ORIGINAL

Decision No. W047/2005

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of two appeals under clause 14 of the First Schedule to the Act

BETWEEN **ELDAMOS INVESTMENTS LIMITED**

(RMA 0851/03)

Appellant

GLADIATOR INVESTMENTS (GISBORNE) LIMITED

(RMA 0861/03)

Appellants

AND **GISBORNE DISTRICT COUNCIL**

Respondent

IN THE MATTER of an appeal under section 120 of the Act

BETWEEN **GLADIATOR INVESTMENTS (GISBORNE) LIMITED**

(ENV W0024/04)

Appellant

AND **GISBORNE DISTRICT COUNCIL**

Respondent

BEFORE THE ENVIRONMENT COURT

Alternate Environment Judge D F G Sheppard (presiding)
Environment Commissioner J D Rowan
Environment Commissioner J R Mills

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

HEARING at Gisborne on 4, 5, 6, 7, 8, 11, 12, 13, 14, and 15 October 2004 and 7, 8, 9, and 10 February 2005.

APPEARANCES

T C Gould and A J Hurst for the appellants
A M Green and N D Wright for the respondent
C N Whata and J Gardner-Hopkins for Progressive Enterprises Limited
G R Webb for Harbourview Body Corporate
N Weatherhead for the Gisborne Retailers Association
J M Douglas in person and for M Douglas
G W Maclean in person

DECISION

Introduction

[1] In this case the Court has to consider the planning provisions for use and development of land near Gisborne Harbour formerly used for food processing; and in particular, a proposal for a large retail store and associated carparking.

[2] The planning provisions in issue arise from variations to the Gisborne District Council's proposed district plan introducing new Fringe Commercial and Amenity Commercial Zones, and application of the latter to that land. The proposal for a large retail store is the subject of a resource-consent application.

The proceedings

[3] There are three proceedings before the Court:

(a) An appeal by Eldamos Investments Limited ('Eldamos') referring to the Court Variations 136-149 to the proposed district plan:

(b) An appeal by Gladiator Investments (Gisborne) Limited ('Gladiator') referring those variations to the Court:

(c) An appeal by Gladiator against the Gisborne District Council's decision refusing resource consent on Gladiator's application to develop and use a 2.37-hectare block of land at Pitt and Customhouse Streets, Gisborne,

('the site') for a branch store for The Warehouse Limited ('TWL') with associated parking spaces, earthworks and landscaping.

[4] The same relief was sought in both the variation appeals as originally lodged. In summary, they sought directions that the Council:

(a) Delete the Amenity Commercial Zone introduced by the variations, and consequential amendments;

(b) Include in the Fringe Commercial Zone the land that was to have been zoned Amenity Commercial;

(c) Amend the rules for the Fringe Commercial Zone to provide for retailing with a gross floor area of over 500 square metres as a permitted activity, and consequential amendments;

(d) Apply an Amenity Control overlay to properties facing the Turanganui River that were to have been included in the Amenity Commercial Zone.

[5] On 8 October 2004, during the course of the hearing of the proceedings, Eldamos lodged an amended notice of appeal by which it sought as primary relief the relief previously sought; and also specified alternative relief in respect only of the site.

[6] The alternative relief sought by Eldamos is that only the site be zoned Fringe Commercial Zone instead of Amenity Commercial; and that (in respect only of the site) that retail activity having a gross floor area greater than 5,000 square metres be provided for as a restricted discretionary activity, with the discretion restricted to external design, appearance and orientation of buildings and parking areas; traffic management; and amenity values.

[7] Gladiator did not amend its appeal. However as a single case was presented on behalf of Eldamos and Gladiator, we apprehend that its variation appeal, too, would be satisfied by the alternative relief if the Court determines that the primary relief is not appropriate.

[8] By its appeal against the refusal of its resource-consent application, Gladiator sought that its application be granted. It proposed conditions of consent, and these were not contested.

The parties

[9] The Gisborne District Council is a unitary local authority, having functions both as a regional council and as a territorial authority. As such it is responsible for the proposed district plan, and for the variations to it that are in issue in these proceedings. The District Council was also the consent authority to which Gladiator applied for resource consent for the Warehouse store on the site, and which refused that application.

[10] At the Environment Court hearing, the Council opposed these appeals, except to the extent that it conceded the Eldamos appeal in amending the provisions of the Fringe Commercial Zone so that large-format retailing larger than 5,000 square metres gross floor area be classified as a discretionary activity.

[11] Eldamos is part of the TWL group of companies, which operates a chain of large-format general-merchandise retail stores (red sheds), and a chain of stationery stores (blue sheds). Eldamos had lodged a submission on the variations. It now owns the site.

[12] Gladiator is a property development company, and formerly owned the site. It had also lodged a submission on the variations; and had applied for resource consent for a branch store for TWL with associated parking spaces, earthworks and landscaping. As mentioned already, Eldamos and Gladiator presented a single case to the Court.

[13] Harbourview Body Corporate administers a 21-unit apartment-house development on land adjoining the site to the south-east. Having made a submission in opposition to Gladiator's resource-consent application, it took part in the resource consent appeal.

[14] The Gisborne Retailers Association Incorporated, which has 56 members, took part in all three proceedings before the Court in opposition to the appeals.

[15] Progressive Enterprises Limited operates a supermarket just north of the Gisborne central business district, and another in a suburban centre of the town. It took part in all three proceedings in opposition to the appeals.

[16] Michael J Foster, Jane Douglas and Margaret Douglas, having made submissions on Gladiator's resource-consent application, gave notice that they wished to be heard in the resource consent appeal. Mr Foster subsequently gave notice that he wished to withdraw. Jane and Margaret Douglas took part in opposition to the resource consent appeal.

[17] Gavin W Maclean had lodged a submission in opposition to Gladiator's resource consent application, and took part in the proceedings in opposition to the resource consent appeal.

[18] Janice Urry had also lodged a submission in opposition to the resource consent application, and took part in the proceedings in opposition to that appeal.

Application of 2003 Amendment Act

[19] As all the appeals were lodged after 1 August 2003, when the Resource Management Amendment Act 2003 came into force, the parties agreed that the proceedings were to be heard and are to be decided under the Resource Management Act as amended by the 2003 Amendment Act.

The sequence of events

[20] We summarise in sequence the events leading to the proceedings, derived from the agreed statement of facts and from the evidence.

[21] The 4.7-hectare block of land at Customhouse and Pitt Streets called the Heinz Wattie land had been used for food processing for many decades. After that activity ended, in 1997 the Council purchased the land.

[22] On 8 November 1997, the Council notified its proposed regional and district plan. By it, the former Heinz Wattie land was to be in the Outer Commercial Zone, in which retailing is a permitted activity.

[23] In mid 2000, the Council decided to sell the land. Mr B R Johns of Gladiator discussed with a Council 'working party' a scheme for developing it for a mixture of residential, bulk retailing, a hotel and conference centre, a restaurant, and office blocks.

[24] By letter dated 17 October 2000 the Mayor of Gisborne confirmed that on financial terms stated in the letter, the working party would promote to the Council the sale of the land to Gladiator.

[25] In November 2000, Mr Johns met with the Council and described his proposals for developing the land, including an area of some 9,200 square metres for bulk retailing. Following that, the Council and Gladiator entered into an agreement to sell and purchase the land. The Council undertook to have the former industrial buildings on the land demolished, and the land cleared.

[26] Gladiator agreed to purchase the Heinz Wattie land from the Council. At that time, the proposed district plan zoned the land Outer Commercial, in which retailing and a range of other commercial activities were permitted activities.

[27] On 17 September 2001, Gladiator applied for resource consents to subdivide the former Heinz Wattie land, to construct 21 town houses (the Harbourview Apartments), a hotel, a café and conference centre, and a large-format retail store (for Harvey Norman). Submissions in opposition were lodged by the Gisborne Retailers Association and by Emerald Hotels. The applications were heard on 21 March 2002 by hearing commissioners appointed by the Council.

[28] In April 2002, the Gisborne Retailers Association, Emerald Hotels, and others commenced proceedings in the High Court against the Council, Gladiator and the Council's hearing commissioners, challenging the proposed district plan for inadequate consultation and deficient compliance with section 32.

[29] On 8 May 2002, the High Court proceedings were settled by agreement. The Council agreed to withdraw those provisions in Chapters 18 and 19 of the proposed district plan which related to retail activities in the Outer Commercial and General Industrial Zones, removing the permitted-activity status of retailing activities. Gladiator undertook to withdraw its resource-consent application in relation to any retail component (excluding a café) and for a conference centre, and also undertook that it would—

> ...not take any steps to appeal or challenge in any manner the Gisborne District Council's proposal to withdraw the abovementioned provisions from Chapters 18 and 10 of the Proposed Plan.

[30] On 8 May 2002 the Council resolved pursuant to clause 8D(1)(a of the First Schedule to the Resource Management Act 1991 to withdraw those provisions from the proposed plan.

[31] On 21 May 2002 the Council granted Gladiator's application to subdivide the former Heinz Wattie land into 9 lots; its application for the 21 apartments (Harbourview Apartments); and the hotel (Portside Hotel). Gladiator subdivided the land, and subsequently sold two lots for apartment buildings, one for the hotel, and one for an office building. (Those buildings have been completed, and lie between the site and the Turanganui River.)

[32] In June 2002 the Council decided to review the retail zoning in its proposed plan. It engaged Mr M G Tansley of Marketplace NZ Limited to participate and make recommendations with a view to developing a retail strategy.

[33] On 10 August 2002, the Council gave public notice of withdrawal, pursuant to clause 8D of the First Schedule to the Act, of the provisions of the proposed district plan in question.

[34] In mid August 2002, Mr Tansley presented his report on Stage One of his commission, being an assessment of the existing retail trading space in Gisborne.

[35] In August 2002 TWL approached Mr Johns with a view to establishing a new store on the site, leading to an agreement reached in December 2002 for sale and purchase of the site, conditional on resource consent.

[36] On 9 September 2002 the Council granted consent for an office building on the lot sold by Gladiator for that purpose.

[37] On about 27 November 2002, Mr Tansley presented to the Council his full report: *The Gisborne Retail Market Study*.

[38] On 7 December 2002 the Council notified Variations 136-149 to its proposed district plan. These variations introduced new Fringe Commercial and Amenity Commercial Zones. The Amenity Commercial Zone was to apply to the former

Heinz Wattie land. In that zone retail activities are to be permitted activities if they are ancillary to other permitted activities. 'Small retail activities' (where the premises are less than 1500 square metres gross floor area) are to be discretionary activities. All other retailing is to be a non-complying activity.

[39] On 4 June 2003 Gladiator applied for resource consent for the construction and operation of The Warehouse store on the site, being part of the former Heinz Wattie land.

[40] Having heard submissions on the variations in August 2003, on 1 October 2003 the Council gave decisions by which residential accommodation, restaurants, outdoor cafes, historical and cultural facilities and tourist centres, and retailing that is ancillary to a permitted activity, were classified as permitted activities in the Amenity Commercial Zone. Retailing with less than 1500 square metres gross floor area was classified as a discretionary activity, and all other retailing was classified as a non-complying activity.

[41] The variation appeals to this Court by Eldamos and Gladiator followed.

[42] In November 2003, hearing commissioners appointed by the Council heard Gladiator's application for The Warehouse development. On 19 December 2003, the commissioners gave their decision refusing the application. Gladiator's appeal to this Court against that decision followed.

[43] On 19 May 2004 the Council granted consent for a 6-storey (20 metre) apartment building on Lot 8 (Bayview Apartments).

The site and its environment

[44] We now give a general description of the site and its environment. We will need to give more particular findings in the context of considering particular issues.

[45] The site is held in two adjoining titles. One has an area of 2,682 square metres and is at the corner of Customhouse and Pitt Streets;[1] the other comprises 2.1084 hectares and has frontage to Customhouse Street.[2]

[1] Lot 1 Deposited Plan 311292.
[2] Lot 3 LT 315803.

[46] The site has a total area of 2.3766 hectares. It is bounded to the north-west by Customhouse Street, which is part of State Highway 35; to the north-east by Pitt Street and by lots formerly part of the Heinz Wattie land (one of which is a heritage reserve,[3] and another of which is occupied by a two-storied office building); to the south-east by a three-storied hotel (the Portside); and to the south-west by the two-storied Harbourview Apartments, and another apartment building (Bayview) that was under construction at the time of the appeal hearing. The Bayview is to be a six-storied building containing 20 apartments

[47] There is a disused railway line beyond the properties to the south-east and south-west, and the Turanganui River is beyond them. Gisborne Harbour and Port are across the river, with Kaiti Hill[4] above them. There are industrial and commercial buildings and activities on the far sides of Customhouse Street and Pitt Street.

[48] The Gisborne central business district is centred on Gladstone Road, a few blocks north from the site.

The planning instruments

[49] The existing planning instruments may apply to consideration of the variation appeals and of the resource consent appeal.

[50] We have considered the New Zealand Coastal Policy Statement; the regional policy statement; the proposed regional discharges plan; the proposed regional coastal environment plan; the proposed regional air plan; and the transitional district plan; and the proposed combined regional land and district plan. In the event, only the latter two instruments have the particularity and application to the circumstances of these appeals.

Transitional district plan

[51] The first Gisborne district scheme became operative in 1964, and the first review of it became operative on 1 January 1977. A proposed second review was notified in 1988, prepared in terms of the Town and Country Planning Act 1977. There are some references outstanding, but none is material to these proceedings.

[3] Te Wai o Hiharore.
[4] Also known as Titirangi.

