BEFORE THE CENTRAL OTAGO DISTRICT COUNCIL

Under	**the Resource Management Act 1991**
And	
In the matter of	**a submission on proposed Plan Change 18: Cromwell Industrial Expansion, to the Central Otago District Plan**

Legal Submissions on behalf of the Director-General of Conservation *Tumuaki Ahurei*

Submitter No. 8

Dated: 5 July 2023

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MAY IT PLEASE the Hearing Commissioner

The following submissions are made on behalf of the Director-General of Conservation Tumuaki Ahurei (Director-General).

Introduction

1. The Director-General submitted[1] to the Central Otago District Council (Council) on Plan Change 18: Cromwell Industrial Expansion (PC18) to the Central Otago District Plan (Plan).

2. As stated in the Director-General's submission, her key issue is potential adverse effects of the proposed industrial zone extension on the adjacent Cromwell Chafer Beetle Nature Reserve (the Reserve).

3. These legal submissions will cover the following matters in support of the Director-General's submission:

   (a) Statutory protection for the Reserve and the Cromwell Chafer Beetle

   (b) Application of the Resource Management Act 1991 (RMA)

   (c) The Exposure draft National Policy Statement for Indigenous Biodiversity

   (d) PC18 and the operative Plan

Statutory protection for the Reserve and the Cromwell Chafer Beetle

The Reserve's classification as a nature reserve shows its importance

4. The Reserve was proposed in the late 1970s when the then Cromwell Borough Council supported creation of the reserve to protect the last known undisturbed habitat of the Cromwell Chafer Beetle (CC Beetle) in the world. The Reserve was formally gazetted and classified as a nature reserve in 1984.[2] It was the first area in the world to be set aside primarily to protect an invertebrate.

5. Section 20 of the Reserves Act 1977 (RA) sets out the primary protective purpose of reserves classified as nature reserves:

[1] Submission on Plan Change 18 to the Central Otago District Plan dated 9 December 2021, submission no. 8.
[2] NZ Gazette 1984, page 1789

20 Nature reserves

(1) It is hereby declared that the appropriate provisions of this Act shall have effect, in relation to reserves classified as nature reserves, for the purpose of protecting and preserving in perpetuity indigenous flora or fauna or natural features that are of such rarity, scientific interest or importance, or so unique that their protection and preservation are in the public interest.

6. This emphasises the importance of the values being protected in the public interest in perpetuity – here the indigenous CC Beetle and its habitat. As Mr Chinn's evidence shows[3], the Reserve's values are rare, of scientific interest, and unique, so as to require their protection and preservation in the public interest.

7. Section 20 RA sets out how nature reserves are to be managed and administered having regard to their primary purpose This includes:

   (a) Preserving the Reserve as far as possible in its natural state: s20(2)(a)

   (b) Restricting entry and access to the Reserve to only persons who hold an access permit granted under the RA, to better protect and preserve the fauna in its natural state: s20(2)(c).

8. This default restriction on public access to entry by permit only again emphasises the importance of the CC Beetle values protected and preserved by the Reserve.

9. By contrast, the public generally have freedom of entry and access to reserves classified as recreation (s17 RA), historic (18 RA) or scenic (s19 RA).[4] Even for reserves classified as scientific (s21 RA), the starting point is the public have access unless the Minister of Conservation considers it necessary for the adequate protection and management of a scientific reserve or part thereof to restrict public access to only those holding a permit.[5]

10. For completeness, there is an ability to restrict public access to government purpose reserves (s 22 RA) and local purpose reserves (s23 RA). As for all reserve classifications other than nature reserves, before public access is restricted the administering body or responsible Minister must take a positive action[6], public access is not restricted by default.

[3] Evidence of Warren Guy Hill Chinn for Director-General of Conservation dated 23 June 2023, paras 15-16 and 21-25.
[4] In all these classification types, public entry and access may be restricted where this is necessary for the protection and general wellbeing of the reserve and the protection and control of the public using it: s17(2)(a), s18(2)(b) and s19(2)(b) RA.
[5] Section 21(2)(a) RA.
[6] Section 22(5) and s23(3) RA.

