based on the approval of a framework plan application?

[155] It is convenient to address these two issues together. In relation to the second question we observe "change" *per se* is not the issue. We can envisage circumstances where the activity status for the same activity may be differently categorised depending on context.

[156] As Mr Somerville correctly observes, the Court in *Queenstown Airport* was engaged with the *vires* of each of the six types of activities listed in s77A; contrary to Auckland Council's submissions this decision was not limited to the *vires* of permitted activities.[36] However in contrast with the restricted discretionary activity rule in the *Queenstown Airport* decision, it is not proposed under the Unitary Plan that if granted, a building or subdivision consent must comply with the requirements (conditions or permissions) specified in a consent granted for a framework plan. As Option A does not test the *vires* of 87A(3)(b), the Court's findings at paragraph [177] of the *Queenstown Airport* decision are not applicable.

[157] Instead, s87A(3)(a) is engaged by the matters over which the council's discretion is proposed to be restricted. Under Option A, buildings and subdivisions on sites that are the subject of an approved framework plan application are restricted discretionary activities.[37] The matters over which Auckland Council would restrict its discretion include consistency with an approved framework plan application.[38]

[158] The council submits that nothing in the Act either expressly or implicitly requires that a categorisation of activity status is fixed and cannot change upon the occurrence of a subsequent change in circumstance – in particular, the later approval of a framework plan application.[39]

[159] Mr Littlejohn regarded the issue that arises in respect of the different status for the same activity, somewhat differently.

[36] Auckland Council memorandum dated 1 March 2016 at [23(f)].
[37] Option A, Activity Table (1).
[38] Option A, 5.1, Matters of Discretion.
[39] Auckland Council memorandum dated 1 March 2016 at [23(c)].

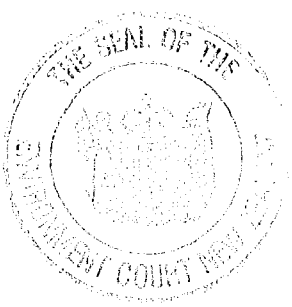
[160] During the hearing he had submitted the matters over which the council's discretion is restricted must (in context) be specified in the Unitary Plan. He characterised the Framework Plan provisions as applicant-led structure planning, agreeing with the Court that, in effect, it is the consent holder which has restricted the exercise of the discretion and not the council.[40] While he did not expand on this submission in response to the revised Chapters (which retain the substance of this discretion for Option A), he reiterated the issue that arises under s77A and s87A is whether a plan may lawfully provide that an activity within a discrete area may be classified as non-complying until an approved resource consent for a framework plan exists for that area, and thereafter classed otherwise.[41]

[161] Expressed in terms of *vires*, we consider the issue that arises under Option A is whether for the purpose of s77B and s87A(3)(a), a future grant of resource consent is a matter over which the consent authority's discretion may be restricted?

[162] To test for *vires* we first asked ourselves 'how would the rule be applied in practice'?

[163] If an activity is classified as a restricted discretionary activity, the consent authority's discretion whether to grant or refuse consent and the imposition of conditions on a grant of consent is limited to matters over which it has restricted the exercise of its discretion.[42] Thus what is being restricted is the consent authority's future decision-making discretion. It does not strain the language of s104C(1) to say that Auckland Council would restrict its discretion to the consideration of whether an application for building or subdivision consent is consistent with another resource consent. Likewise, what conditions may be imposed under ss104C(3) and 108 are restricted to those matters that would achieve consistency with that resource consent.

[164] The restriction of discretion in Option A is redolent of the principle in *Hawthorn Estates Ltd v Queenstown Lakes District Council*[43] where the environment embraces the



[40] Transcript at 124.
[41] Mr Littlejohn supplementary submissions dated 7 March at [10]. In this submission he mentions both non-complying and discretionary activities. We could find no reference to discretionary activities and assume this was in error.
[42] Section 104C.
[43] [2006] NZRMA 2014 at [84].

future state of the environment as it might be modified by the implementation of resource consents where it appears likely that those consents will be implemented.

[165] The efficacy of the rule depends on the correctness of the unstated assumption: that is the resource consents, in particular the land use consents for the framework plan, are likely to be given effect to. If that assumption is incorrect or is only correct in part, then consistency with the Framework Plan may not be the most appropriate way of achieving the objectives for the precinct (*per* s32 RMA).

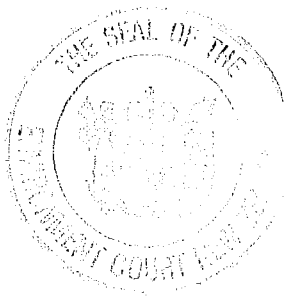
[166] An application for a building or subdivision on a site that is the subject of an approved framework application is a restricted discretionary activity. That is so whether or not the application is to implement the approved framework plan and equally whether or not the consent for the approved framework plan has or will be implemented. It is entirely conceivable, for example, that assumptions made in a framework plan application about building yield may be modified, for instance in response to changes in the economy necessitating future changes to roading layout and parks. The restriction of discretion invites a "yes" or "no" response – neither of which may be entirely correct.

[167] In our view consistency with a consent for a framework plan is a matter best left as an assessment criterion.

[168] This is one example of provisions that are inherently complicated: Option A being more so than its alternative. This is a matter, however, that goes to the merits of the provision, which ultimately is for the Independent Hearings Panel to decide. This particular complication does not arise under Option B.

Outcome

[169] Auckland Council seeks declaratory orders that the council may lawfully include the provisions proposed for the framework plan application as set out in revised Chapters G and K. Declaratory Orders A and AA address both the merits and lawfulness of their respective provisions. While the merits and lawfulness of the two options are closely intertwined, the Environment Court cannot step into the shoes of the Independent Hearings Panel and adjudicate merits.