[52] The plan contains goals, including one that Gisborne should be provided with a full range of shops;[5] and another that the major focus of commercial activity should continue to be the central area.[6]

[53] The plan also contains objectives, including those to be receptive to new trends in commercial activity; to endeavour to meet the needs of the commercial sector as they arise;[7] to improve land use distribution to minimise conflicts between incompatible land uses and protect the integrity of zones;[8] to promote a standard of amenity which will improve the natural beauty and image of the City and further establish the reputation of the City as a good place to live;[9] and to maintain the city centre as the business, entertainment, cultural and social focus of Gisborne.[10]

[54] There are also objectives of retaining the inner part of the central area for pedestrian-oriented commercial use,[11] and of encouraging vehicle-oriented commercial uses needing a central location to establish on the outer sides of the central business district.[12]

[55] The Gisborne central business district is zoned Commercial 1, and outer parts of it are zoned Commercial 2. Some relatively small areas on the south-western flank of the Commercial 2 zone are zoned Industrial 1. The former Heinz Wattie site and adjacent land to the north-west are zoned Industrial 2.

[56] The Industrial 2 zone is for light and medium industry. It would have suited the food processing activities then carried out on the Heinz Wattie site.

[57] Residential, retailing and visitor accommodation activities are not provided for in the Industrial 2 zone; so retailing activity on the site would have the status of a non-complying activity under the transitional district plan.

[5] Para 13.1.3.1.
[6] Para 13.1.3.3.
[7] Para 13.4.4.5.
[8] Para 9.1.
[9] Para 9.2.
[10] Para 9.6.
[11] Para 4.1.
[12] Para 4.2.

The proposed regional and district plan

[58] The proposed regional land and district plan was publicly notified on 8 November 1997. It includes district plan contents, as well as provisions for some of the Council's regional responsibilities, specifically soil conservation, natural hazards, and hazardous substances.

[59] As the changes to the proposed plan that would be made by Variations 136-149 are in issue in these proceedings, the starting point has to be the provisions of the proposed plan as they were prior to notification of the variations. If, in deciding the variation appeals, the Court determines that Variation 147 should be deleted, we may also have to consider the resource-consent application by reference to the proposed plan as it was prior to the variations.

[60] Chapter 18 of the proposed plan relates to commercial zones. It describes the central business district in a way that does not include the former Heinz Wattie land. There is a policy of containing commercial activities in the central business district to the area so described.[13]

[61] The proposed plan provides an Inner City Commercial Zone (which applies to the central business district), and an Outer Commercial Zone (which includes the former Heinz Wattie land).

[62] The proposed plan contains a policy of encouraging lower intensity, high traffic-generating uses to locate within the Outer Commercial Zone where the effects of commercial uses could be managed.[14] Retail activities were a permitted activity in the Outer Commercial Zone, without restriction on the size of premises.[15]

[63] The Council purported to withdraw from the proposed plan that policy and provision for retail activities in order to implement the settlement that it reached with other parties to the High Court proceedings brought by the Gisborne Retailers Association and Emerald Hotels. It did not do so by a variation or other publicly-notified process, but by simple resolution of which prior public notice had not been given.

[13] Policy 18.4.1.
[14] Policy 18.4.3.
[15] Rule 18.10.1.2 and 18.10.1.9.

[64] As that withdrawal is material to the basis on which the Court has to determine these proceedings, we need to consider whether or not that was effective at law to delete those provisions from the proposed plan.

[65] The proposed plan contains performance standards, some of which are applicable to the resource-consent application in this case.

Effectiveness of withdrawal of plan provisions

[66] We now consider whether the Council's resolution (in implementation of the settlement of the High Court proceedings) to withdraw parts of the proposed district plan was effective at law to amend the plan in those respects. If it was, then the variations are to be assessed as varying a plan by which retailing is not provided for on the land in question; and the resource-consent application is to be assessed as a non-complying activity. If the resolution was not effective, the variations are to be assessed as removing retailing from the activities that are permitted on the land in question; and resource consent would not be required for the proposed retailing activity.

[67] We acknowledge that it was the Court that raised the question; and that no party contended that the resolution was not effective. Indeed the Council, the appellants and Progressive Enterprises all contended that the Court should not consider the question.

[68] However the question concerns the effectiveness of the Council's own action, so the Council had no interest in the question being considered by the Court. Progressive Enterprises' opposition to the appeals reflects its private interest as a trade competitor of the Eldamos, so it had no interest in the question being considered either. The Gisborne Retailers Association had achieved its objective by the settlement of the proceedings it had brought in the High Court, so it, too, had no interest in the question being considered.

[69] The appellants were differently placed, but are restrained by Gladiator's undertaking that it would not take any steps to appeal the withdrawal or challenge it in any manner. (Even so, an undertaking restraining resort to the courts to challenge the lawfulness of a public authority's action in public law may be unenforceable as contrary to public policy.)

[70] In short, the settlement of the High Court proceedings served the private interests of each of those parties. It did not necessarily serve the public interest in achieving the purpose of the Resource Management Act.

[71] We accept that it may not be in the interest of any party that the Court should find that the withdrawal resolution was not effective in law. Yet this alone should not deter a court from forming an opinion on whether the withdrawal was effective, in the course of making a finding about the content of the proposed district plan for the purpose of deciding proceedings in which that is relevant.

[72] We now summarise the parties' grounds for contending that the Court cannot and should not do.

Can and should the Court consider the effectiveness of the withdrawal?

[73] The Council submitted that the Environment Court is not the forum in which the validity of its part withdrawal decision should be decided, because the question is not before the Court. The appeals concern a decision to decline a resource consent, and a decision to include various commercial zones in the proposed plan. No party has questioned the validity of the withdrawal decision.

[74] Counsel relied on *Transit New Zealand v Pearson*[16] and observed that one of the parties to the High Court proceedings, Emerald Hotels, is not a party to these proceedings and could not have anticipated that the outcome it secured through the settlement could be challenged in these proceedings. Counsel submitted that the validity of the withdrawal decision is capable of challenge by judicial review in the High Court, but until so challenged is to be treated as valid.

[75] The appellants contended that the effectiveness of the withdrawal is not in issue because it is a process separate from the matters before the Court in these proceedings, and the Court is not seised of the issue. The jurisdiction of the Court springs from the variations and the process that was followed in relation to them.

[16] [2002] NZRMA 318 (HC).

[76] Counsel for Progressive Enterprises cited three authorities on the jurisdiction of a specialist tribunal to inquire into the legality of an exercise of power not directly in issue before it: *R v Wicks*;[17] *Boddington v British Transport Police*;[18] and *McGuire v Hastings District Council*.[19]

[77] We start by stating our understanding of the law as declared in the authorities cited by counsel for the Council and for Progressive Enterprises.

[78] The Environment Court's jurisdiction is limited by the scope of the appeal, and the relief sought by it.[20] In criminal proceedings to enforce an administrative act valid on its face directed at the defendant, a defence that the act was invalid as having been influenced by bias or improper motives cannot be raised.[21] But in proceedings for failure to comply with an administrative act of general character, not specifically directed at an individual, the defendant is entitled to raise the legality of the act.[22] A court of special jurisdiction cannot entertain a challenge to an administrative act within the jurisdiction of another court.[23]

[79] We acknowledge that the scope of these appeals, and the relief sought by them, do not directly raise the effectiveness at law of the Council's resolution withdrawing parts of the proposed plan. To the extent that the authorities about collateral challenges in administrative appeals are relevant, the general character of the withdrawal of parts of the proposed plan indicates that collateral challenge is not precluded. Certainly the effectiveness of withdrawal of part of a proposed plan is not within the jurisdiction of another court, except perhaps in judicial review proceedings.

[80] With two classes of exception, anyone could apply to the High Court for judicial review of the lawfulness of the Council's withdrawal of parts of the plan. The first exception is provided by section 296 of the Resource Management Act, which postpones review until after any right of appeal has been exercised. The second class is the undertakings given in the settlement of the Gisborne Retailers and Emerald Hotels proceedings not to take any steps to appeal or challenge the

[17] [1998] AC 92.
[18] [1999] 2 AC 143.
[19] [2002] 2 NZLR 577.
[20] *Transit v Pearson.*
[21] *R v Wicks.*
[22] *Boddington v British Transport Police.*
[23] *McGuire v Hastings District Council.*

withdrawal in any manner (to the extent that those undertakings are enforceable in terms of public policy).

[81] We accept that the Environment Court should not assume the power of judicial review. In review proceedings, if the High Court finds that an exercise of statutory power was not done in accordance with law, it can declare the act invalid, and can quash or cancel it. If, in the course of making a finding about the contents of the proposed plan, the Environment Court were to form an opinion that the withdrawal was not effective at law, that would not be assuming the authority of judicial review. Forming the opinion would not be declaring the withdrawal invalid, nor quashing or cancelling it. It would simply be a necessary step in making a finding of fact that is essential to decide the appeals within their scope.

[82] Emerald Hotels, one of the parties to the High Court proceedings that were settled by the agreement we have referred to, is not a party to these proceedings. If a Court were to consider making a declaration or order that the withdrawal of the parts of the proposed plan was invalid, the interests of Emerald Hotels might be prejudiced; and it should have opportunity to be heard.

[83] However there is no risk of that outcome in these proceedings. All we are intending is to make a finding about the content of the proposed plan. That is a necessary basis for deciding appeals about variations to the plan, and a resource-consent application in terms of it.

[84] We do not accept that Emerald Hotels could not have anticipated that the Environment Court would need to make findings about the contents of the proposed plan, and consider whether the purported withdrawal of parts of it was effective. Emerald Hotels could have lodged submissions on the variations and resource-consent application, and then have taken part in the appeal proceedings. It did not do so. So it has forgone the opportunity of presenting argument to the Environment Court about whether at law the proposed district plan contains or does not contain the retailing provisions which the Council purported to withdraw pursuant to the settlement.

[85] Whether or not the retailing provisions were included in the Outer Commercial Zone prior to notification of the variations affects the extent of the amendments that the variations would make, if approved. The contents of the proposed plan are also a matter to which the Court has to have regard in considering

the resource-consent appeal. So we hold that the Court can and should form an opinion on that question in making its finding about the contents of the plan.

Was the purported withdrawal effective?

[86] It is well established that if a council wishes to alter its proposed planning instrument, it can only do so to give effect to an appeal decision, or to meet a submission, or by publicly notified variation.[24] Otherwise it could not be said with certainty that other persons might not have intervened.[25]

[87] There is also high authority that the observance of natural justice in using the machinery of a statutory code for planning may reasonably have been intended by Parliament, and that this may require public notification or service on particular persons affected.[26]

[88] Of the scheme of the Town and Country Planning Act 1977, Justice Holland remarked that it—

> ...contemplates notice before changes are made by a local authority to ... its plan ... it should not amend the provisions of the plan or the review beyond what is specifically raised in the objections to the plan which have been previously advertised.[27]

[89] Save in one respect (clause 8D of Schedule 1), the provisions of the Resource Management Act about the processing of planning instruments are not materially different from those of the 1977 Act. Clause 16 of Schedule 1 continued section 50 of the Town and Country Planning Act 1977, and section 26A(1) of the Town and Country Planning Act 1953. The condition of a local authority being able to make an amendment without further formality is restricted to alterations of minor effect or correction of minor errors.

[90] The High Court has observed that the requirements of notice and the wide rights of public participation conferred by the Resource Management Act are based upon a statutory judgment that decisions about resource management are best made

[24] *Wellington City v Cowie* [1971] NZLR 1089; 4 NZTPA 177 (CA); applied in subsequent cases, eg *Whitford Residents v Manukau City Council* [1974] 2 NZLR 340 (SC).
[25] Ibid, p 1114; per Richmond J.
[26] *Ronaki v No 1 Town & Country Planning Appeal Board* [1977] 2 NZLR 174 (CA).
[27] *Nelson Pine Forest v Waimea County* (1988) 13 NZTPA 69, 73 (HC).

if informed by a participative process in which matters of legitimate concern under the Act can be ventilated. [28]

[91] In this case the Council's withdrawal of the retailing provisions from its proposed plan was not to give effect to an appeal decision; it was not to meet a submission; it was not the subject of a publicly notified variation; it was not an alteration of minor effect, nor was it a correction of a minor error. The withdrawal was not, either, to give effect to a Judgment following a contested hearing of the High Court proceedings brought against it by the Gisborne Retailers' Association and Emerald Hotels. Those proceedings were discontinued before being brought on for hearing.

[92] The Council purported to remove those provisions from its proposed plan by simple resolution, to give effect to a private settlement of the High Court proceedings. It did not give public notice of its intention to do so.

[93] In response to the Court's enquiry, its counsel, Mr Wright, submitted that it had been entitled to do so by clause 8D of Schedule 1 to the Act. Counsel remarked that it had done so with the agreement of several of the parties to these proceedings (including the predecessor of Gladiator); and that Gladiator had been party to the discussions that had led to the settlement of the High Court proceedings and the withdrawal of those parts of the plan.

[94] Mr Wright acknowledged that clause 8D does not expressly provide for withdrawal of *part* of a proposed plan, and he relied on the Environment Court decision in *Minister of Conservation v Whakatane District Council*[29] for the proposition that the clause enables a Council to withdraw the plan or any part of it.

[95] Mr Wright argued that where a council has power to withdraw the whole of a plan, preventing it from withdrawing only part of it would lack any real rational basis. He observed that withdrawal of a proposed plan would be a hugely disruptive process, and where only part if it is at issue, allowing focus on those aspects only would prevent a great deal of that disruption.

[28] *Murray v Whakatane DC*, High Court, Rotorua; 2/7/97, Elias J. See also *Westfield v North Shore City Council* [2005] NZSC 17 at para [25] per Elias CJ; and at para [46] per Keith J.
[29] W79/2003.

[96] Counsel acknowledged that there are circumstances in which powers exercised under clause 8D could lead to an unreasonable or draconian outcome, as after a person has bought a property believing that the plan provisions applicable to it were beyond challenge, when withdrawal would remove development rights without the owner having any say. But he observed that the potential for that kind of effect would apply equally to withdrawal of the entire proposed plan, and argued that careful selection of the part to be withdrawn would assist in minimising prejudice.