The Cromwell Chafer Beetle is fully protected under the Wildlife Act 1953

11. The Wildlife Act 1953 (WA) absolutely protects all wildlife in New Zealand unless the species of wildlife is specified in Schedules 1 – 5 of the WA.[7] However, invertebrates are not automatically protected under the WA. This is because they do not automatically come within the definition of "wildlife" as this refers to "*… any animal that is living in a wild state …*" and "animal" is defined to mean a mammal, a bird, a reptile, and an amphibian.[8] The definition of "animal" has been amended to add:

> "and includes any terrestrial or freshwater invertebrate declared to be an animal under section 7B …"

12. Section 7B(1) provides that terrestrial invertebrates specified in Schedule 7 of the WA are "animals". Accordingly, the specified terrestrial invertebrates are also "wildlife" and fully protected by the WA.

13. Section 7B and Schedule 7 were introduced into the WA on 19 September 1980, and specified the CC Beetle giving it absolute protection as wildlife from that date.[9] This recognition of the need to protect the CC Beetle demonstrates the importance of this species.

14. As Mr Chinn states[10] the CC Beetle is still considered to be Threatened: Nationally Endangered. The Department of Conservation (Department) has been carrying out a work programme to manage the Reserve and better understand how it provides habitat for the CC Beetle since the Reserve was created nearly 40 years ago.[11]

Application of the RMA – Part 2 Section 6(c), and Section 31 indigenous biodiversity

15. The scheme of the RMA as it relates to indigenous biodiversity was considered by the Environment Court in *Director-General of Conservation v Invercargill City Council* where the Court stated[12]:

> "… the primary responsibility of local authorities when exercising their functions in respect of indigenous biodiversity is part of the very definition of "sustainable management": to safeguard the life-supporting capacity of ecosystems."

16. Under section 6, in achieving the RMA's sustainable management purpose, all decision-makers under the Act in relation to managing the use, development and

[7] Section 3 WA and noting that Schedule 6 wild animals specified under the Wild Animal Control Act are also excluded.
[8] Section 2 WA.
[9] The Wildlife Amendment Act 1980 introducing section 7B and Schedule 7 listed the Cromwell Chafer Beetle under the category "*Scarabaeidae – scarab beetles"* when enacted: http://www.nzlii.org/nz/legis/hist_act/waa19801980n17200/
[10] Evidence of Warren Chinn, supra at para 14.
[11] Supra at para 25.
[12] [2018] NZEnvC 84, at [45]

protection of natural and physical resources are required to recognise and provide for matters of national importance, including:

> (c) the protection of areas of … significant habitats of indigenous fauna

17. "Protection" is not defined by the RMA. In *Royal Forest & Bird Society of New Zealand Inc v New Plymouth District Council*[13] the Environment Court considered "protection" as used in section 6(c) and held:

> We use it in the sense … as meaning to keep safe from harm, injury or damage. The only gloss which we would put on to that meaning is that it is implicit in the concept of protection that *adequate* protection is required.[14]

18. I submit the Reserve, as the sole remaining habitat of the CC Beetle, must be significant habitat of indigenous fauna to be protected as a matter of national importance. In the context of PC18 and the Reserve, I submit *adequate* protection extends to the areas bordering the reserve where activities in those areas may potentially adversely affect the reserve's significant habitat for the CC Beetle.[15]

19. Section 31(1)(b)(iii) was inserted into the RMA in 2003[16] and under this Territorial authorities, such as the Council in its District, have functions for the purpose of giving effect to the Act including:

> (b) the control of any actual or potential effects of the use, development, or protection of land, including for the purpose of—
> …
> (iii) the maintenance of indigenous biological diversity:

20. Pursuant to this section in the exercise of its functions the Council is required to control not just any actual effects but also any potential effects of the use, development, or protection of land for the purpose of maintaining indigenous biological diversity.