[170] The intention of the council is to include a provision in the Unitary Plan enabling an integrated application for a bundle of land use consents. Our tentative view is that such a rule would be *intra vires* the Act. However for reasons that we have stated we are not yet satisfied that this has been achieved under either option. There is a legal uncertainty arising in relation to the phrase "approved framework plan application" and following *Queenstown Airport*[44] a rule that does not specify the activities that are expressly allowed subject to a grant of consent would be *ultra vires* s77A(1) and s77B(3) of the Act. The land use activity rules[45] are arguably *ultra vires* s77A(1) and s77B(3) RMA as the activity for which land use consent is required is not identified. Alternatively, the rule may be void for uncertainty.

[171] For the above reasons we will decline to make Declaratory Order A. Declaratory Order A contextually over-arches Declaratory Orders B and D. As the context no longer exists, we also intend to decline to make these orders. (We observe that even if we were minded to do so we would have modified the broadly framed Order B).

[172] The Court is tentatively of a mind that it could make a declaration in terms of C in the Amended Application, but with modifications suggested in the next paragraph of this decision, although we record that such declaration might have no utility unless Declaration AA is capable of being made (and if not so capable, C should be refused). C is presently worded as follows:

- on commencement, the PAUP may lawfully provide that, in assessing and determining a resource consent application for an activity in a precinct, the consistency of that activity with an approved framework plan application for that precinct is, in terms of s104 of the RMA, a matter to which regard must be had by the consent authority.[46]

[173] We favour submissions made on behalf of the Fletcher parties that changes could be made in Chapter K to Section 5.1 "Matters of discretion" and 5.2 "Assessment criteria", and on behalf of Messrs Schweder to make a link to activities authorised by other resource consents granted over the land likely to be given effect to (the

[44] At [168].
[45] For both options either the Activity Table and/or the rule for Framework Plan Applications (Rule 3).
[46] Declaration C.

"Hawthorn" test) and relevant to the activities for which consent is being sought. These appear to have been carried through into Option B at 5.1.2(b) and 5.2(b). The parties are to confirm whether this is the case.

[174] In the circumstances the Court is faced with no option but to offer one more opportunity for the parties to place material before the Court on which two positive declarations could possibly be made. We adjourn the proceeding in relation to Declaratory orders AA and C, and (as noted) will make further directions for party input in relation to the same, in line with the comments we have offered about various parties' recent submissions. A Minute will shortly be issued. If the declarations are made, they are likely to be in a modified form.

[175] The Court recognises that the subject matter of the present proceedings is urgent, but it is also complex and being attended to by the Court and parties under great pressure. The Court expresses its appreciation to the council and all other parties for the co-operative approach taken to resolving it, and hopes that this spirit continues.

Decision

[176] Pursuant to s313(c) the Environment Court declines to make the following Declarations A, B and D in the council's Amended Application of 1 March 2016:

- on becoming an operative combined plan under the Local Government (Auckland Transitional Provisions) Act 2013 (LG(ATP)A) and Part 5 of the RMA (commencement), the council's Proposed Auckland Unitary Plan (PAUP) may lawfully include the provisions proposed for framework plan applications for specific geographical areas (precincts) as set out in the attachments to this amended application marked "G1" and "AK1" to be sought by means of a resource consent application for land uses under Part 6 of the RMA;[47]
- on commencement, the PAUP may lawfully provide that an activity in a precinct may be classed (in terms of s77A and s87A of the RMA) as a non-complying activity or as a discretionary activity until a framework plan

[47] Declaration A.

application has been approved for that precinct and thereafter classed otherwise;[48] and

- on commencement, the PAUP may lawfully include provisions designed to encourage framework plan applications for precincts, which provisions are more advantageous for resource consent applicants if a framework plan application has been approved for that precinct than would otherwise be applicable.[49]

L J Newhook
Principal Environment Judge

B P Dwyer
Environment Judge

J E Borthwick
Environment Judge

[48] Declaration B.
[49] Declaration D.

BEFORE THE ENVIRONMENT COURT

Decision No. [2016] NZEnvC 65

IN THE MATTER	of an application for declarations under Part 12 of the Resource Management Act 1991 ("RMA")
BY	AUCKLAND COUNCIL (ENV-2015-AKL-000138) Applicant
Hearing at:	in Chambers
Full Court:	Principal Environment Judge L J Newhook Environment Judge B P Dwyer Environment Judge J E Borthwick
Counsel:	J Hodder QC and M G Wakefield for Applicant T Daya-Winterbottom for Viaduct Harbour Holdings Ltd, in support W S Loutit and K M Stubbing for Fletcher Construction Developments Ltd, Tamaki Redevelopment Co and Kauri Tamaki Ltd, in support D R Clay and A F Theelen for Ngati Whatua Orakei Whai Rawa Ltd, in opposition R B Enright for Wiri Oil Services Ltd, in opposition K R M Littlejohn and K and D Schweder, in opposition Dr R J Somerville QC as *Amicus Curiae*
Date of Decision:	15 April 2016
Date of Issue:	15 April 2016

FINAL DECISION OF FULL COURT OF THE ENVIRONMENT COURT ON APPLICATION BY AUCKLAND COUNCIL FOR DECLARATIONS REGARDING THE LAWFULNESS OF FRAMEWORK PLAN PROVISIONS IN THE PROPOSED AUCKLAND UNITARY PLAN

A: Pursuant to s 313(a) of the Resource Management Act 1991 the Environment Court makes the following declaration:

Declaratory order AA

On becoming an operative combined plan under the Local Government (Auckland Transitional Provisions) Act 2013 (LG(ATP)A) and Part 5 of the RMA (commencement), the Council's Proposed Auckland Unitary Plan (PAUP) may lawfully include a provision enabling an application for a bundle of land use consents under Part 6 of the RMA which authorise the key enabling works necessary for development associated with the first stage of urbanization and/or redevelopment of brownfield and greenfield land within identified specific geographical areas (precincts) as set out in the attachments to this decision marked "Chapter G" and "Chapter K".