[97] Clause 8D provides—

> (1) Where a local authority has initiated the preparation of a ... plan, the local authority may withdraw its proposal to prepare ... the ...plan at any time—
>
> (a) if an appeal has not been made to the Environment Court under clause 14, or the appeal has been withdrawn, before the plan ...is approved by the local authority; or
>
> (b) if an appeal has been made to the Environment Court, before the Environment Court hearing commences.
>
> ...

[98] We accept that at the time of the Council's resolution purporting to withdraw parts of its proposed plan, the Environment Court hearing of appeals about its contents had not commenced.

[99] Clause 8D does not explicitly prescribe the procedure by which a local authority may withdraw a proposal to prepare a plan. In some circumstances a simple resolution without prior notification might be appropriate. In other circumstances (as where the withdrawal would deprive occupiers of land of permitted-activity rights that have applied for some years), justice may require notice and opportunities for participation.

[100] In *Minister of Conservation v Whakatane District Council*, the Council withdrew two chapters about natural heritage and related schedules from its proposed district plan, intending to notify a variation to introduce new provisions in place of those withdrawn. Two of the appellants questioned whether the Council could lawfully withdraw part only of a plan, and whether their appeals remained alive. The Council asked the Court to clarify those issues.

[101] Judge Thompson addressed the first question as one of interpretation of clause 8D, and reasoned that if a council has power to withdraw a whole plan, a lesser power to withdraw part of the plan is implied. The learned Judge also

observed that if a submission requested abandonment of the relevant part, the council could withdraw that part by allowing that submission. He concluded that clause 8D enables a council to withdraw the whole of a plan, or any part of it.

[102] Evidently *Wellington City v Cowie*, and the other authorities applying it, were not cited to Judge Thompson, so he did not consider whether they should influence the construction of clause 8D. It does not appear that the Whakatane case was one in which an un-notified withdrawal might deprive people of rights to use and develop their land. In that case the Judge did not need to consider whether other persons might not have intervened had the withdrawal been notified, eg as a variation.

[103] The present case is distinguishable from that which Judge Thompson had to consider. Here the withdrawal deprived all occupiers of land in the Outer Commercial Zone and Industrial Zones of the right, as a permitted activity, to use it for retailing. That right had been available for some 5 years.

[104] Prior notice of intention to withdraw those provisions was not given to the public, nor was any opportunity given for public participation so that the decision to withdraw them could be informed by a process in which matters of legitimate concern under the Act could be ventilated. It could not be said with certainty that if such opportunity had been given, other persons would not have intervened. In the light of the removal of retailing as a permitted activity, we think it more likely than not that some would have wished to ventilate matters of legitimate concern under the Act.

[105] In short, applying the authorities of long standing, we hold that clause 8D cannot have been intended to enable the Council to remove from its proposal plan the retailing provisions of the Outer Commercial and Industrial Zones without prior public notice and opportunity to make submissions and appeal.

[106] Consequently we hold that the Council's resolution of 8 May 2002 was not effective at law to remove the provisions for retailing form the Outer Commercial and Industrial Zones of its proposed plan. The plan must be taken still to have included those provisions at the time the variations were notified.

The Variation appeals

[107] The Council initiated Variations 136 to 149 following its review of the provisions of the proposed plan on retailing. Of relevance to these proceedings, they would amend the objectives and policies for the commercial zones;[30] amend the rules for the Inner Commercial Zone;[31] introduce a new Fringe Commercial Zone;[32] and introduce a new Amenity Commercial Zone.[33]

[108] The variations would include the site in the Amenity Commercial Zone, instead of the Outer Commercial Zone.

[109] The parties agreed that the issues in the variation appeals can be confined to whether the application of the Amenity Commercial Zone to the Heinz Wattie land is the most appropriate way to achieve the purpose of the Act, with regard to:

(a) The visual, landscape, heritage and social amenity values of the land in the zone and the surrounding or connected environs;

(b) The overall form and function of Gisborne's central commercial area, including social and economic effects on its shape and urban form; and

(c) Transportation planning and transportation efficiencies and related effects.

[110] Before we address those issues, we identify the basis on which challenges to plan provisions are to be considered.

Post 2003 test for plan appeals

The parties' positions

[111] In that regard, we have to consider whether the 2003 Amendment Act altered the basis for deciding plan appeals. Counsel for the Gisborne District Council, Mr Green, argued that it did. His submission was adopted by counsel for the Gisborne

[30] Variation 137.
[31] Variation 138.
[32] Variation 139.
[33] Variation 147.

Retailers Association (Mr Weatherhead), and supported by counsel for Progressive Enterprises (Mr Whata). Counsel for the appellants (Mr Gould) contested the Council's submission, maintaining that the significance and substance is no different than before.

[112] Mr Green's argument on this topic was founded on comparing the text of section 32 as amended in 2003 with the text prior to the amendment. In summary, he contended:

(a) that the prior text called for the optimum planning solution[34] because of the words 'necessary' and 'most appropriate' in subsection (1)(c):

(b) that other provisions of the Resource Management Act (unlike those of previous planning Acts) do not call for plans to provide for the best or optimal use of resources:

(c) that the amended version omits reference to what is necessary and most appropriate, and replaces them with *evaluation* of the *extent to which* objectives are the most appropriate, and *whether* the policies, rules and other methods are the most appropriate:

(d) that there is no longer a requirement for optimal provisions and local authorities, having identified the most appropriate method, can now adopt provisions that do not represent the optimal or most appropriate way to achieve the purpose of the Act where local conditions or community feeling dictate:

(e) that on a plan appeal, the Court (which is not itself a planning authority) ought not supplant the policy-making role of the local authority by determining whether the plan provisions in question optimise the use of the resources in question or represent the best outcome in terms of Part II of the Act. The Court should only interfere when satisfied that the policy is unsupportable on the evidence or the implementation of it would not achieve the purpose and principles of the Act.

[34] A phrase derived from *Wellington Club v Carson* [1972] NZLR 698, 701 per Woodhouse J.

[113] Mr Whata added that the 2003 amendments to section 32 allow a much broader discretion in the assessment of appropriate objectives for achieving sustainable management; and that the judgement now called for is one of overall merit rather than of necessity. He also submitted that in considering whether a policy, rule or other method achieves the purpose of the Act, that purpose is to be found in the objectives and policies of the plan.

[114] Mr Gould submitted that the amended form of section 32 simplifies the analysis and evaluation required of a local authority, but does not fundamentally change it, as the replacement of 'satisfied' by evaluation, and 'necessary' by 'most appropriate' do not alter the process. In particular section 5 has not been altered, and the local authority's duty is to evaluate the extent to which each objective is the most appropriate way to achieve the Act's purpose.

[115] Counsel submitted that the amendment of section 32 was not accidental, and that the test in *Nugent v Auckland City Council*[35] adjusted in response to the amendments to section 32(2) would read:

> ... a rule in a proposed district plan must be evaluated as to whether it is the most appropriate way of achieving the objectives, which in turn must be the most appropriate way to achieve the purpose of the Act, being the sustainable management of natural and physical resources (as those terms are defined); it has to assist the territorial authority to carry out its function of control of actual or potential effects of the use, development or protection of land in order to achieve the purpose of the Act; it has to be the most appropriate means of exercising that function; and it has to have a purpose of achieving the objectives and policies of the plan.

[116] Mr Gould argued that the Council and Progressive Enterprises had overstated the effect of the amendment in contending that the Court ought not supplant the policy-making role of the local authority by determining whether the plan provisions in question optimise the use of the resources in question or represent the best outcome in terms of Part II of the Act; and that it allows a much broader discretion in the assessment of appropriate objectives so that the judgement now called for is one of overall merit rather than of necessity.

[117] Counsel urged that the amendment is not an opportunity for policies that are not in accordance with the purpose and principles of the Act; nor to preclude the Court from evaluating whether plan provisions in question are the most appropriate

[35] [1996] NZRMA 481, 484.

means of achieving that purpose. Rather, he submitted that the Court's appellate role continues of evaluating whether a plan provision achieves the purpose of the Act.

Consideration and findings

[118] Prior to the 2003 amendment, the provisions of section 32 describing the content of the duty imposed on planning authorities were contained in subsection (1), which we now quote:

> (1) In achieving the purpose of this Act, before adopting any objective, policy, rule, or other method in relation to any function described in subsection (2), any person described in that subsection shall—
> (a) Have regard to—
> (i) The extent (if any) to which any such objective, policy, rule, or other method is necessary in achieving the purpose of this Act; and
> (ii) Other means in addition to or in place of such objective, policy, rule, or other method which, under this Act or any other enactment, may be used in achieving the purpose of this Act, including the provision of information, services, or incentives, and the levying of charges (including rates); and
> (iii) The reasons for and against adopting the proposed objective, policy, rule, or other method and the principal alternative means available, or of taking no action where this Act does not require otherwise; and
> (b) Carry out an evaluation, which that person is satisfied is appropriate to the circumstances, of the likely benefits and costs of the principal alternative means including, in the case of any rule or other method, the extent to which it is likely to be effective in achieving the objective or policy and the likely implementation and compliance costs; and
> (c) Be satisfied that any such objective, policy, rule, or other method (or any combination thereof)—
> (i) Is necessary in achieving the purpose of this Act; and
> (ii) Is the most appropriate means of exercising the function, having regard to its efficiency and effectiveness relative to other means.

[119] The corresponding provisions provided by the 2003 amendment are in subsections (3), (4) and (5):

> (3) An evaluation must examine—
> (a) the extent to which each objective is the most appropriate way to achieve the purpose of this Act; and
> (b) whether, having regard to their efficiency and effectiveness, the policies, rules, or other methods are the most appropriate for achieving the objectives.
> (4) For the purposes of this examination, an evaluation must take into account—
> (a) the benefits and costs of policies, rules, or other methods; and
> (b) the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules, or other methods.

> (5) The person required to carry out an evaluation under subsection (1) must prepare a report summarising the evaluation and giving reasons for that evaluation.

[120] Comparing the two, we accept Mr Green's submission to the extent that the amended version does not set the same test as the former subsection (1)(c). We also accept Mr Gould's submission that this change cannot have been accidental. Parliament is to be taken to have intended a change of meaning.

[121] The purposes of the Resource Management Act and of district plans under it differ from those of the Town and Country Planning Act 1953, and of district schemes under it, that were the subject of *Wellington Club v Carson*.[36] But despite differences in terminology, the substance of the procedure for challenging contents of proposed planning instruments, and the powers of the appellate body in deciding those challenges, are largely the same. Under both Acts, for the purpose of hearing and determining an appeal, the appellate body has the same powers, duties, and discretions as the body against whose decision the appeal is brought.[37] Under both, the appellate body has power to confirm the provision in question, or to direct amendments to it.[38]

[122] Those features of the 1953 Act were held by the Supreme Court in the *Wellington Club* case to contemplate a hearing *de novo* on appeal.[39] That has continued to be applied to such appeals under the Town and Country Planning Act 1977 and the Resource Management Act 1991.

[123] In the *Wellington Club* case, the appellants argued that the Appeal Board had wrongly limited the question for decision to whether acceptable grounds existed for acting in the face of the planning authority's policy. The Supreme Court upheld that contention. Mr Justice Woodhouse (as he then was) said:[40]

> ...I am ... unable to find any statutory intention that presumptions should run in favour of either the policies or the announced planning or the detailed zoning or the subsequent decisions upon objections of a Council during the progress of its proposed district scheme towards the point at which it will become operative. Each aspect of those various matters will stand or fall on its own merits when tested by objections and the challenge or alternatives or modification. I do not doubt that except in the unusual case the general

[36] [1972] NZLR 698 (SC).
[37] Cf Town and Country Planning Act 1953, s 42(1A) (inserted by s 10(1) TCP Amendment Act 1971), and Resource Management Act s 290(1).
[38] Cf Town and Country Planning Act 1953, s 42(3) and Resource Management Act, First Schedule, cl 15(2).
[39] [1972] NZLR 698 at 701 (line 50) and 702 (line 3) per Woodhouse J.
[40] Ibid, p 702, line 54 to p 703, line 13.

> proposals of a council will stand where matters of detail may often deserve some attention and change. But in neither case is it necessary or desirable that the point of view of the administrator should be given a procedural head start that might never be overtaken simply because the influence of adversary techniques seems to have introduced the need to recognise a burden of proof. Certainly that situation is not contemplated by the Act.

[124] That authority has stood ever since, through changes of legislation. The 1953 Act had no equivalent of section 32 of the 1991 Act. If, in 2003, Parliament had intended to change the law that plan appeals are to be heard *de novo*, and that on appeal no presumption should be given in favour of the planning authority's policy, it would have done so directly and explicitly, not as an implied consequence of amending the contents of the planning authority's duty under section 32.

[125] In amending section 32 of the Resource Management Act in 2003, Parliament did not also amend section 290(1), or clause 15 of the First Schedule, which expressly state the Environment Court's powers on appeals about the contents of planning instruments under the Act. Those powers are as applicable to challenges to the objectives and policies of proposed plans as they are to challenges about rules, zoning, and other methods.

[126] Parties to those appeals are entitled to have the Court fully exercise its jurisdiction on them, and not limit it in the way the Appeal Board did in the *Wellington Club* case by applying a presumption in favour of the planning authority's policy.

[127] We apply the law declared by the Supreme Court, and hold that the Environment Court should not limit the scope of the appeals out of respect for electoral responsibility of the District Council. So we do not accept the Council's submission that in these proceedings the Court ought to refrain from supplanting the Council's policy-making role.[41]

[128] However we accept that the amendments to section 32 call for revision of the *Nugent* test, by omitting the references to a rule being necessary, and having to be the most appropriate means. We have revised the test having regard to the current legislation, and propose the following measures for evaluating objectives, and for evaluating policies, rules and other methods:

[41] *CREEDNZ v Governor-General* [1981] 1 NZLR 172 (CA), cited by Mr Green, was (as counsel acknowledged) a case of judicial review, not an appeal. The passage from Richardson J's judgment quoted by Mr Green does not, with respect, assist in determining the scope of powers on appeal.