21. In applying this to PC18 and the Reserve, I submit a positive action is required of the Council in its functions to give effect to the RMA. While the method by which this is achieved is up to Council, it must still be sufficient to meet this function and the

[13] [2015] NZEnvC 219
[14] Supra at [63].
[15] Evidence of Warren Chinn, supra at para 30.
[16] As part of New Zealand implementing the Convention on Biological Diversity, in particular Article 8, ratified by New Zealand in 1993: https://www.cbd.int/doc/legal/cbd-en.pdf

sustainable management purpose of the Act.[17] In this instance Mr Chinn supports an ecological buffer for the Reserve.[18]

The Exposure draft National Policy Statement for Indigenous Biodiversity

22. An Exposure draft of the National Policy Statement for Indigenous Biodiversity was released in June 2022 (Edraft NPSIB).[19] If approved and gazetted, this would be the first national policy statement to state objectives and policies for indigenous biodiversity as a matter of national significance and to achieve the purpose of the RMA.[20]

23. The purpose of releasing the Edraft NPSIB was:

> "*… to test the workability of the NPSIB provisions with key groups. It incorporate[s] feedback from the public consultation and hui [on the previous draft NPSIB] held in 2019 and 2020."*[21]

24. I submit the advanced stage the Edraft NPSIB has now reached mean that it is a matter which the Council may consider as, should it be approved, the Council will need to prepare plans (and plan changes) in accordance with it.[22]

25. If the Edraft NPSIB is approved, the Council will be required to give effect to it. I submit relevant provisions in the Edraft NPSIB include the Objective and Policies 3 and 7, which state:

> **Policy 3:** A precautionary approach is adopted when considering adverse effects on indigenous biodiversity.
>
> **Policy 7:** SNAs are protected by avoiding and managing adverse effects from new subdivision, use and development.

26. These policies are implemented in Part 3 of the Edraft NPSIB. I submit clause 3.7 Precautionary approach and clause 3.10 Managing adverse effects on SNAs of new subdivision, use and development are relevant matters the Council may consider. In the context of a plan change, clause 3.10(2)[23] states (my emphasis):

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[17] *Royal Forest & Bird Protection Society Inc v New Plymouth District Council,* supra note x at [71] refers to a 'palette of measures' being in place for the Council to meet its s6(c) and s31(1)(b)(iii) RMA duties.
[18] Evidence of Warren Chinn, supra at para 32,
[19] NPSIB-exposure-draft.pdf (environment.govt.nz)
[20] Section 45(1) RMA
[21] See MfE website at: https://environment.govt.nz/acts-and-regulations/national-policy-statements/proposed-nps-indigenous-biodiversity/ - Update and next steps section
[22] RMA section 74(1)(ea).
[23] For completeness, there are exceptions to clause 3.10 set out in clause 3.11. However, I do not consider those exceptions apply in the context of a proposed change from rural resource zoning to industrial zoning.

(2) Local authorities must make or change their policy statements and plans to include objectives, policies, and methods that require that the following adverse effects on SNAs of any new subdivision, use, or development are avoided:

(a) loss of ecosystem representation and extent:

(b) disruption to sequences, mosaics, or ecosystem function:

(c) fragmentation of SNAs or the or loss of buffers or connections within an SNA:

(d) a reduction in the function of the SNA as a buffer or connection to other important habitats or ecosystems:

(e) a reduction in the population size or occupancy of Threatened, At Risk (Declining) species that use an SNA for any part of their life cycle.

27. As Mr Chinn's evidence sets out, the approximately triangular shape of the Reserve is not ideal and compromises the Reserve's ecological functioning.[24] I submit this makes the Council's consideration of the appropriate new subdivision, use and development of adjacent land, and whether an ecological buffer is appropriate, more important.

28. Part 4 of the Edraft NPSIB sets out Timing expectations including that local authorities must give effect to it as soon as reasonably practicable: clause 4.1(1).