B: Pursuant to s 313(c) of the Resource Management Act 1991 the Environment Court declines to make the following declaration:

Declaratory order C

On commencement, the PAUP may lawfully provide that, in assessing and determining a resource consent application for an activity in a precinct, the consistency of that activity with an approved framework plan application for that precinct is, in terms of s 104 of the RMA, a matter to which regard must be had by the consent authority.

REASONS FOR DECISION

Introduction

[1] In March 2016 the Environment Court released its Interim Decision on Auckland Council's application for declaratory orders regarding the lawfulness of framework plan provisions in the proposed Unitary Plan.[1]

[2] The Court, having declined to make three of the five declaratory orders sought, directed Auckland Council to confer with the other parties and file submissions responding to the Interim Decision and to address five specific concerns raised by the Court.[2]

[1] [2016] NZEnvC 56.
[2] Minute dated 29 March 2016.

[3] Auckland Council filed its further submissions,[3] with separate submissions being filed on behalf of Fletcher Construction Developments Ltd and Tamaki Redevelopment Company,[4] Messrs K and F D Schweder[5] and Wiri Oil Services Ltd.[6]

[4] Once again we are grateful for counsel's diligence when responding to the Court's directions within the timeframe set.

The outstanding declaratory orders

[5] This decision concerns Auckland Council's application for amended declaratory orders AA and C as follows:

Declaratory order AA

> On becoming an operative combined plan under the Local Government (Auckland Transitional Provisions) Act 2013 (LG(ATP)A) and Part 5 of the RMA (commencement), the Council's Proposed Auckland Unitary Plan (PAUP) may lawfully include the provisions proposed for framework plan applications for specific geographical areas (precincts) as set out in the attachments to this amended application marked "G1" and "BK1" to be sought by means of a resource consent application for land uses under Part 6 of the RMA.

Declaratory order C

> On commencement, the PAUP may lawfully provide that, in assessing and determining a resource consent application for an activity in a precinct, the consistency of that activity with an approved framework plan application for that precinct is, in terms of s 104 of the RMA, a matter to which regard must be had by the consent authority.

Further Revision to Chapters G and K

[6] Attached to Auckland Council's submissions are further revisions to Chapters G and K of the Unitary Plan, and these are referred to in this decision as the second revision.

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[3] Memorandum dated 7 April 2016.
[4] Memorandum dated 7 April 2016.
[5] Memorandum dated 11 April 2016.
[6] Memorandum dated 13 April 2016.

[7] In the second revision Auckland Council proposes to adopt the language of 'framework consents' proposed by counsel for K and D Schweder, Mr Littlejohn. The provisions clearly differentiate between "an application for a framework consent" on the one hand and, following approval, "a framework consent" on the other. It is now clear for the reader of the Unitary Plan as to whether it is the application or the consent that is spoken of.

[8] The concept of a framework consent is well defined and consistently applied in Chapter G (second revision).

[9] The concept of a framework consent follows:

> Framework consents are resource consents that authorise activities associated with the first stage of urbanisation and/or redevelopment of brownfield and greenfield land within identified precincts (such as roading networks, public open space, walking/cycling networks, infrastructure (e.g. stormwater and wastewater networks), earthworks and (in some instances) building location and scale).

[10] The purpose of a framework consent is:

> The purpose of framework consents is to ensure the integrated development of land within the identified precincts and to authorise the key enabling works necessary for that development.
>
> [our emphasis]

[11] Mr Littlejohn submits "enable" and not "ensure" is semantically more consistent with the Act and better reflects the fact that a consenting regime is permissive, not mandatory.[7] We accept his submission.

[12] The advantages of a framework consent are then expanded upon as follows:

> The ability to apply for framework consents is provided for within identified precincts. In those identified precincts there will be provisions that contain specific:
>
> - objectives and policies that articulate the development outcomes for the precinct or sub-precinct;
> - rules that give effect to those development outcomes;
> - mechanisms that incentivise the use of framework consents as a first stage process for land development;
> - assessment criteria that need to be addressed as part of applications for framework consents;

[7] Memorandum Schweder at [4].

- information requirements for applications for framework consents, as specified in clause 2.7.3, unless otherwise specified in the precinct provisions.

[13] Chapter K (second revision) contains the template for rules pertaining to 33 precincts or sub-precincts. In summary, the template for Chapter K (second revision) are as follows:

- a catch-all rule provides that unless otherwise stated the activities, controls and assessment criteria that apply to the underlying zones and separately the Auckland-wide rules, also apply to the precinct;
- an Activity Table that identifies the status of certain activities within the particular precinct. An application for a framework consent is a restricted discretionary activity. The table is to separately list those land use activities which may be sought as part of an application for a framework consent as restricted discretionary activities;
- buildings and subdivisions that are not the subject of a framework consent are subject to the tests for notification under ss 95 to 95H of the Act;
- an application for a framework consent and applications for buildings and subdivision on sites that are the subject of a framework consent, will be considered as a restricted discretionary activity without the need for public notification. Limited notification may be required, where any owner of land within a precinct or sub-precinct has not given their approval to the application for consent;
- a rule requires an applicant for framework consent to apply for land use consent for certain land use activities which are listed;[8]
- different development controls may apply to buildings subject to whether consent has been granted for a framework consent (5 Controls);
- in respect of an application for a framework consent the council would restrict its discretion to matters listed in Chapter G at 2.6.1, and "the overall development layout, being the layout and design of roads, pedestrians linkages, open spaces, earthworks areas and land contours, and infrastructure location";[9]

[8] Rule 3 Framework Consents.
[9] There may be other relevant matters of discretion for an individual precinct which the template notes has yet to be identified.