A. An objective in a district plan is to be evaluated by the extent to which:

1 it is the most appropriate way to achieve the purpose of the Act (s32(3)(a)); and

2 it assists the territorial authority to carry out its functions in order to achieve the purpose of the Act (s72); and

3 it is in accordance with the provisions of Part 2 (s74(1)).

B. A policy, rule, or other method in a district plan is to be evaluated by whether:

1 it is the most appropriate way to achieve the objectives of the plan (s32(3)(b)); and

2 it assists the territorial authority to carry out its functions in order to achieve the purpose of the Act (s72):

3 it is in accordance with the provisions of Part 2 (s74(1)); and

4 (if a rule) it achieves the objectives and policies of the plan (s 76(1)(b)).

[129] We do not find persuasive the Council's submissions against seeking an optimum planning solution. The variation proceedings are by way of appeal, not judicial review. The evaluation is carried out for the purpose of coming to a decision on the questions identified in the previous paragraph. That could also be described as seeking an optimal planning solution for achieving the purpose of the Resource Management Act. On appeal, the evaluation is to be made on the totality of the evidence given in a *de novo* hearing, without imposing a burden of proof on any party.

[130] Finally we address Mr Whata's submission that in considering whether a policy, rule or other method achieves the purpose of the Act, that purpose is to be found in the objectives and policies of the plan. Counsel relied on Environment Court decisions in *Warehouse v Dunedin City Council*[42] and *Progressive Enterprises v Christchurch City Council*,[43] and referred to *Shaw v Selwyn District Council*.[44]

[131] We accept counsel's proposition in general, but not as having universal application. One obvious class of exception is where the relevant objectives and policies are also challenged. Another might be where the objectives and policies of the planning instrument so plainly fall short of achieving the purpose of the Act, that

[42] Environment Court Decision C101/2000.
[43] Environment Court Decision C98/2003.
[44] [2001] NZRMA 399 (HC).

to rely on them alone would fail to give primacy to Part 2 as directed by sections 61(1), 66(1), and 74(1). We hold that the evaluation of a policy, rule or other method should be done by considering all the provisions of the Act that apply. We intend that List B in paragraph 128 refers to them all.

Management and control of effects

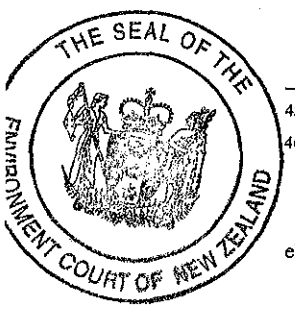
[132] The next issue we have to decide is whether the variations fail to meet the test of achieving the purpose of the Resource Management Act in that, instead of managing or controlling *effects* of activities, they are directive of a particular *outcome* (precluding bulk retailing) as was the purpose of district schemes under previous planning legislation.

The parties' positions

[133] The appellants submitted that a territorial authority's functions for giving effect to the Act are those stated in section 31, being integrated management and control of *effects*; not in effect allocating resources (citing *Wellington International Airport v Board of Airline Representatives*[45] and *Kiwi Property Management v National Trading* [46]).

[134] The appellants contended that the Council had failed to prepare the variations in the context of the enabling purpose of the Act to avoid adverse effects, but had determined an outcome for the former Heinz Wattie land that precluded bulk retailing, and then sought to achieve its view of the 'wise use' of that land by the variations. They cited objectives and policies for the Amenity Commercial Zone, and in particular a policy that bulk retailing is not an appropriate activity for the zone.

[135] The appellants contended that the Council (having itself sold the site to one of the appellants for development of a bulk retail store, among other activities), by identifying bulk retailing as an inappropriate activity, in effect classified bulk retailing as a prohibited activity, without consideration of the effects of the activity itself.



[45] Environment Court Decision W102/97.
[46] Environment Court Decision A045/2003.

[136] The Council responded that the purpose of the Amenity Commercial zone is not simply to prescriptively allocate resources *per se*. It contended that the purpose of the variations is:

(a) to manage the potential effects associated with the built form of development by promoting those types of development that contribute to amenity through built form and discouraging those that do not; and

(b) to attempt, in doing so, to enhance the positive characteristics of the existing natural and physical resources associated with the variations area.

[137] Mr Green submitted that the purpose of the Amenities Commercial Zone is not to protect existing retail centres by regulating the positioning of large retail facilities in relation to those centres, but to manage the effects associated with the built form of development. Counsel relied on the evidence of Ms B M O'Shaughnessy and Mr H I van Kregten.

[138] Mr Whata disputed that the variations represented a 'wise use' approach. He contended that they give effect to the requirement to manage resources at a rate or in a way which enables people and communities to provide for their wellbeing; and accord with the broader discretion afforded by the revised version of section 32.

[139] Mr Gould submitted that Ms O'Shaughnessy and Mr van Kregten had given evidence of the Council's intention of prescribing a particular use and outcome for the Heinz Wattie land, with the objective of preventing bulk retailing there.

[140] In his evidence Mr V R C Warren identified passages in the variations that he considered were outside the Council's functions for achieving the purpose of the Act. Without detailing them all, we accept that there are passages that raise doubt whether the variations were intended to manage or control effects, rather than implement the Council's view of the wise use of particular land.

[141] In particular Mr Warren referred to the classification in the Fringe Commercial Zone of retail activities having a gross floor area of 8,000 square metres or greater as non-complying activities. The witness observed that it would need to be shown that retailing of that scale would be likely to have effects on the

environment that would be contrary to the objectives and policies of the district plan and to achieving the purpose of the Act.

[142] The Council's purpose was clarified by the planning witnesses relied on by the Council.

[143] In her evidence, Ms O'Shaughnessy asserted that the Act provides for plans to be proactive in promoting appropriate outcomes to most efficiently and effectively manage resources in a sustainable manner for future generations. This witness agreed that the variations were not generic in nature, they were very specific;[47] and that one of the reasons she was supporting the variations was to preclude development of the scale of bulk retailing on the site.[48]

[144] Mr van Kregten gave evidence that the Council wanted to preserve the Heinz Wattie land for other activities, and that the rules restrict bulk retail development in the Amenity Commercial Zone to the extent that it almost makes it impossible to establish bulk retailing in the zone.[49]

Consideration and findings

[145] There being no contest on the point, we follow previous Environment Court decisions in holding that the purpose of a district plan is to assist the local authority to carry out its functions under the Act to achieve the purpose of the Act;[50] and not in effect to allocate resources, or prescribe what the local authority considers the wise use of them.[51]

[146] The proposed plan is both a regional plan and a district plan. The subject matter of the variations is within the scope of a district plan rather than a regional plan, so the functions of the Council under the Act that are relevant are those of a territorial authority, prescribed by section 31(1). The relevant functions can be summarised as integrated management and control of the effects of the use, development or protection of land and associated resources.

---

[47] Notes of evidence, 12.10.04, p 494.
[48] Ibid, p 511.
[49] Notes of evidence 13.10.04 p 585.
[50] Section 72.
[51] *Wellington International Airport v Board of Airline Representatives*; and *Kiwi Property Management v National Trading, ante.*

[147] We have considered the Council's contentions of its purposes for the Amenity Commercial Zone, which we summarise as managing effects of buildings and other development by discouraging types that do not contribute to amenity through built form, and enhancing positive characteristics of natural and physical resources. We have come to two findings: first, we are not persuaded that these were the true purposes of Variation 147 introducing that zone; and secondly that even if they were, they would not qualify as assisting the Council to carry out its functions under the Resource Management Act.

The Council's true purposes

[148] We have already quoted the two purposes claimed for the variations.

[149] Section 75(1) requires that the variations contain the principal reasons for adopting the objectives, policies and methods of implementation,[52] and the environmental results anticipated from their implementation.[53]

[150] We have reviewed the reasons and environmental outcomes stated in the variations. This task is not straight-forward, because the variations were not published as such, but only as versions of the relevant chapters of the proposed plan as they would be if the variations are approved, with the alterations marked. We have not been able to identify, among the reasons and environmental outcomes, purposes corresponding to those claimed by the Council at the appeal hearing.

[151] The evidence of the Council's own witnesses, Ms O'Shaughnessy and Mr van Kregten, did not support the claimed purposes. Rather, it tended to suggest a purpose of precluding bulk retailing from the land proposed to be rezoned Amenity Commercial, and preferring other classes of activity on that land.

[152] We have examined the record of evaluation of Variation 147 for the purpose of section 32 that was prepared by Ms O'Shaughnessy and was before the Council when it decided to initiate the variations. [54] It referred to taking advantage of amenity values of the area, and does not refer to managing effects of built development. The record identified the principal alternative of retaining Outer

[52] Section 75(1)(e).
[53] Section 75(1)(g).
[54] Exhibit 21.

Commercial zoning on the site, and identified the cost of that as loss of opportunity to enhance the amenity values and public enjoyment of the location.

[153] Accordingly we are not persuaded on the evidence that the purposes claimed by the Council for the variations were its true purposes. We suspect that the purposes asserted at the appeal hearing may have been a later attempt to formulate purposes for the Amenity Commercial Zone in order to support the Council's case in response to these appeals.

Would the claimed purposes assist the Council's functions?

[154] We now consider a further question on the hypothesis that the Council had been able to persuade us that the purposes claimed had indeed been its purposes in initiating the variations. The further question is whether those purposes would assist it to carry out its functions under the Act to achieve the purpose of the Act, rather than in effect to allocate resources, by prescribing what it considers the wise use of the land in question.

[155] We start with the claimed purpose of managing the potential effects associated with the built form of development. We have already stated our finding that the management and control of effects of the use and development of land are among the functions of a territorial authority under the Act. However the Amenity Commercial Zone policies and rules that are challenged in these variation appeals relate to bulk retailing as an activity. Those provisions do not themselves serve a purpose of managing effects of built form of development. Permitted activities (such as residential accommodation or a tourist centre) might occupy large buildings too.

[156] The second claimed purpose, of enhancing positive characteristics of existing natural and physical resources, does not appear to bear on the relevant functions of the Council under the Act.

[157] We have recorded Ms O'Shaughnessy's opinion that the Act provides for plans to be proactive in promoting appropriate outcomes to most efficiently and effectively manage resources in a sustainable manner for future generations. We do not accept that formulation. It does not give effect to the direction that the purpose of a district plan is to assist a territorial authority to carry out its functions under the Act, being the integrated management and control of the effects of the use and development of land.

[158] So, even if we had been persuaded that the Council had initiated the variations for the purposes claimed, we do not accept that they would comply with the functional purpose of a district plan prescribed by the Act. They do not relate to the integrated management and control of effects of the use or development of the land.

[159] Rather, on the evidence of Ms O'Shaughnessy and Mr van Kregten, we accept the appellants' allegation and find that in initiating the variations, the Council sought the allocation of resources in achieving its view of the wise use of the land in question, and in particular by preventing bulk retailing on the site.

Consultation and community attitude

[160] The next topic we have to address relates to the weight to be placed on consultation and community atttitudes to the future of the site.

The parties' attitudes

[161] The Council urged that in reaching the decision to promote the variations, it had had the benefit of a year of investigation, which had assisted the Council to form the policy direction for this part of Gisborne. It asserted that in this process it had been informed by the input of a wide section of the community through many public meetings, discussions and the submissions process, which had identified the site as having potential as a future tourist-based retail and cultural point. The Council urged that this had provided a strong mandate from the Gisborne community for the variations.

[162] The Gisborne Retailers Association contended that the Council had a duty to gauge and assess the views of the local community; that the community's expectation for the Heinz Wattie area had changed quickly, but should not be frustrated.

[163] The appellants contended that the consultation relied on by the Council had been inadequate, and directed towards a self-serving purpose. They maintained that the Council had relied on a flawed process.

[164] Before considering this issue we summarise the relevant evidence.

The evidence

[165] Ms O'Shaughnessy is Senior Planner (District Policy) at the Council, and had prepared and presented planning reports dealing with the variations. In giving evidence, she presented several documents, including:

(a) Appendix 1 'Background' which referred to "consultation with the business community";[55]

(b) Appendix 6 'Media Coverage of Issues' which is a list of items in *The Gisborne Herald* newspaper, and also items in the Council's own newsletter *Town and Country*;

(c) Appendix 7 'Consultation Log' which is a record of formal consultation and some informal discussions in relation to the variations.

[166] Ms O'Shaughnessy stated that she had witnessed no other resource management issue which had activated the wider community quite so strongly or to express such a solid view; and that the community had in her opinion been notably united in their view, as much as any community can be. The witness summarised the view identified by community consultation that the former Heinz Wattie land possess a unique potential for development which reflects the high amenity values of the area.

[167] Ms O'Shaughnessy stated that the views of the community had been obtained in a number of ways, some formal and some informal, referring to the contents of Appendixes 6 and 7, and to submissions on the variations. There are examples in her evidence of the weight that she placed on that material:

[168] Having acknowledged that the site has commercial value, the witness continued:[56]

> The community through the Plan has qualified that economic value, by determining that priority be given firstly to achieving the requirement of sections 7(c) and 7(f) of the Act, when determining appropriate use and development for this relatively small pocket of land zoned commercial.

[55] Para 10.3.3..
[56] B M O'Shaughnessy, evidence in chief, para 6.21.

[169] Of the policy about bulk retailing, she said:[57]

> Specific mention of bulk retail ... as an example of activity likely to be inappropriate, was necessary in my view to send a strong signal to operators of such activities about the views of the community. The community was aware that, despite the clear indications in the plan at the time the variations were notified that the amenity values of this area were to be promoted and enhanced for the future, that consent would likely be sought for such a development in the very near future. Council felt confident it understood the community view on this matter and that this warranted mention in the plan, in order to be transparent.