29. I acknowledge that until such time as a National Policy Statement for Indigenous Biodiversity is approved, the Council is not required to act in accordance with it. I submit, however, it is a relevant matter which the Council may at its discretion consider.

Plan Change 18 and the operative Plan

30. The Plan does recognise the Reserve and the CC Beetle in Section 2: The Resources and Significant Resource Management Issues for the District, in 2.5 – Flora and Fauna, "Significant Issue – Significant Indigenous Vegetation and Significant Habitats of Indigenous Fauna".[25] However, the cross-references from the significant issue only go to Section 4 – Rural Resource Area. Section 4 only manages activities on land zoned as rural resource area.

31. While the Reserve is identified as a significant natural area in Schedule 19.6.1, the controls imposed by the Plan and the Schedule only relate back to Section 4. Protection of significant habitats of indigenous fauna and maintenance of indigenous

[24] Evidence of Warren Chinn, supra, at paras 26-29.
[25] CO District Plan, Section 2.5.1, pp 2.29-2.30.

biodiversity as a matter to be controlled by the Council are not addressed by the Plan in either Section 9: Industrial Resource Area or Section 12: District Wide Rules and Performance Standards.

32. The Plan is silent on indigenous biodiversity within the industrial resource zone, and I submit reference to the RMA and higher order statutory planning documents is required.

33. The evidence of Mrs Williams for the Director-General[26] refers to the partially operative Otago Regional Policy Statement 2019 as well as the proposed Otago Regional Policy Statement 2021. Mrs Williams sets out relevant provisions in both versions of the Regional Policy Statements[27], noting the Council must give effect to the partially operative RPS and the proposed RPS is a matter the Council shall have regard to.[28] Her conclusion is the Reserve would qualify as a significant natural area.

34. Considering PC 18 and the section 42A report, Mr Chinn comments on light pollution as a potential adverse effect on the Reserve[29]. Mrs Williams supports the section 42A Report writer's proposed amendment to Rule 12.7.6(i) in the Plan to address potential adverse effects of light spill on the Reserve as providing partial relief for the Director-General,[30] and it is pleasing to see this addressed.

35. Mrs Williams compares the Plan's Rural Resource Area and Industrial Resource Area provisions, noting the greater intensity of land use and that there is no consideration of ecological values of significant habitats of indigenous fauna in the Industrial Resource Area.[31]

36. The Director-General's submission sought an ecological buffer adjacent to the Reserve. Mr Chinn considers such a buffer should be no less than 30-40 metres wide, although noting the Director-General only sought a 25 metre buffer in her submission.[32]

37. I confirm the Director-General does not seek a wider buffer than the 25 metres sought in her submission. Mrs Williams has discussed the reasons for this width

[26] Evidence of Elizabeth Moya Williams for the Director-General of Conservation dated 26 June 2023, at
[27] Supra at paras 27-29.
[28] RMA sections 75(3)(c) and 74(2)(a)(i).
[29] Evidence of Warren Chinn, supra at paras 30 and 33.
[30] Evidence of Liz Williams, supra at paras 31-32.
[31] Evidence of Liz Williams, supra at paras 43-47
[32] Evidence of Warren Chinn, supra at paras 32 and 40.

being consistent with resource consent granted for the Motorsport Park which adjoins another boundary of the Reserve.[33]

38. In her conclusion, Mrs Williams states her preferred option is to amend PC18 to remove a 25 metre buffer strip adjoining the Reserve from the proposed Industrial Resource Area. This would leave a buffer area within the Rural Resource Area. There could be ongoing management issues to be addressed (e.g., weed and pest control), and the Department would need to work with the Council to address these.[34]

39. For these reasons, the Director-General continues to seek a 25 metre buffer strip adjoining the Reserve be excluded from the PC18 expansion of the Cromwell Industrial Resource Area.

Pene Williams
Counsel Rōia for the Director-General

[33] Evidence of Liz Williams, supra at 38.
[34] Evidence of Liz Williams, supra at paras 51-55.