- for applications for buildings (including alterations and additions) and applications for subdivision, the matters of discretion include consideration of the buildings and subdivision "relative to overall development, including...". We observe that the phrase "relative to overall development" is ambiguous. For present purposes we have assumed the phrase refers to both the environment in the *Hawthorn Estates Limited v Queenstown Lakes District Council*[10] sense and secondly, the building or subdivision activities for which consent is sought (6.1 Matters of discretion);
- regardless of whether an application for framework consent has been granted, for all building applications the matters of discretion include the same matters that would apply to an application for framework consent (2.6.1). We make the further observation that the merits of this rule is a matter for the Independent Hearing Panel. It is unclear to us whether 2.6.1 is to be applied insofar as those matters are relevant to the particular application building or subdivision consent or something else (6.1 Matters of discretion);
- the assessment matters for applications for a framework consent, buildings and subdivision include the relationship of the matters requiring consent to the activities authorised by other resource consents granted in respect of the precinct or sub-precinct (6.2 Assessment Criteria); and
- an application for a framework consent is to be accompanied by certain information, the requirements of which are listed in this chapter (7 Special information requirements).

Consideration

[14] We are satisfied that a rule enabling consent to be applied for a bundle of land use activities that would authorise the key enabling works necessary for the integrated development[11] of land is *intra vires* the Act. Provided that the consent expressly allows the consent holder to use land in a manner that contravenes a district rule (s 9(3)), the

[10] [2006] NZRMA 2014 at [84] i.e. the future state of the environment as it might be modified by the implementation of resource consents where it appears likely that those consents will be implemented.
[11] See purpose statement in Chapter G (second revision).

rule is *intra vires* the Act even though other resource consents will be required to authorise further development of the land.

[15] A district council's ability to make rules is constrained by ss 77A and 87A. If the consent does not authorise the consent holder to use land in a manner that contravenes a district rule, but instead purports to authorise a plan about the future use of land, such a rule would be *ultra vires* the Act. Ngati Whatua Orakei Rawa Ltd, supporting the second revision, captured the *vires* issue neatly in its submission that the revision helps remove the previous ambiguity that framework consents are planning tools observing "[a] framework consent is not something for which consent must be obtained of itself".[12]

[16] Subject to the comment we make above concerning the matters of discretion and assessment criteria (which are matters for the Independent Hearings Panel) we considered the template provisions in Chapter K (second revision) to have a clear, succinct structure with its key terms "applications for framework consents" and "approved framework consents" applied consistently throughout.

Other matters

Fletcher Construction Developments Ltd and Tamaki Redevelopment Company ("Fletchers")

[17] Fletchers filed further submissions attaching a revised version of Chapters G and K for the Tamaki Precinct. Counsel for Fletchers thought it would be of assistance to the Court to see how the template provisions in Chapter K would work for a specific precinct.

[18] In the Tamaki Precinct example, Fletchers has further developed the concept of a 'framework consent' by differentiating between 'integrated consents' on the one hand and 'development consents' on the other. 'Integrated consents' is used to describe the

[12] Memorandum Auckland Council at [37].

enabling phase of land use consents.[13] The term 'development consents' is used to describe the delivery land use phase of the project.[14]

[19] We make the observation that there may be little or no synergy between the content of an application for an 'integrated consent' and the land use activities identified for an integrated consent. To illustrate, in the Tamaki Precinct it is proposed that an integrated consent must be sought for one or more identified land use activities; one of which is archaeology. An application for an 'integrated consent' must include, amongst other matters, (c) development yield/density, (g) subdivision and stage, (h) interface with surrounding environment/lots. It is difficult to understand how these matters are relevant in the circumstances where the activity to which the application relates is archaeology and at first blush Fletcher's integrated consent appears to be a plan for the future.

[20] As the content of each individual precinct is a matter for the Independent Hearing Panel to decide, and in the absence of any response from Auckland Council (or other interested parties) on the Fletchers' precinct provisions, we shall not comment further.

K and D Schweder

Clarification of activity status in absence of neighbours' approvals

[21] The Schweders seek that Chapters G and K (second revision) be amended to make explicit that an application for a framework consent can only be made in respect of all of the land in a precinct or sub-precinct where the applicant owns all of the land or, where land is in multiple ownership, the application is made with the written consent of all of the landowners. If these circumstances do not apply then a landowner may still apply for resource consent (without being disadvantaged by activity status) and have their proposal assessed in the normal way. The Schweders propose amendments to each chapter in support of their submission.

[13] Integrated consents were previously referred to as Framework Plan or Framework Consent in the council's latest version.
[14] Memorandum Fletchers at [7]-[9].

[22] We consider Chapters G and K adequately address the Schweders' concerns. Based on the template provisions, if an application for building or subdivision consent is lodged for sites that are not the subject of a framework consent the applicant is not disadvantaged in terms of activity status. An application for a building or subdivision consent is a restricted discretionary activity whether or not a framework consent has been granted. What changes is the notification process, with the tests for notification under ss 95 to 95H applying.

[23] As the submission largely concerns the clarity around specific provisions the Unitary Plan, it remains open to the Schweders to pursue this matter before the Independent Hearing Panel.

Incentives

[24] The notification process and land use and development controls are used to incentivise the application for framework consents. It is not clear whether the status of the activity will change depending on whether there is an approved framework consent, it may do.

[25] In the form of land use and development controls Chapter K (second revision) retains the incentive of greater development rights which are to be conferred if the framework consent process is followed (5, Control). More particularly, Chapter K gives by way of an example different height limits which will apply to buildings depending on whether or not a framework consent has been granted. We are not told what the status of a building application that does not comply with the controls would be. Height limits are one incentive; other incentives include site intensity and building coverage.