[170] Of the classification of large-format retailing as a non-complying activity, Ms O'Shaughnessy said:[58]

> Provision of LFR activities as anything other than non-complying activities in the zone would not provide for the future well-being of the community in an efficient or effective manner as it ignores the priority given by the community to the maintenance and enhancement of amenity values of this area.

[171] In cross-examination, Ms O'Shaughnessy explained that the consultation log in Appendix 7 did not record phone calls or individual approaches that members of the community had made to herself;[59] and that she regarded casual comments, letters to the editor and discussions in passing as consultation,[60] and deserving some significant weight "because it certainly supports the comments made in formal meetings."[61]

[172] The witness having described meetings with retailers, commercial landowners, and other business people, she was asked whether the consultation log shows consultation with the business community but no wider than that. In reply Ms O'Shaughnessy referred to coverage of the review process in the newspaper and in the Council's quarterly newsletter, from which people had made contact with her in a generally informal way as well as by submissions to the variations.[62]

[173] Asked if there had been any attempt to arrange formal consultation with sectors of the community other than business interests, Ms O'Shaughnessy stated that they had discussed it with the likes of Grey Power and similar groups, but none had eventuated.[63]

---

[57] Ibid, para 6.30.
[58] Ibid, para 6.55.
[59] Notes of evidence, 12.10.04, p 467.
[60] Ibid, p 469.
[61] Ibid, p 468.
[62] Ibid, p 471.
[63] Ibid, p472.

Consideration and findings

[174] In considering the evidence about the consultation and views of the community relied on by the Council and the Retailers Association, we keep in mind that in preparing and changing its district plan the Council is not to have regard to trade competition.[64] (We address the extent to which it could have regard to consequential effects of trade competition in the next section of this decision.)

[175] Even so, the evidence shows that in reviewing the retail provisions of its proposed plan, the Council was influenced by expressions of opinion from four sources: media coverage, consultation with the business community, informal expressions of opinion by individuals, and submissions on the variations when notified.

[176] The media, including newspapers, have valuable functions in society. Yet their content (including editorial material and selection of correspondence for publication) may be influenced by editorial policies, stated or unstated. Editors' views need not be given greater weight than those of other people. Review of newspaper content is not necessarily a reliable source of the range of views of people in a circulation area.

[177] The media coverage listed in Ms O'Shaughnessy's Appendix 6 included items in *The Gisborne Herald* newspaper, and also items in the Council's own quarterly newsletter *Town and Country*. Of course items in the newsletter were a means of informing the public of the Council's intentions and views. They cannot be seen as a source of information about public opinion concerning the review of the retail provisions.

[178] The formal consultation recorded in Ms O'Shaughnessy's Appendix 7 shows that the Council was active in obtaining the views of the business interests who would be affected by trade competition from retailing in the Outer Commercial Zone. Yet we could not place weight on trade competition views.

[179] We are unable to place weight, as Ms O'Shaughnessy did, on informal expressions of opinion, because the sources of those views have not been placed on record, and cannot be identified for verification. For all the appellants can know,

[64] s 74(3).

those sources may have been mobilised by central business district traders with whom retailers in the proposed Amenity Commercial Zone would be in competition.

[180] We have to hear and determine these proceedings in a judicial manner. It would not be consistent with that duty for the outcome to be influenced by the number of people who support or oppose the variations. So we should not place weight on a case of a party founded on the extent that the party (or its supporters) has mobilised public opinion.[65]

[181] We now come to the formal submissions on the variations. The evidence presented to the Council in support of the submissions was of course the proper foundation for the Council's decisions. However, as the Court has to have a *de novo* hearing, the proper foundation for our decision is the evidence presented to us at the appeal hearing, not the evidence of submitters at the primary hearing.

[182] In summary, for the purpose of these proceedings the sources of Ms O'Shaughnessy's opinion about the views of the community do not establish that those views were representative of the public, and we place no weight on them. Rather we will make our findings on the evidence given at the appeal hearing.

Visual, landscape, heritage and cultural amenity values

[183] The Council's case for the variations replacing the Outer Commercial zoning of the former Heinz Wattie land with the new Amenity Commercial Zone was that the new zoning would assist it to carry out its function of integrated management of effects to enhance amenity and heritage values of the area. The Council asserted that the area possesses high amenity values, and there is potential for enhancing them.

[184] Progressive Enterprises' case was that the whole of the former Heinz Wattie land and surrounding environs enjoy high visual, landscape, heritage and social amenity values.

[185] The appellants disputed that the site has amenity or heritage values that would warrant recognition by zoning. They contended that the site has low amenity values. They acknowledged that other parts of the area may have heritage values, but not the site. The appellants also contended that the Amenity Commercial Zone does not contain provisions for promoting any amenity or heritage values

[65] Cf *Contact Energy v Waikato Regional Council* (2000) 6 ELRNZ 1.

[186] The Retailers Association contended that it would be artificial to disregard the fact that the site is part of a larger area; and that further artificiality is introduced by arguing that it is only the harbour and river edge that has significant amenity value.

[187] The breadth of amenity values that may be considered is evident from the definition of that term in section 2(1) of the Act:

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

[188] We recognise that there may be some connection between visual, landscape, heritage and social values of the area, and that considered in combination they may contribute to amenity values. However in making our findings, we start by considering separately the evidence about visual and landscape values, and about heritage and cultural values. We do so in the course of considering the variation appeals, not the specific development the subject of the resource-consent application (which we consider later).

Visual and landscape values

[189] We start by reviewing the evidence bearing on the question whether the site possesses visual or landscape amenity values. Evidence was given by five witnesses who are qualified in landscape architecture: Ms R A Skidmore (also qualified in urban design), Ms M A Monzingo, Ms S M Dick, Ms M C Buckland, and Ms N E Henderson. We review their evidence in coming to our finding on this question.

Evidence

[190] Ms Monzingo had not distinguished between consideration of the variations and consideration of the visual effects of the specific proposal the subject of the resource consent appeal.

[191] Ms Monzingo stated that the site is located at the interface between the river, the new and proposed river edge developments, and the commercial core. She identified values from the proximity of the river and riverside reserve, the inner harbour and the commercial core; and views of, and from, Kaiti Hill; and

acknowledged that, viewed in isolation, the site may not seem to contain any outstanding amenity values.

[192] Ms Dick gave her opinion that the landscape values of the former Heinz Wattie land relate to its physical location within the geographic context of the river, harbour edge, ocean and hill environment. She acknowledged that neither the site nor its environs is an outstanding natural landscape or feature, but observed that Young Nicks Head is an outstanding natural and physical feature which is visible from locations in and around the former Heinz Wattie land.

[193] Ms Dick gave her opinion that the attractiveness of the area lies in its pivotal location within an amphitheatre of natural, physical and cultural icons, Titirangi Kaiti Hill, the Turanganui River, the harbour, and the sweep of Poverty Bay with views out to Young Nicks Head, and the civic centre of Gisborne. The witness referred to geographic, hydrologic and geologic relationships: the wash of the ocean meeting the mouth of two rivers, nestled harbour, bounded by the geological highpoint of Kaiti Hill.

[194] Ms Dick addressed the question whether the landscape values reach into the site, or are only a feature of the river and harbour edge. She gave her opinion that the landscape values do not end at the boundary of the site, in that

> ...even though some views (e.g. the river edge) may not be directly apparent, the specialness of the place is held by those living near or entering the site. In the same way, one can feel at the seaside without a direct view of the sea... Standing at the corner of Pitt Street and Customhouse Street one has a view to the Waikanae Reserve and the sea to the south-west, a view south-east to the Turanganui River ... and connecting the two: the view to Kaiti Hill.

[195] Ms Dick gave the opinion that the panorama stretching from Waikanae Reserve to the Turanganui River provides a significant visual linkage between the important natural features of the area: coastal foreshore, Kaiti Hill, and the Turanganui River. She did not accept that the visual amenity of those features is isolated to the margin of the river, as there are strong visual links between Customhouse Street and the river and Waikanae waterfront for pedestrians and drivers. She considered that the aesthetic coherence of that wider view is extremely important.

[196] Ms Buckland also identified views across the river to the inner harbour, and port activities and ships; and views up to Kaiti Hill, and hills to the west, and views out to Poverty Bay and Young Nicks Head. She also identified the land proposed to be rezoned Amenity Commercial as the foreground when viewed from Titirangi Kaiti Hill, an important tourist venue, and when approaching along the Esplanade or Kaiti Beach Road on the southern side of the harbour. The witness gave the opinion that the proposed Amenity Commercial Zone and its surroundings have unique visual and landscape amenity values.

[197] Ms Buckland did not agree that the site does not have the same attributes as the peripheral parts of the land. The witness remarked that the whole area needs to be dealt with in a holistic fashion; and that it is inappropriate to pick out specific sites which have river view advantages for protection, and treat other parts of the same block with more limited river views as completely different, divorced from their context.

[198] In cross-examination, Ms Buckland agreed that one of the visual links referred to in her evidence is obscured by the hotel.

[199] Ms Henderson also identified Kaiti Hill as an important feature from which one can enjoy views over the city and hinterland, and that the site is in the foreground of that view, though partly obscured from one viewing point. This witness stated that the site is generally visible from the inner harbour area, explaining that from the Wharf Café outdoor eating area, there is a view into the site over the reserve and the Bayleys Building car park; and a glimpse in along the right-of-way adjacent to the Bayleys Building. She also referred to glimpses of the site available from the riverside reserve between blocks of the Harbourview apartment complex.

[200] Ms Skidmore, too, identified Titirangi Hill as a visually dominant element that can be viewed from many parts of the town and assists to define the coastal edge and inner harbour. She observed that that the views from Titirangi Hill are panoramic, and place the central business district in its wider geographic context, so that people experience a wider expansive view, rather than being focused on one area within the town.

[201] Ms Skidmore remarked that existing and future development of the land between the site and the river will largely screen views of the site from the reserve, and gave the opinion that the site does not have a direct relationship to the inner harbour or the adjoining reserve. She gave the opinion that the uniqueness of the area within the urban context of Gisborne had been overstated; and she did not agree that the area is pivotal to the City.

Findings

[202] We have been assisted in understanding the evidence from having (at the parties' request) viewed the former Heinz Wattie land (including the site) from various vantage points, including those on Kaiti Hill.

[203] We find that views from Kaiti Hill across the Turanganui River towards central Gisborne are important; and that views from the former Heinz Wattie land (including the site) to Kaiti Hill are also valuable. We accept that views from the hill are expansive, and in that context the site itself is not significant. Views of the hill from the site are partly obscured by the buildings recently erected on the riverside, including the Portside Hotel. Views from the site of the river, harbour, and harbourside activities are substantially obscured by them too. From the harbourside, the site can only be seen through narrow glimpses between buildings, and is unimportant.

[204] Another important view in the landscape, that across Poverty Bay towards Young Nicks Head, is not obtainable from the site either, being obscured by the recent Harbourview and new Bayview apartment developments. The view from Customhouse Street to the river and harbour is not available from most of the site due to the recent intervening development. It will be further restricted by current and future development.

[205] We find unpersuasive the opinions of Ms Dick and Ms Buckland ascribing visual and landscape values to the site as specialness of place, and as holistic dealing. Although other parts of the former Heinz Wattie land possess visual and landscape amenity values (especially along the riverside recently developed for multi-storey buildings), we find that the site possesses no significant visual or landscape amenity values.

Heritage and cultural values

[206] We now review the evidence on whether the site possesses heritage or cultural amenity values. As well as the landscape architects already named, evidence on this topic was given by several other witnesses.

[207] The attributes of the site that were referred to as tending to suggest that it has heritage and cultural values were its proximity to the mouth of the Turanganui River, where Captain Cook first met tangata whenua; its former occupation by Maori fishing villages, and proximity to the foreshore of the river where there had been a waka landing place; its later occupation by European housing; and its location at the interface or transition between the commercial centre of the city and the riverside and inner harbour

[208] There is no heritage building on, or in the immediate vicinity of the site; nor any evidence that any event of historic or heritage value occurred on it. The former tauranga waka is not on the site; nor did the historic meeting of Captain Cook and tangata whenua occur on it. The burial ground of the former Maori occupation of the land is off the site in the Te Wai o Hiharore heritage reserve. When the former food processing buildings were demolished in accordance with the undertaking the Council gave to Gladiator in the sale agreement, the task was monitored by tangata whenua, and remains of two individuals that were uncovered were re-interred off the site.

[209] It was suggested that the site has significant amenity value due to its strategic location and proximity to the riverside reserve. However the site is not substantially visible from either.

[210] Ms Monzingo acknowledged that those amenity values do not all apply equally to all sites in the vicinity, and that the subject site, when viewed in isolation, may not seem to contain any outstanding amenity values. In cross-examination, Ms Buckland agreed that the river mouth, Captain Cook's statue, and the inner city walkway with palm trees linking to Waikanae Park would not be compromised by any form of development of the site.

[211] It was suggested that there could be pedestrian or visual links through the site to the river. The Council did not reserve them when it sold the land for commercial development, or when it consented to its subdivision for commercial activities. Even so, the possibility of providing them in development of the site for retailing is not precluded.

[212] Ms Dick stated clearly a theme that was also expressed by other witnesses:

> One could not say that the heritage and cultural amenity values are not part of one's experience at this location.[66]

[213] Ms Skidmore's opinion on the topic more fully expressed our understanding of the relationship:

> The subject site does not have a direct relationship with the inner harbour or the adjoining reserve... development [of the site] will not diminish the enjoyment and appreciation of the coastal environment for those using the waterfront reserve.[67]

[214] Like Mr Warren, we cannot discern any particular relationship between the site and the heritage and cultural values of the riverside reserve, harbour, and coastal features. In short we do not accept that the site possesses any significant heritage or cultural amenity value.

Findings

[215] Having reviewed the evidence, we find that the site possesses no significant visual, landscape, heritage or cultural amenity values.

[216] Even if we had accepted the evidence of the parties opposing the appeal, the alternative relief sought by the appellants would contain express provisions to assist the Council to carry out its function of management of relevant effects by classifying retail activity having a gross floor area of more than 5,000 square metres as a restricted discretionary activity, the discretion to include external design, appearance and orientation of buildings and parking areas and amenity values.

[66] Evidence in chief, p 5 para 22.
[67] Evidence in chief, p 11 par 43.

Trade competition

[217] Now we return to the direction that in preparing and changing its district plan the Council is not to have regard to trade competition. That was the context of submissions by Progressive Enterprises and by the appellants about the Court's jurisdiction to consider the effects of retailing in these proceedings.

The parties' attitudes

[218] Progressive Enterprises identified in the case law three approaches to dealing with the effects of retailing:

(a) the "economic thread" approach (as in *Terrace Tower v Queenstown Lakes District Council*[68]);

(b) the "necessary intervention" approach (as in *Westfield v Hamilton City Council*[69] and *St Lukes Group v Auckland City Council*[70]–the Sylvia Park decision), and

(c) the "active management commensurate with community expectations" approach (as in *St Lukes Group v North Shore City Council*[71]).

[219] Counsel for Progressive Enterprises argued that the economic thread approach ought not to be followed because presumptions about enabling and efficiency are inappropriate in a context where what is enabling for one person may be disenabling for another; and that what is enabling communities may not accord with aspirations of individuals.

[220] Mr Whata also argued that the necessary intervention approach is now partly redundant because it depended on the requirement of the former version of section 32 that rules and other methods must be 'necessary', and that has been omitted from the version inserted by the 2003 Amendment Act.

---

[68] [2001] NZRMA 23.
[69] (2004) 10 ELRNZ 254, Fisher J.
[70] Environment Court Decision A132/2001.
[71] [2001] NZRMA 412.

[221] Counsel contended that the active management approach taken by the Environment Court in *St Lukes Group v North Shore City Council* should be followed because:

(a) it provides for greater flexibility in giving expression to community aspirations for urban form and amenity;

(b) it provides for managing resources at a rate and in a way which enables people and communities to provide for their wellbeing;

(c) it accords with the broader discretion now afforded by section 32.

[222] On that foundation, Mr Whata submitted that a territorial authority is required to take into account effects of providing for retailing on the ability of people and communities to provide for their social, economic and cultural wellbeing, including effects on the focal and availability factor, and the functional efficiency and convenience of an existing retailing centre. He acknowledged that it should not take into account effects on individual retailers, and submitted that transportation costs are economic effects that should be taken into account. He questioned the suggestion that retail effects would have to be ruinous before intervention is justified, citing *Northcote Mainstreet v North Shore City Council.*[72]

[223] In reply, counsel for the appellants submitted that for trade effects to constitute an adverse social or economic effect they must be so significant that "the scene could be set for a CBD tumbleweed street scene";[73] or "seriously threaten the viability of the centre as a whole with on-going effects for the community served by the centre".[74]

[224] Mr Gould submitted that the 'active management' approach ought not to be preferred as it involves an inappropriate level of intervention into the area of trade competition. Counsel submitted that the correct approach remains that in *St Lukes Group v Auckland City Council* (the Sylvia Park decision) by which findings are made about growth in the relevant market; about the extent of the impact on trade competitors from which social and economic effects are claimed to follow; and about the social and economic effects consequential on the loss of trade.

---

[72] (2004) 10 ELRNZ 146, Randerson J, para [62].
[73] *Westfield v Upper Hutt City Council* Environment Court Decision W44/2001.
[74] *Northcote Mainstreet v North Shore City Council* (2004) 10 ELRNZ 146, para [62].

Consideration and findings

[225] Since the appeal hearing, the Supreme Court has given its judgment in *Westfield v North Shore City Council.*[75] That case concerned whether a resource consent application should have been notified, but there are passages in the reasons for judgment that are of more general application to the effects of retailing on existing centres.

[226] The following passages occur in the reasons for judgment of Justice Blanchard:

> [119] ...significant economic and social effects have to be taken into account. Such effects on amenity values would be those which had a greater impact on people and their communities than would be caused simply by trade competition...
> [120] ... social or economic effects must be 'significant' before they can properly be regarded as beyond the effects normally associated with trade competition on trade competitors. It is of course necessary for a consent authority first to consider how trading patterns may be affected by a proposed activity in order that it can make an informed prediction about whether amenity values may consequentially be affected.

[227] In her reasons for judgment, the learned Chief Justice remarked that there is no basis for suggesting that adverse effects on the amenities of existing centres must threaten the viability of the centres for them to be considered.[76]

[228] We apply those reasons to resolving the issue between the parties over the approach to be taken in dealing with the effects of retailing.

[229] Since no party advocated the 'economic thread' approach, we discard it for the present purpose.

[230] Since *Westfield v North Shore City Council* it is not now the law that retailing effects can only be considered if they seriously threaten the viability of the centre as a whole. A consent authority is to consider all significant effects of retailing on the ability of people and communities to provide for their social and economic wellbeing that have a greater impact than would be caused simply by trade competition.

[75] [2005] NZSC 17.
[76] Ibid, para [26].

[231] The method of making findings (about growth of the market, about the extent of the trade impact, and about the consequential social and economic effects) that was advocated by the appellants seems to fit the second sentence of the passage we have quoted from Justice Blanchard's reasons for judgment.

[232] Due to the 2003 alteration of section 32, the 'necessary intervention' approach would need to become the 'most appropriate means' approach.

[233] Progressive Enterprises relied for the 'active management commensurate with community expectation' approach on the Environment Court decision in *St Lukes Group v North Shore City Council.*[77]

[234] In his reasons for judgment in *Westfield v North Shore City Council,* Justice Blanchard quoted passages from the Environment Court decision in *St Lukes Group v North Shore City Council* with apparent approval. But those passages do not provide support for Progressive Enterprises' proposition that where a community has clear expectations about a level of desirable urban amenity, regulation of retailing may be appropriate to achieve outcomes which are commensurate with those expectations.

[235] Faced with a choice between that and a 'most appropriate means' approach, we prefer the latter as responsive to section 32 and as consistent with *Westfield v North Shore City Council.*

[236] To summarise, we hold that in preparing and changing its district plan,—

(a) The Council was not to have regard to trade competition:

(b) The Council was required to adopt the most appropriate means of achieving the objectives for achieving the purpose of the Act to assist it to exercise its function of integrated management and control of the effects of the use:

(c) In identifying the effects of provision for retailing, the Council should:

i. consider the extent to which trading may be affected (taking into account growth of the market);

[77] [2001] NZRMA 412.

ii. identify those effects that are significant (being beyond the effects normally associated with trade competition on trade competitors); and

iii. make an informed prediction about consequential social and economic effects (including those on amenity values).

Significant effects on trading in the central commercial area

[237] We now review the evidence to make our findings on the extent to which trading may be affected by retailing on the site; and then evaluate whether those effects would be significant (in the sense of being beyond the effects normally associated with trade competition on trade competitors). If we find that there would be significant effects, we have then to make a finding about any consequential social or economic (including transportation) effects that would result.

[238] Those findings will contribute to the judgement we need to make on whether Variation 147 is the most appropriate means of achieving the objectives for achieving the purpose of the Act to assist it to exercise its function of integrated management and control of the effects of the use

Identifying the effects on trade competitors

[239] The main evidence on this topic was given by Dr J D M Fairgray and Mr M G Tansley, both of whom are experienced independent consultants. Each of them focused on the effects of the specific proposal the subject of the resource-consent application. Neither of them addressed the question, more pertinent for considering the variation appeals, of the effects on trade competition if the site remained in the Outer Commercial Zone, or if it is zoned Fringe Commercial with or without the modifications proposed by the appellants. So, for want of evidence more directly in point, we consider (as an example of the nature and scale of effects that might occur if the variation appeal succeeds) the effects on trade competitors of the business the subject of the resource consent appeal. That proposed business is a The Warehouse Limited (TWL) retail store with a gross floor area of 10,045 square metres, a retail floor area of 8,571 square metres, and an on-site parking area providing 372 car-parking spaces. It would replace an existing TWL store in the Gisborne CBD which has a gross floor area of 4,148 square metres.

[240] Dr Fairgray estimated the impact on various types of retailing, attributing greater impact on apparel stores, other department stores and appliance stores. He gave the opinion that there would be significant redistribution of retail supply in the most impacted store types, through reduced floor space, staffing levels, stock levels and possibly closure of individual outlets. He quantified the effects in terms of employment per hectare, giving the opinion that it would reduce the intensity of activity in the main retail precinct from 10.2 FTEs per hectare to 8.9 FTEs per hectare, a drop of around 15.5%.

[241] Dr Fairgray agreed that those effects would occur if the new TWL store was located on any of several alternative sites around the Gisborne Central business district.

[242] Dr Fairgray had estimated that the additional travel to the site (beyond the existing TWL store in Gisborne) by shoppers in private vehicles would on average add 88 cents to the cost of each trip.

[243] Mr Tansley stated that most communities grow in household numbers, and the amount spent by households; and added that the amounts spent by tourists from overseas is increasing more rapidly than domestic market spending. From analysing demographic information from census data, this witness forecast household growth for the period from 2004 to 2009 at between 75 and 80 households per annum on average.

[244] Mr Tansley considered separately the effects of the proposed TWL store on supermarkets and on general merchandise retailers. He found that Gisborne could support more supermarket space than is currently provided, and gave reasons for his opinion that any encroachment the proposed store would have on the supermarket trade would be nominal and no threat to the retail sector.

[245] In considering the effects of the proposed larger TWL store on general merchandise retailers, Mr Tansley examined measurements of existing stores and found that there is under-provision of supply of department and variety stores; that minor reductions in other general merchandise categories are likely, and that vacancy levels are very modest. The witness took into account the likely growth in the number of households and in the average spending per household, including a net increase in tourist spending. The witness concluded that, even on a low growth assumption, general merchandise sales in the Inner Commercial Zone would, by the

second year of operation of the larger TWL store be the same as in the base year, and for other retailers in Gisborne central, sales would have increased. On a higher growth scenario, he forecast that sales in the Inner Commercial Zone would increase by nearly 4%: that there would be a 17% impact on department and variety stores, and a 1.5% impact on other general merchandise stores.

[246] On those bases, Mr Tansley gave the opinion that the trade competition effects on trade competitors would be of negligible level and of very short duration.

Finding the significance of the effects on trading

[247] In evaluating the significance of the effects on trade competitors, we are to take into account growth of the market, and attribute significance to those effects that are beyond the effects normally associated with trade competition on trade competitors.

[248] Mr Tansley's evidence took into account growth of the market in a way that was explained and acceptable. Dr Fairgray fairly stated that the effects he estimated (measured in terms of employment per hectare) would occur if the proposed TWL store is established on any of several alternative sites around the CBD (none of which is in the proposed Amenity Commercial Zone). His estimated additional travel cost is insignificant, even though based on a questionably high rate ($1) per kilometre.

[249] The combination of those two elements lead us to accept that the trade competition effects of retailing on the site on trade competitors in the Gisborne CBD would not exceed the effects normally associated with trade competition on trade competitors. Accordingly we find that, taking into account likely growth in the market, the extent to which trading would be affected by retailing on the site would be short-lived, and would not be significant.

[250] It follows that it is not appropriate for the Court to consider any consequential social or economic (including transportation) effects, whether on amenity values or otherwise.

Does Variation 147 represent the most appropriate means?

[251] We have now to reach our judgement on whether the variations, as they apply to the site, meet the tests of acceptability indicated by the legislation, to which we referred in Lists A and B in paragraph 128 of this decision.

[252] We come to that judgement on the basis of our findings:

(a) That the Council's purpose was the allocation of resources in achieving its view of the wise use of the site, in particular by preventing bulk retailing on it:

(b) That the Council's assertion that it had a strong mandate from the community for the variation does not deserve weight:

(c) That the site possesses no significant visual, landscape, heritage or cultural amenity value:

(d) That bulk retailing on the site would not have a significant effect on trade competitors, so that consideration of any consequential social or economic (including transportation) effects, on amenity values or otherwise, would not be appropriate.

[253] By Variation 147 the Council proposed to amend Objective 18.3 by inserting reference to the unique visual amenity and cultural heritage areas within the Amenity Commercial Zone. Its true objective was to prevent bulk retailing on the site, and it failed to establish that the site is a unique visual amenity and cultural heritage area.

[254] The Council proposed an amendment to Objective 18.5 by inserting reference to promoting the visual and physical link between activities in the Amenity Commercial Zone and the surrounding harbour, walkway, Poverty Bay and Kaiti Hill environment. In respect of the site, there is no substance in that.

[255] The purpose of the Act is not to give effect to the Council's view of the wise use of the land in question. It is the sustainable management of natural and physical resources as described in section 5. All provisions of a district plan, objectives, policies, rules and other methods, have to be in accordance with Part 2, which includes section 5.

[256] On the totality of the evidence the Council has not established that the Variation is the most appropriate way to achieve that purpose; nor that it is in accordance with section 5. The variation fails items A1, A3, and B3 in paragraph 128.

[257] All provisions of a district plan, objectives, policies, rules and other methods, have to assist the territorial authority to carry out its functions. The relevant functions are the integrated management and control of the effects of the use and development of land.

[258] Because the Council's purpose was the allocation of resources in achieving its view of the wise use of the site (in particular by preventing bulk retailing on it), the variation was not calculated to assist it to carry out its true functions of the integrated management and control of the effects of the use and development of land. The variation fails items A2 and B2 in paragraph 128.