[26] On the topic of land use and development control type incentives in the Interim Decision the Court declined to make Declaratory Order D, finding Declaratory Order A (which the Court also declined to make) contextually over-arches Declaratory Order D.[15]

[15] Interim Decision at [171].

[27] Declaratory order D states:

> On commencement, the PAUP may lawfully include provisions designed to encourage framework plan applications for precincts, which provisions are more advantageous for resource consent applicants if a framework plan application has been approved for that precinct than would otherwise be applicable.

[28] Mr Littlejohn submits in declining to make the declaration implicitly the Court accepted the submissions of the *Amicus Curiae*. Therefore, he submits, the precinct plans cannot include incentivised development rights.[16] We doubt Mr Littlejohn is right in his last submission and upon further reflection, it would have been helpful to the parties had the Interim Decision addressed directly the *vires* of the incentives in the context of both options being pursued by the Council at that time.

[29] In March 2016 Dr Somerville, as *Amicus*, submitted that a rule providing for building height increases with an approved framework plan is *ultra vires* s 76(3) of the Act. This section requires the territorial authority to have regard to the actual or potential effect on the environment of activities, including any adverse effect.[17] The language used by s 76(3) makes this a mandatory requirement – "in making the rule, the territorial authority shall have regard…".

[30] While Wiri Oil Services is generally supportive of the position taken by Mr Littlejohn, in its view it is only where an incentive leads to a differential activity status can it be said that the provision is *ultra vires*.[18]

[31] We gained little assistance on this topic from the affidavit of Ms Dimery, who does not address s 76 (3) but rather the merits of the incentive provision.[19]

[32] The parties will recall that the Court explored this topic with counsel during the March hearing. The Court was left with the impression that the actual or potential effects of activities that are subject to the relevant land use and development controls is a matter to be determined under an application for the former "framework plan". This reinforced a view that what would be applied for was in the nature of a plan.

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[16] Memorandum Schweder at [9]-[14]. No doubt Mr Littlejohn is correct in this last submission.
[17] Submissions of Amicus Curiae at [5].
[18] Memorandum Wiri at [10].
[19] Sworn 14 October 2015 at [72(c)].

[33] The Court is usually hesitant to be drawn on policy matters where the views of the territorial authority are not known. Chapter K is a template for 33 precincts and sub-precincts. The Court is being asked, in effect, to make a declaration on the *vires* of a provision without evidence on what actually is proposed, and without the benefit of evidence addressing s 76 (3). The Court will not make declaratory orders in an evidential vacuum, and we confirm the decision to decline Declaratory Order D.

Description of Activities

[34] At paragraphs [149]-[154] of the Interim Decision the Court repeated concerns expressed during the course of the hearing that the rules requiring consent for certain land use activities as part of a framework application were either *ultra vires* s 77A(1) and s 77B(3) of the Act or alternatively void for uncertainty.

[35] Auckland Council responded by advising that the Chapter K provisions are template provisions only.[20] They are not, and never were, intended to demonstrate what the final Chapter K (which makes provision for 33 precincts) would look like in the PAUP.

[36] We understand Auckland Council would have the land use activities listed in Chapter K (second revision) treated as if they were placeholders, carrying little or no semantic information. Auckland Council has now clarified that:

> The precinct provisions included in the PAUP will reflect the specific activities that require land use consent for each identified precinct. Those activities will reflect the site characteristics and development outcomes and objectives for particular precinct, as will the provisions relevant to framework consents.[21]

[37] This clarification is important, because the description of the land use activities reinforced the Court's impression that what was proposed to be granted *ultra vires* the Act would be a consent for a plan and not a consent authorising a bundle of land use activities.

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[20] Attached to Ms Dimery's initial affidavit and the amended application for declarations dated 1 March 2016.

[21] Memorandum Auckland Council at [10]. The statement is contained in Chapter K (3 Framework consents)

Deeming consents

[38] Finally, at paragraph [147] of the Interim Decision we recorded Wiri Oil Services Ltd's concern with the validity of a provision in a plan which deems consents granted under earlier ("legacy") planning instruments to be an "approved framework plan".

[39] Auckland Council makes clear it will seek the definition "approved framework plan" be deleted from the Unitary Plan. If the Independent Hearings Panel makes this decision, then we with agree with Auckland Council and the *Amicus Curiae*[22] there would be no deeming provision.[23] The Council has accepted that consents granted under the legacy instruments cannot be deemed to be "framework consents", as these consents have not been assessed and approved pursuant to the provisions in Chapter K.[24]

[40] Auckland Council is correct in its observation that a resource consent granted pursuant to an earlier "legacy" planning instrument will remain a resource consent despite the legacy planning instrument (under which the consent was granted) being replaced by the Unitary Plan. That is because any consent, until declared invalid by a Court with competent jurisdiction, is to be administered and enforced in accordance with its terms.

[41] That said, we do not necessarily agree with Auckland Council's unqualified submission that consents granted under the legacy planning instruments are of enduring relevance. The relevance of any resource consent is nuanced. This is implicitly recognised in Auckland Council's submission in relation to the assessment criteria that "planners will need to consider any approved framework consents (or equivalent framework consents), which are a part of the receiving environment (as per *Hawthorn Estates Limited v Queenstown Lakes District Council* [2006] NZRMA 2014 at [84])". The Court of Appeal is talking about the future state of the environment as it might be modified by the implementation of resource consents where it appears likely that those consents will be implemented: per *Hawthorn Estates Limited v Queenstown Lakes District Council* at [84]. We recognise consent authorities are challenged on a daily

[22] Dr Somerville email dated 6 April 2016.
[23] Memorandum Auckland Council at [16].
[24] Memorandum Auckland Council at [18(b)].

basis by the requirement to reach an informed view as to the likelihood of resource consents being implemented.