[259] A policy, rule or other method has to be evaluated, having regard to their efficiency and effectiveness, by being the most appropriate way of achieving the objectives, taking into account the benefits and costs, and the risks of acting or not acting in cases of uncertainty or insufficient information.[78]

[260] For this purpose, we must consider the objectives without the amendments proposed by the variations that we have held fail to achieve the purpose of the Act.

[261] There is no basis on the evidence for applying to the site proposed Policy 18.4.3, about taking full advantage of the visual amenity and cultural values of the area, and discouraging activities which do not utilise those aspects of the location. The same applies to proposed Policy 18.6 about the amenity value of the Amenity Commercial Zone. To the extent that they apply to the site, those policies cannot be the most appropriate way of achieving the objectives of the plan. Their application to the site is based on an unsubstantiated assumption about attributes. There are no benefits to outweigh the costs of the policies. The extent of the cases of the parties and the evidence before the Court left no room for doubt about uncertainty or insufficient information.

[78] S 32(3) & (4).

[262] To the extent that the rules of the Amenity Commercial Zone preclude retailing on the site beyond that which is ancillary to other permitted activities, the same applies.

[263] So we find that so far as they would apply to the site, the policies and rules (including zoning) of the variations fail items B1 and B4 in paragraph 128.

[264] In summary it is our judgement that, to the extent that they apply to the site, the variations fail the tests of acceptability indicated by the legislation, and to that extent should be deleted.

Relief

[265] The relief sought by the appellants was not simply that the variations should be deleted to the extent that they apply to the site. The primary relief sought was deletion of the Amenity Commercial Zone entirely; rezoning the whole area to which it was to apply as Fringe Commercial, and amending the rules for the Fringe Commercial Zone.

[266] However the evidence was substantially directed to the appellants' site, and our findings have been focused on the site too. The alternative relief was related only to the site. No other party sought an order directed to the application of the Amenity Commercial Zone to any other land.

[267] In those circumstances we consider it appropriate that, in allowing the variation appeals, the directions the Court gives to the Council under clause 15 of Schedule 1 of the Act should be confined to the site. In our judgement the appropriate relief is that the Court direct the Council:

(a) to zone the site Fringe Commercial: and

(b) to amend the rules of the Fringe Commercial Zone, in respect only of the site, by providing that retail activity having a gross floor area greater than 5,000 square metres be provided for as a restricted discretionary activity, with the discretion restricted to external design, appearance and orientation of buildings and parking areas; traffic management; and amenity values.

The resource consent application

[268] We now come to the resource consent appeal, which we consider on the footing that the site is in the Fringe Commercial Zone with the provision for retail activity with a gross floor area greater than 5,000 square metres on the site being a restricted discretionary activity.

The proposal

[269] Eldamos's proposal is for a branch store for TWL in a new building on the site providing a retail floor area of 8,571 square metres and a total of 10,045 square metres gross floor area including a café, stockroom, offices, and an outdoor garden centre display/sales area of 266 square metres. There would be 372 parking spaces provided on the site. Earthworks and landscaping are proposed.

[270] The external cladding of the building would be a combination of concrete tilt panels and colour steel, with architectural features to articulate and provide visual relief to the facades.

[271] A band of TWL corporate red would be presented on the upper part of the facades facing the car parking and Customhouse Street. Otherwise the building would be painted a soft green.

[272] Signage is proposed to include TWL logos on the facades to the car parking and to Customhouse Street; and pole signs at the three vehicle access points to the site. The signs will be 7 metres high with sign boards 3.9 metres by 2.05 metres.

[273] Two-way customer vehicle access is proposed from Customhouse Street, Pitt Street and Reads Quay; and a 10.2-metre wide goods delivery access is proposed from Customhouse Street.

[274] A 3.8-metre wide footpath is proposed along the Customhouse Street face of the building with a canopy over to provide separate pedestrian access.

[275] Along the Customhouse and Pitt Streets frontages, lines of pohutukawa trees and ground cover are to be planted. Pohutukawa trees are also to be planted through the car parking area. Small gardens are proposed at the end of each row of car-

parking spaces. A hedge of *pittisporum tenuifolium* is proposed along the south-eastern boundary with the hotel property.

Approvals

[276] Written approvals to the proposal have been given by the owners of the hotel, of the Harbourview apartment tower, of the office building at the corner of Pitt Street and Reads Quay, and of the contractor's yard at the corner of Kahutia and Customhouse Streets.

Proposed consent conditions

[277] The appellants presented a set of consent conditions which they proposed could be imposed on a grant of consent. There was some expectation that the other parties might comment on them by written submissions within 15 working days of the end of the hearing, but they do not appear to have done so. It is appropriate that we should consider the proposal and its effects on the footing that if consent is granted, the conditions proposed by the appellants would be imposed.

[278] Condition 12 of the conditions applicable to the development consent would specify a colour 'Ivorie' for the roof, and would allow for the colour scheme for the south-eastern façade to be modified at the request of Harbourview within 20 working days of commencement of the consent.

Status of proposal

[279] By the transitional district plan the property is zoned Industrial 2. Retailing as proposed is not provided for in that zone, and the proposal is a non-complying activity in terms of the transitional plan.

[280] By the proposed district plan prior to the variations the land was in the Outer Commercial Zone, and retailing was a permitted activity. The result of the variations is that the Court's direction that the site be included in the Fringe Commercial Zone, and provision be made in that zone for retailing occupying a gross floor area of 5,000 square metres or more be a restricted discretionary activity. So the proposed retailing activity is a restricted discretionary activity.

[281] As the new building would be visible from the streets, it is a controlled activity, control being limited to external design and appearance and amenity values.[79]

[282] The two free-standing signs are non-complying activities.

[283] Resource consent is also required for dispensations from standard requirements for crossing widths, number of loading bays, yards and landscaping.

Effects on the environment

[284] The proposal being for retail activity on the site with a gross floor area exceeding 5,000 square metres, it is classified as a restricted discretionary activity. The Court's powers to decline consent, or to impose conditions, are restricted to the matters specified, being external design, appearance and orientation of buildings and parking areas; traffic management; and amenity values.[80] So we confine our consideration of the actual and potential effects on the environment of allowing the activity to those topics.

Effects on the potential environment

[285] Before we engage in identifying those effects we need to decide on whether, and if so the extent to which, we should have regard to actual and potential effects of those kinds on the potential environment (as in *Wilson v Selwyn District Council*[81]), as well as those on the present environment. Three of the parties made submissions on this question.

[286] Mr Whata submitted that *Wilson* is authority for the proposition that, for the purpose of section 104, an effect on the development potential of another property is a relevant effect on the environment, and observed that the weight to be accorded to it is a matter to be assessed in each case. Mr Whata urged that it calls for a broad holistic approach to effects assessment, and also cited *Kapiti Environmental Action v Kapiti Coast District Council.*[82]

---

[79] Rule 18.10.2.1.
[80] S 77B(3)(c).
[81] [2005] NZRMA 76 (HC).
[82] [2002] NZRMA 289 (EC) confirmed on appeal sub nom *Pukenamu Estates v Kapiti Environmental Action* HC Wellington AP106/02; 1/07/03, Ronald Young J.

[287] Mr Green submitted that *Wilson* gives rise to some serious practical problems in the context of resource-consent applications. He acknowledged that *Wilson* excludes the need to consider fanciful developments of surrounding land. He observed that future subdivision of land surrounding the subject site was not regarded as fanciful, even though—

(a) subdivision required resource consent as a discretionary activity under the transitional district plan and as a consent authority under the proposed plan;

(b) subdivision that could have an impact on existing rural uses would be clearly contrary to the objectives and policies of both plans; and

(c) there were several outstanding reference appeals seeking greater control over the siting of houses that could potentially give rise to reverse sensitivity effects.

[288] Counsel observed that *Wilson* called for a consent authority to assume that the current rules would remain unchanged, and to form a judgement on the merit of existing challenges to them that had not been heard.

[289] The Council submitted that we should have regard to the effects of the proposal on potential development and use of the parts of the Heinz Wattie land that remain undeveloped for apartment or hotel purposes or small-scale retailing and tourist-oriented facilities, in accordance with the Amenity Commercial zoning. We should also have regard to the effects of the proposal on potential development and use of land across Customhouse Street to the north-west, zoned Outer Commercial, for commercial and retailing activities in place of the existing industrial uses.

[290] Mr Gould submitted that, to the extent that *Wilson* requires an expansion of the permitted baseline test to the adjacent environment as it might exist in future, it is wrong and should not be followed in these proceedings. This Court should apply the Court of Appeal authorities *Bayley v Manukau City Council,*[83] *Smith Chilcott v Auckland City Council* [84] and *Arrigato v Rodney District Council,*[85] which defined the permitted baseline by reference to the environment as it exists or as it might exist as of right.

---

[83] [1999] 1 NZLR 568; 4 ELRNZ 461; [1998] NZRMA 513 (CA).
[84] [2001] 3 NZLR 473; 7 ELRNZ126; [2001] NZRMA 503 (CA).
[85] [2002] 1 NZLR 323; 7 ELRNZ 193; [2001] NZRMA 481 (CA).

[291] Mr Gould also submitted that in this case recent development or resource consents have determined the environment of the site, with the exception of one small lot located between a carpark and an office building, for which potential residential activity would be fanciful.

[292] On reviewing the judgment in *Wilson*, we doubt whether the learned Judge was intending to develop the law on the permitted baseline. The 2003 Amendment Act did not apply to that case, so the common-law permitted baseline (developed by the Court of Appeal) applied, not the codification now in section 104(2). The judgment gives no indication that the Court of Appeal authorities were in question.

[293] Rather, although the judgment refers to the baseline, we infer that the learned Judge was explaining the scope of the environment for the purpose of the prior step, that is, identifying what the actual and potential effects of allowing the activity would be. We accept that there could sometimes be practical difficulties in identifying potential activities (some of which were explained by Mr Green).[86] But it is only when the actual and potential effects on the environment have been identified that the consent authority has to consider whether some of them are not to be taken into account because they are within the permitted baseline.

[294] If our understanding of *Wilson* is correct,[87] then it is not inconsistent with the Court of Appeal authorities that constructed the permitted baseline test. As such, we have to apply *Wilson* as authority. The option of not following it, as Mr Gould urged, is not open to us.

[295] So applying *Wilson* we hold that, in identifying for the purpose of section 104 actual and potential effects on the environment of allowing the activity, we should include an actual or potential effect on a non-fanciful potential development or use of another property. We accept Mr Whata's submission that the weight to be accorded to such an effect is a matter to be assessed in each case. The relative probability of the hypothetical activity might influence that. Then, like any other adverse environmental effect, it could be disregarded if the plan permits an activity with that effect.[88]

---

[86] See eg *Freilich v Tasman District Council* Environment Court Decision C015/05.
[87] Leave has been granted for appeals to the Court of Appeal in both the *Kapiti* and *Wilson* cases. The judgments of that Court in those cases may be expected to resolve the difficulties in understanding and applying this area of the law.
[88] S104(2).

Effects of design, appearance & orientation

Parties' attitudes

[296] Harbourview contended that there would be adverse effects on the environment by the apartment occupiers being faced with an outlook on a 128-metre long utilitarian building varying in height from 6 metres to 10 metres that would obscure views of the hills to the north and west, would shade one block of apartments for most of the winter months, and would shade the pool and spa area in early mornings during spring and autumn. Progressive Enterprises contended that the proposal would cause a visual dysfunction.

[297] The appellants contended that the proposal would have no or minimal visual impacts from the riverside, foreshore or any public viewing points, no more than minor adverse effects.

Evidence

[298] We review the evidence on this topic of the five landscape architects who testified at the appeal hearing.

[299] Ms Monzingo gave the opinion that the development would have a very strong visual character that is appropriate for bulk retailing but "out of character" with the surrounding area and, being a dominant utilitarian building of industrial scale, would adversely affect the streetscape and outlooks from adjacent properties.

[300] Ms Dick gave the opinion that the brand red colour on two sides of the building, high reflectance finishes on the other two and the roof, the scale and bulk of the building, the continuous unbroken length of the facades and roof line, and the size of the car parking area with little planting, would diminish landscape, aesthetic, heritage and shared/recognised values. This witness rated the adverse effects as more than minor.

[301] Ms Dick accepted that shading of Harbourview Apartments from the proposed building would be no more than expected from a complying building. She considered that changing the finishes of the roof and walls to those of lower reflectance values would not mitigate the effects of the larger expanse of roof and walls from Kaiti Hill and Harbourview Apartments; and that the proposed planting

would not be adequate to reduce the impact of the parking area. She regarded the variations in external cladding and height of panels as mere decoration that would do little to mitigate the character of the solid industrial walls.

[302] In cross-examination, Ms Dick stated that she had provided a landscape and visual assessment for the Bayview Apartments on an adjoining property, a 6-storey building reaching a height of 20.1 metres. In her evidence in support of that proposal she had given the opinion that the importance of Kaiti Hill would not be affected by the Bayview building.

[303] Ms Buckland had assessed the visual effects of the proposed development from three viewpoints: the corner of Customhouse and Pitt Streets, Kaiti Hill, and the inner harbour. She considered the length of the building (a solid block), its low elevation, and the colours. Using the existing vacant site as the baseline, she rated the overall visual effects as between low/moderate and moderate/high.

[304] In cross-examination, Ms Buckland agreed that it is not fanciful to suppose that another row of apartment or accommodation buildings could be located on the site, of scale, design and width similar to those that have been constructed on the adjoining properties facing the river.

[305] Ms Henderson had also assessed the visual effects of the proposed development from the same vantage points, and from Awapuni Road. She identified the bulk and scale of the building, the red walls, the height and size of the pole signs, and the size of the carparking area, and gave the opinions that the development would create significant adverse effects on the visual values of the area, and that the proposed mitigation measures would be inadequate.

[306] In cross-examination, Ms Henderson stated that a building proposed for an adjoining site between the hotel and the Bayley office building is to have 5 storeys and be 20.5 metres high. She doubted if the proposed building would be visible from the inner harbour if that building is constructed.

[307] In her evidence Ms Skidmore observed that buildings in the vicinity of the site are of a particularly utilitarian character, and gave the opinion that introduction of the proposed large scale building of relatively simple form would respond to visual elements of its context. She remarked that feature elements of the design contribute to variation in the building form.

[308] Ms Skidmore remarked that the relatively undifferentiated frontage presented to Customhouse Street would be broken by use of feature arch elements and use of different materials and colours; and the provision for a café in the north-eastern corner with glazing along the Customhouse Street façade. The witness also considered that the long façade facing Pitt Street is well articulated with variety of materials, forms and colour finishes. She remarked that the south-eastern corner of the parking area would be largely screened from view from the street by the mounding of the reserve and future development on the lots fronting Pitt Street.

[309] Ms Skidmore considered views of the development from Harbourside Apartments, from the Portside Hotel, the Bayleys Building, and from Titirangi (Kaiti) Hill, and identified proposed mitigation measures. She concluded that with the mitigation proposed the building would not diminish those views, and that the configuration and development form recognises the character of the surrounding urban environment and has an appropriate relationship with its immediate environment in urban design terms.

Findings

[310] In considering that evidence it is appropriate to have regard to effect on a non-fanciful potential development or use of other property in the vicinity. We find that it is not fanciful to suppose completion of the Bayview Apartment Building, construction of a 20-metre high building between the Portside Hotel and Bayley's Building, and development of the lot between that and the cultural reserve.

[311] Although the basic retail building would have been utilitarian, design elements have been incorporated that distinguish it from the purely utilitarian, even if to some they are "mere decoration". In the context of the Portside Hotel, the Bayview Apartments, and the proposed building between that building and Bayleys building, and the utilitarian buildings across Customhouse and Pitt Streets, we do not accept that the proposed building is out of scale. Nor is it out of character with the latter properties, or with the log storage across the river. The proffered condition about finishes would reduce the reflectance effects referred to by Ms Dick.

[312] We accept that the shading effects on the Harbourside Apartments property would be no greater than would be expected from a complying building. We also accept that the adverse effect of the design and appearance of the building from those apartments, from the Portside Hotel, and from the Bayview Apartments would be

effectively mitigated in the ways described by Ms Skidmore. The developers of the first two gave written approvals, and the proposal for this development was made before the Bayview development obtained consent.

[313] The extent of the corporate red on two facades, and the height and sizes of the pole signs to present corporate logos, are adverse visual effects, and there should be scope to enhance the mitigation effects of planting in the carparking area.

[314] Taking those matters into account, we judge that the effects of the design, appearance and orientation of the proposed development would be no more than low to moderate. The effects could be reduced by restricting the corporate signage; and the appearance of the carpark could be further mitigated by additional planting.

Traffic management effects

[315] The parties agreed that the traffic effects on the surrounding traffic network arising from traffic movements generated by the proposed TWL store would be no more than minor. We accept that, and find that there would be no significant traffic management effect of allowing the activity.

Effects on amenity values

[316] The other matter on which a judgement is to influence the grant or refusal of consent is effects on amenity values. We have already quoted the broad meaning given to that term by the Act.

[317] The parties opposing the resource consent contended that the proposal would detract from the amenity values of the environment, and the appellants contended that the proposal would have no or minimal impacts.

[318] In considering the variation appeals, we reviewed the evidence bearing on the question whether the site possesses visual or landscape amenity values. In the context of the resource-consent appeal, having already come to our findings on the effects of design, appearance and orientation of the building and parking area, the remaining question is slightly different. It is whether and to what extent the proposed activity would have actual or potential effects on the amenity values of the environment. So we have to review the evidence again to come to a finding on that

question, avoiding duplication of effects of design, appearance and orientation of the building and parking area.

The evidence

[319] Ms Monzingo gave the opinion that the development would be out of character with the surrounding area and would adversely affect the amenity values of adjacent lots; that it would separate the amenity values associated with the commercial core from those associated with the river and inner harbour.

[320] In cross-examination, Ms Monzingo agreed that the band of residential and accommodation buildings around the perimeter of the site separate the edge of the river from the commercial core in a physical sense, but not in an amenities sense. Asked whether there is anything about the development that would interrupt or prevent an appreciation of the general heritage values in the precinct, the witness did not identify any.

[321] Ms Dick had considered the shading effects of the proposed TWL building on the Harbourview Apartments, and gave the opinion would be no more than that expected from a complying building. She also referred to adverse effects on the amenity values associated with the riverside reserve and pedestrian linkages to the CBD and the marina harbour.

[322] This witness had provided evidence in support of the application for the Bayview Apartment building, in which she had given the opinion that that building would not impact negatively on the landscape significance of Kaiti Hill, and that the importance of Kaiti Hill from within the city would not be affected by the proposed building (20.1 metres high). She agreed with Mr van Kregten's evidence on that proposal that views of Titirangi from around the city will for the most part be partly obstructed, and that anyone seeking an unobstructed view of that landmark would stand on the riverbank walkway, or other vantage points.

[323] The evidence of Ms Buckland related to the visual effects of the design and appearance of the development (earlier considered), but did not extend to other effects on the amenity values of the environment.

[324] Ms Henderson gave the opinions that the increased traffic movement on Customhouse and Pitt Streets and Reads Quay generated by the proposal would change the ambience of those streets, impacting on the amenity and character of the area; and that local attractions of the river walkway, restaurants, parks and accommodation would not be enhanced by those effects. She considered that the heritage reserve on Pitt Street would look forlorn surrounded by carparking; that the development would break down the urban pattern, and reduce the legibility of this part of the city; and that the open space of the car park would create a failing in the city structure.

[325] This witness also gave the opinion that the historical and cultural context would be effectively negated by the proposal. In particular she considered that there had been no attempt to contain the space or integrate the reserve in a design sense with its surroundings, or reinforce a connection with the river walkway and recreation reserve.

[326] In cross-examination, Ms Henderson accepted that the existing development on the perimeter of the site does not allow for pedestrian linkages through to the harbour front, but thought that there are still opportunities alongside the right-of-way, and on undeveloped privately owned land fronting Pitt Street. She agreed that there are no other opportunities on the perimeter of the site as it faces the river.

[327] Ms Skidmore gave the opinions that the residential apartments and hotel provide an appropriate built edge to the riverside reserve; that the site does not have a direct relationship to the inner harbour or the reserve; and that the proposal would not diminish the enjoyment and appreciation of the coastal environment by those using the waterfront reserve. She considered that the site is at the periphery, and slightly removed from, the urban core, and the development would not erode the continuity or integrity of the core environment. This witness also gave the opinion that the proposal would not diminish the amenity of the immediately adjoining street environment, and that the proposed café would relate directly to that environment and would enhance the relationship between the development and street environment.

Findings

[328] We have addressed effects of design, appearance and orientation of the building and parking area in a previous section. We now confine ourselves to considering whether there would be actual or potential effects on other amenity values of the environment.

[329] We accept that the proposed building would not cause shading of other properties, or obstruct views of Titirangi/Kaiti Hill, any more than other complying development. Indeed the extent of the carparking area would result in less shading and view obstruction than other potential development of the site. We also accept that the development is sufficiently separated from the central business district that it would have no adverse effect on the amenity values of that part of the environment.

[330] We have considered Ms Henderson's opinion about the effect on the amenity values of the heritage reserve fronting Pitt Street. We accept that car-parking activity on the adjoining site might detract from some people's appreciation of the pleasantness, aesthetic coherence, or cultural attributes of the reserve.

[331] We have also considered Ms Henderson's opinion about the effect of the development on the urban pattern, legibility and structure of this part of the city. We accept that those qualities could be amenity values in the broad meaning given to that term by the Act. But we do not accept that the proposal would adversely affect people's appreciation of the environment in terms of those qualities.

[332] We now address the pedestrian links between Customhouse Street and the riverside. The main link is along Pitt Street. That would not be interrupted by the proposal.

[333] However some of the witnesses considered that the lack of provision for additional pedestrian links from Customhouse Street across the site to the riverside reserve is an adverse effect on the amenity values of the environment. We do not accept that. There was opportunity for the Council to make provision for pedestrian paths across the site when it owned it, but it did not do so. There may also have been opportunity for the Council to make provision for pedestrian paths across the site when it consented to subdivision of the Heinz Wattie land, but it did not do so.

[334] In short, it is not the proposed development of the site now that it is privately owned that causes the loss of opportunity, it is the Council's omission to provide for it when it had power to do so. Nor would any adverse effect on the amenity values of the area be caused in practice by the development. The current development between the site and the riverside reserve precludes such a pedestrian path. But the development would not in practice prevent anyone who wished to walk from Customhouse Street across the parking area and through the access to Reads Quay.

[335] In short, we do not accept that the development would cause any adverse effect on the environment in respect of pedestrian access between Customhouse Street and the riverside reserve.

[336] To summarise, the only potential adverse effect of the proposal on the amenity values of the environment would be that car-parking activity on the site might detract from some people's appreciation of the pleasantness, aesthetic coherence, or cultural attributes of the adjoining heritage reserve. In our judgement, that effect would be no more than minor.

Permitted baseline

[337] By section 104(2), when forming an opinion about effects on the environment of allowing an activity, a consent authority may disregard an adverse effect of an activity if the plan permits an activity with that effect.

[338] The permitted activities in the Fringe Commercial Zone (provided they comply with the general rules) include residential accommodation, educational institutions, offices, parking areas, service stations, and health and medical centres. The general rules require landscaping for carparks. They do not control the colour of buildings.

[339] The adverse effects of the design, appearance and orientation of the proposed development would not be significantly different whether the development is for a TWL store or for a service station.

[340] The adverse effect on amenity values of the heritage reserve caused by car parking on the site would not be significantly different whether the carparking is associated with the proposal or with a service station, a health and medical centre, or an educational institution.

[341] Except to the extent (already mentioned) of restricting the corporate signage and mitigating the appearance of the carpark by additional planting, we find that the adverse effects of the proposal on the environment should therefore be discarded.

Plan provisions

[342] In having regard to the transitional district plan, we place little weight on its contents because it was prepared under the 1977 Act, and does not represent provisions for achieving the purpose of the Resource Management Act, nor for assisting the Council to carry out its functions for achieving that purpose.

[343] Even so, because the proposal is a non-complying activity in terms of the transitional plan, section 104D applies, and a consent authority can grant consent only if it is satisfied that the adverse effects on the environment will be minor, or the activity will not be contrary to the objectives and policies of the plans. Section 104(2) applies in coming to a decision about whether the adverse effects will be minor.[89]

[344] We have identified the adverse effects of the proposal on the environment as being:

(a) low to moderate effects of the design, appearance and orientation of the proposed development, which could be mitigated by restricting the corporate signage, and by additional planting; and

(b) no more than minor detraction from some people's appreciation of the pleasantness, aesthetic coherence, or cultural attributes of the adjoining heritage reserve.

[345] Having applied the permitted baseline described by section 104(2), we have found that the adverse effects of the proposal on the environment should be discarded.

[346] Accordingly we find that the proposal complies with the first of the conditions of power to consent to a non-complying activity set by section 104D(1).

[89] 104D(2).

[347] In having regard to the provisions of the proposed plan, we confine ourselves to those that bear on the specified matters by which power to decline consent, or to impose conditions, is restricted: external design, appearance and orientation of buildings and parking areas; traffic management; and amenity values.

[348] We have found that the adverse effects on the environment of external design and appearance of the proposed building and parking area can be mitigated by restricting the corporate signage and by additional planting; and any other potential adverse effects are, by application of section 104(2), to be discarded.

[349] Restriction of the corporate signage, and additional planting, can be required by conditions of consent under section 108. On the basis that they would be required in that way, it is our judgement that the proposal qualifies for resource consent as a restricted discretionary activity in terms of the proposed plan; and as a non-complying activity in terms of the transitional plan.

[350] Because the proposed free-standing signs are non-complying activities, power to consent to them only exists in one or other of the conditions in section 104D(1). We are satisfied that the adverse effects of the proposed signs would be minor, and are capable of being mitigated; and find that the condition of power to consent exists.

[351] We have not expressly considered in this decision the details of the dispensations from the requirements of the proposed plan for crossing widths, number of loading bays, yards and landscaping. In the context of the deeper issues of the case, those matters were absorbed into broader considerations. We judge that consent to the proposal should incorporate those dispensations.

Determinations

[352] The appeals will therefore be allowed to the extent that:

(a) The Court will direct the Council

(i) To zone the site Fringe Commercial: and

(ii) To amend the rules of the Fringe Commercial Zone, in respect only of the site, by providing that retail activity having a gross floor area greater than 5,000 square metres be provided for as

a restricted discretionary activity, with the discretion restricted to external design, appearance and orientation of buildings and parking areas; traffic management; and amenity values.

(b) The Court will grant resource consent for the proposal on the conditions presented by the appellants on 10 February 2005, amended so as to restrict the commercial signage and to require further planting than shown on the landscaping plans referred to in Condition 5.

[351] The appellants may lodge and serve a draft formal order to give effect to those outcomes. If any party wishes to contend that the formal order fails to correctly give effect to this decision, written submissions, proposing the amendments sought, may be lodged and served within 10 working days of receipt of the appellants' draft. The appellants my lodge written submissions in reply within 10 working days.

[352] The question of costs is reserved. Any application for an order for costs may be lodged and served within 15 working days of the date of this decision. Any party against whom an order is sought may lodge and serve written submissions in reply within 15 working days of receipt of an application.

DATED at Auckland on 22nd May 2005.

For the Court:

D F G Sheppard,
Alternate Environment Judge.