[42] We are aware of difficulties that may arise for consent holders where the planning environment changes upon a new District Plan becoming operative. Auckland Council alludes to this at paragraph [18(d)] of its submission.[25] Consents granted under legacy planning instruments may, however, bring different challenges, particularly for those consents that do not actually authorise any works. The difficulty administering such consents is the subject matter of the Environment Court decision *184 Maraetai Road Ltd v Auckland Council.*[26]

[43] As the content of the Unitary Plan, including its interface with framework plan type consents, is not a matter for us to determine, we will not comment further.

[44] Returning to Wiri Oil Services Ltd, we record that this party accepts the concerns that it raised in relation to deemed consents have now been addressed.

Declarations

[45] On 1 March 2016 Auckland Council amended its application for declarations. The amendments reflect the wording of revised Chapters G and K that are the subject matter of the Interim Decision.

[46] The Council has not amended the application to respond to the second revision of Chapters G and K.

[47] The Court is prepared to make, with modifications, Declaratory Order AA.

[48] Attached to and forming part of these orders are Chapters G and K (as modified by the Court). The modifications to these chapters address issues of *vires* and issues of

[25] The Council submits "There may be situations where specific provisions or development controls used in ("legacy") planning instruments refer to equivalent framework consents. In that instance the Chapter K provisions for those particular precincts may need to preserve those provisions or development controls through tailored provisions that ensure that those provisions will endure. This can only be achieved by way of a case-by-case review of the Chapter K precinct provisions against the legacy planning instruments that provide for equivalent framework consents".
[26] [2015] NZEnvC 213 at[8]-[9].

uncertainty which have been the focus of our decision. The content and merits of Chapters G and K as they may be applied in the context of the 33 precincts and sub-precincts is to be determined by the Independent Hearings Panel.

[49] The Court will decline to make Declaratory Order C. In the second revision of Chapters G and K reference to the "consistency of that activity with an approved framework plan" in the matters of discretion or assessment criteria was deleted with new provisions substituted. Auckland Council advises this was done in order to remove from the Council's determination of any restricted discretionary activity any assessment against "consistency", and also to remove perceived uncertainty and possible contravention s 104(1)(b) raised by other parties.[27] Declaratory Order C has not been amended to follow suit. Given the amendments made to Chapters G and K the Court declines to make Declaratory Order C as there remains no live issue for the Court to determine.

Outcome

[50] Pursuant to s 313(a) the Environment Court makes the following declaration:

Declaratory order AA

> On becoming an operative combined plan under the Local Government (Auckland Transitional Provisions) Act 2013 (LG(ATP)A) and Part 5 of the RMA (commencement), the Council's Proposed Auckland Unitary Plan (PAUP) may lawfully include a provision enabling an application for a bundle of land use consents under Part 6 of the RMA which authorise the key enabling works necessary for development associated with the first stage of urbanization and/or redevelopment of brownfield and greenfield land within identified specific geographical areas (precincts) as set out in the attachments to this decision marked "Chapter G" and "Chapter K"..

Declaratory order C

[51] Pursuant to s 313(c) the Environment Court declines to make the following declaration:

[27] Memorandum Auckland Council at [13(d-h)].

On commencement, the PAUP may lawfully provide that, in assessing and determining a resource consent application for an activity in a precinct, the consistency of that activity with an approved framework plan application for that precinct is, in terms of s 104 of the RMA, a matter to which regard must be had by the consent authority.

L J Newhook
Principal Environment Judge

B P Dwyer
Environment Judge

J E Borthwick
Environment Judge

Part 3 - Chapter G: General provisions

2.6 Framework Consents

Introduction

Framework consents are resource consents that authorise activities associated with the first stage of urbanization and/or redevelopment of brownfield and greenfield land within identified precincts (such as roading networks, public open space, walking/cycling networks, infrastructure (e.g. stormwater and wastewater networks), earthworks and (in some instances) building location and scale).

The purpose of framework consents is to ~~ensure~~ enable the integrated development of land within the identified precincts and to authorise the key enabling works necessary for that development.

The ability to apply for framework consents is provided for within identified precincts. In those identified precincts there will be provisions that contain specific:

- objectives and policies that articulate the development outcomes for the precinct or sub-precinct
- rules that give effect to those development outcomes
- mechanisms that incentivise the use of framework consents as a first stage process for land development
- assessment criteria that need to be addressed as part of applications for framework consents
- information requirements for applications for framework consents, as specified in clause 2.7.3, unless otherwise specified in the precinct provisions.

Applications for framework consents will generally be categorised as restricted discretionary activities that will be assessed without the need for public notification, unless special circumstances exist. The Auckland-wide provisions and rules, and any applicable overlay provisions, apply to applications for framework consents, unless otherwise specified in the identified precinct provisions.

Matters of discretion

1. Unless otherwise stated in the precinct rules, the Council will restrict its discretion to the following matters for applications for framework consents:
   - i. the location, physical extent and design of the transport network
   - ii. the location, physical extent and design of open space
   - iii. the location and capacity of infrastructure to service the land for its intended use
   - iv. integration of development with neighbouring areas, including integration of the transport network with the transport network of the wider area
   - v. earthworks and suitable land contours for development
   - vi. staging of development and the associated lapse period for applicable resource consents
   - vii. staging and funding of infrastructure and services

Assessment criteria

2. Unless otherwise specified in the identified precinct rules, applications for framework consents will be assessed against the following assessment criteria:

i. The location, physical extent and design of the transport network
   - The transport network (roads, public transport connections, pedestrian connections and cycle connections) is generally provided in the location identified in the precinct plan to achieve a legible street network. Where no location is identified, an integrated and efficient street and pedestrian network should be provided, including connections to existing and future streets and networks.

ii. The location, physical extent and design of open space
   - Public open spaces are generally provided in the location(s) identified in the precinct plan to meet the needs of the local community. Where no location is identified, open space should be provided to and located to serve the future needs of the local community.

iii. The location and capacity of infrastructure to service the intended use of the land and, in particular, significant infrastructure
   - Adequate infrastructure is provided to service the proposed development of the land, including transport, stormwater, wastewater, water supply, electricity, gas and telecommunications.
   - Stormwater management methods that use low impact stormwater design principles and improved water quality systems are encouraged.

iv. Where applications for framework consents relate to particular sub-precincts, integration of the proposed development with neighbouring sub-precincts and the balance of the precinct generally, including integration of the transport network with the transport network of the wider area
   - Where applications for framework consents relate to a sub-precinct, the application should demonstrate how the proposed development achieves the overall objectives of the precinct, including the integration of the transport network, open spaces and other infrastructure that will serve the development.
   - Applications for framework consents should show how the results of an Integrated Transport Assessment have been taken into account.

v. Earthworks and land contours suitable for development
   - Earthworks, including bulk earthworks for the provision of infrastructure and the final contouring of land should be consistent with the scale of development.
   - The finished land contours and scale of the earthworks should be commensurate to the amenity anticipated in the precinct.
   - The assessment criteria set out in H4.3 Land Disturbance apply.

vi. Staging of development and the associated lapse period for the framework consent
   - Applications for framework consents should provide details of how the proposed development will be staged and how that staging coincides with provision and integration of infrastructure, bulk earthworks and services across the wider area. The council may impose conditions enabling a lapse period longer than five years.

vii. Staging and funding of infrastructure and services
   - Applications for framework consents should provide details and information that addresses how infrastructure and services will be staged and funded to support the proposed development. The timing of infrastructure should coincide and be coordinated with the expected staging of the proposed development to facilitate integrated transport and land use planning.

2.7.3 Framework consent applications

1. Unless otherwise stated in the identified precinct rules, applications for framework consents must be accompanied by the information listed in the general information requirements (clauses 2.7 – 2.7.9.2) as well as plans and supporting information which demonstrate the following:

a. the overall context of the application area, including a site development concept plan for the relevant precinct or sub-precinct area
b. existing infrastructure and street pattern
c. details of how the development on the application site will be staged
d. details of how the staging of the development coincides with provision of infrastructure and services in the wider area.

CHAPTER K – Precinct rules

[Precinct name]

The activities, controls and assessment criteria in the [specify underlying zones] and Auckland-wide rules apply to the [precinct name] precinct unless otherwise specified below.

Refer to planning maps for the location and extent of the precinct [and sub-precincts].

1. Activity table

1. The activities in the [underlying zone] apply in the [precinct name] precinct, unless otherwise specified in the activity table below.

Activity	Activity Status
Commerce/Accommodation/Industry	
[insert activities relevant to the specific precinct e.g. retail, retirement villages, offices]	[X]
Framework consents	
Applications for framework consents for land use consents for an entire precinct or sub-precinct complying with clause 3.1 below	RD
Development	
Minor cosmetic alterations to a building that does not change its external design and appearance	P
Buildings, and alterations and additions to buildings	RD
[List each activity associated with an application for a framework consent (as set out in Clause 3) as a separate activity, using the same terminology for the activities as appears elsewhere in the PAUP. ~~*For example:*~~ ~~*Earthworks – will incorporate either specific provisions applying to the earthworks activities occurring within the precinct or sub-precinct, or will rely on the underlying Auckland-wide rules for earthworks found in Chapter H, 4.2, where earthworks activities have a number of different activity categorisations.*~~ ~~*Roads*~~ ~~*Pedestrian linkages*~~ ~~*Water, wastewater and stormwater infrastructure*~~ ~~*Earthworks, landscaping and construction of parks infrastructure for the purpose*~~	RD ~~*RD*~~ ~~*RD*~~ ~~*RD*~~ ~~*RD*~~ ~~*RD*~~

~~*of establishing open space]*~~	
Subdivision	
Subdivision	RD

2. **Notification**

1. The council will consider applications for framework consents as a restricted discretionary activity without the need for public notification. However, limited notification may be undertaken, including notice being given to any owner of land within a precinct or sub-precinct who has not provided their written approval to the application.

2. The council will consider applications for buildings, alterations and additions to buildings, on sites that are the subject of an approved framework consent as a restricted discretionary activity, without the need for public notification. However, limited notification may be undertaken, including notice being given to any owner of land within a precinct or sub-precinct who has not provided their written approval to the application.

3. The council will consider applications for subdivision on sites that are the subject of an approved framework consent as a restricted discretionary activity, without the need for public notification. However, limited notification may be undertaken, including notice being given to any owner of land within a precinct or sub-precinct who has not provided their written approval to the application.

4. The council will consider applications for buildings, alterations and additions to buildings, on sites that are not the subject of an approved framework consent as a restricted discretionary activity, subject to the normal tests for notification provided by sections 95 to 95H of the Resource Management Act 1991.

5. The council will consider applications for subdivision on sites that are not the subject of an approved framework consent as a restricted discretionary activity, subject to the normal tests for notification provided by sections 95 to 95H of the Resource Management Act 1991.

3. **Framework consents**

Purpose: to ~~ensure~~ enable the integrated development of land within identified precincts and to authorise the key enabling works necessary for that development to occur.

1. Applications for framework consents must seek land use consents for the following activities:

[Clauses a – e are provided by way of example only. The precinct provisions included in the PAUP will reflect the specific activities that require land use consent for each identified precinct. Those activities will reflect the site

characteristics and development outcomes and objectives for particular precincts, as will the provisions relevant to framework consents.]

~~*a. Roads*~~
~~*b. Pedestrian linkages*~~
~~*c. Earthworks – will incorporate either specific provisions applying to the earthworks activities occurring within the precinct or sub-precinct, or will rely on the underlying Auckland-wide rules for earthworks found in Chapter H, 4.2, where earthworks activities have a number of different activity categorisations*~~
~~*d. Water, wastewater and stormwater network infrastructure*~~
~~*e. Earthworks, landscaping and construction of parks infrastructure for the purpose of establishing open space*~~

4. Development Controls

1. The development controls in the [underlying zone] apply in the [precinct name] precinct unless otherwise specified below.

5. Control [X]

~~*[Insert relevant land use and development controls e.g. Building height, site intensity, building coverage etc. For example:*~~

~~*1. Buildings must not exceed the heights specified on precinct plan X, prior to the approval of a framework consent.*~~
~~*2. With an approved framework consent, buildings must not exceed the heights specified on precinct plan X.]*~~

6. Assessment – Restricted discretionary activities

6.1 Matters of discretion

For development that is a restricted discretionary activity in the [precinct name] precinct, the council will restrict its discretion to the following identified matters and the matters specified for the relevant restricted discretionary activities in the underlying zone:

1. Applications for framework consents
   a. The matters of discretion in clause 2.6.1 of the general provisions apply.
   b. The overall development layout, being the layout and design of roads, pedestrian linkages, open spaces, earthworks areas and land contours, and infrastructure location.
   c. *[Specify relevant matters of discretion in addition to clause 2.6.1 for the specific precinct]*
2. Buildings, alterations and additions to buildings

a. The matters of discretion in [clause X] of the underlying zone rules for new buildings and/or alterations and additions to buildings apply.
b. The location, bulk and scale of buildings relative to overall development, including the layout and design of roads, pedestrian linkages, open spaces, earthworks areas and land contours, and infrastructure location.
c. Design, bulk and location of buildings.
d. The matters of discretion in clause 2.6.1 of the general provisions apply.

3. Subdivision
   a. The matters of discretion in [clause X] of the underlying zone rules [or clause X of the subdivision rules in H5].
   b. The proposed subdivision layout relative to the overall development, including the layout and design of roads, pedestrian linkages, open spaces, earthworks areas and land contours, and infrastructure location.

[Insert matters of discretion for other activities that are classified as restricted discretionary activities in the activity table, such as: roads; pedestrian linkages; earthworks; water, wastewater and stormwater network infrastructure; earthworks, landscaping and construction of parks infrastructure for the purpose of establishing open space. The following are provided by way of example

x. Roads

xx. The location, physical extent and design of the transport network]

6.2 Assessment criteria

Unless otherwise specified below, for development that is a restricted discretionary activity, the following assessment criteria apply in addition to the criteria specified in the underlying zone rules:

1. Applications for framework consents
   a. The assessment criteria in clause 2.6.2 of the general provisions apply.
   b. The relationship of the matters requiring consent to activities authorised by other resource consents granted in respect of the precinct or sub-precinct.
   c. *[Specify relevant assessment criteria for specific precinct]*

2. Buildings, alterations and additions to buildings
   a. The assessment criteria in *[clause X – include a cross reference to Part 2 of the Unitary Plan which provides the specific provisions]* of the underlying zone rules for buildings and/or alterations and additions to buildings apply.
   b. The proposed building, alteration or addition relative to the location of infrastructure servicing the area and open space should result in an integrated network that is adequate to meet the needs of the overall development area.

c. The relationship of the matters requiring consent to activities authorised by other resource consents granted in respect of the precinct or sub-precinct.

3. Subdivision
   a. The assessment criteria in [clause X] of the underlying zone rules [or clause X of the subdivision rules in H5].
   b. The location of infrastructure servicing the area servicing the area, and open space, should result in an integrated network that is adequate to meet the needs of the overall development area.
   c. The relationship of the matters requiring consent to activities authorised by other resource consents granted in respect of the precinct or sub-precinct.

[Insert assessment criteria for other activities that are classified as restricted discretionary activities in the activity table, such as roads; pedestrian linkages; earthworks; water, wastewater and stormwater network infrastructure; earthworks, landscaping and construction of parks infrastructure for the purpose of establishing open space. The following are provided by way of example

d. Roads
   i. The transport network (roads, public transport connections, pedestrian connections and cycle connections) is generally provided for in the location identified in the precinct plan to achieve a legible street network. Where no location is identified, an integrated and efficient street and pedestrian network should be provided, including connections to existing and future streets and networks.
   ii. The physical extent and design of the transport network should be multimodal, providing for cycle and pedestrian movement.
   iii. Block layout and design should enable the creation of sites which can meet the development controls of the precinct and relevant underlying zone provisions.]

7. Special information requirements

1. Applications for framework consents must be accompanied by the following information:
   a. [Insert information requirements relevant to the specific precinct.]

[The following are provided by way of example only]
b. where changes to site contours are intended, the relationship of those site contours to existing and proposed streets, lanes, any adjacent coastal environment, and, where information is available, public open space
c. the location, width, design and function of proposed streets, cycle routes and pedestrian routes
d. the location, dimension, design and function of public open spaces
e. the location of stormwater, wastewater, and water supply, electricity, gas and telecommunications infrastructure
f. the landscaping concept for the application area
g. the location of any historic heritage or natural features

h. the location and volume of earthworks and intended final contours]

2. Buildings, and alterations and additions to buildings, and subdivision on sites that are not the subject of an approved framework consent must provide the following information:
   a. A compilation and assessment of approved resource consents relevant to the application site.