BEFORE THE ENVIRONMENT COURT

Decision No: [2015] NZEnvC 219

ENV-2014-WLG-000056

IN THE MATTER	of applications under section 311 and 316 of the Resource Management Act 1991 (RMA)
BETWEEN	ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED Applicant
AND	NEW PLYMOUTH DISTRICT COUNCIL Respondent

Court: Environment Judge B P Dwyer
Commissioner K Edmonds
Commissioner R Howie

Appearances: S Ongley and P Anderson for the Royal Forest and Bird Protection Society of New Zealand
S Hughes QC for the New Plymouth District Council
R Gardner for Federated Farmers of New Zealand
R Gibbs and H White for Nga Hapu o Poutama
M Hill for the Property Owners Action Group
F Collins and S Gunawardana for the Queen Elizabeth II National Trust
J Coleman, M Evans, R Goodwin, C Jensen, J King, M Redshaw, A Ryan and N Sulzberger (Section 274 parties) for themselves

Heard: In New Plymouth on 3-6 August 2015
Final submissions received on 21 August 2015

DECISION ON APPLICATION
FOR DECLARATIONS AND ENFORCEMENT ORDERS

Decision issued: 17 DEC 2015

A: Declaration made

B: Costs reserved

Introduction

[1] The Royal Forest and Bird Protection Society of New Zealand Incorporated (Forest and Bird) has applied for declarations and enforcement orders pursuant to the provisions of ss311 and 316 of the Resource Management Act 1991 (RMA). The Respondent in the proceedings is New Plymouth District Council (the Council).

[2] The applications considered by the Court (amended as an outcome of agreements reached at mediation between the parties) are in the following terms:

> *1. I, the Royal Forest and Bird Protection Society of New Zealand Incorporated ("RFBPS") apply for the following declaration under sections 310(bb)(i) and (c) of the Act:*
>
> *A declaration that the New Plymouth District Plan contravenes the Act in that it:*
>
> > *(a) fails to adequately recognise and provide for the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna contrary to section 6(c); and*
> >
> > *(b) has not been prepared in accordance with the New Plymouth District Council's function under section 31(1)(b)(iii) for controlling the actual or potential effects of the use, development, or protection of land for the purpose of "[t]he maintenance of indigenous biological diversity", nor does it give effect to the provisions of the New Zealand Coastal Policy Statement or the Taranaki Regional Policy Statement, as required by section 75.*
>
> *2. I, RFBPS, also apply for the following enforcement orders under section 314(1)(b) of the Act:*
>
> > *(a) An order that the New Plymouth District Council notify a change to the New Plymouth District Plan and in due course notify its review of the District Plan so as to identify as significant natural areas for the purposes of section 6(c) of the Act all the 363 sites that are likely to meet the New Plymouth District Plan significance criteria based on the desktop assessments described in Wildland Consultants Limited Reports 1623 (March 2007), 2407 (October 2009), 2611 (March 2011) and*

2611a (March 2012), in addition to the significant natural areas contained in Appendix 2l of the District Plan;

(b) An order that the review of the New Plymouth District Plan include rules for the protection of significant natural areas;

(c) [withdrawn];

(d) An order that for all natural areas of the District that have been excluded from the section 6(c) identification work undertaken by or on behalf of the New Plymouth District Council because:

i. they are habitats that are difficult to adequately identify through desk-top analysis; or

ii. they are considered to be protected through other means such as through legal covenant or under the Taranaki Regional Council's Key Native Ecosystems Programme;

iii. the New Plymouth District Council undertake further work to identify these areas and to include them as significant natural areas if they are likely to meet the criteria for significance as set out in the New Plymouth District Plan; and

(e) Such further orders as the Court considers necessary in order to ensure compliance with the Act.

[3] It will be seen that the proceedings are directed at recognition of and provision for areas of significant indigenous vegetation and significant habitats of indigenous fauna in the New Plymouth District Plan (the District Plan). In these proceedings such areas are jointly referred to as Significant Natural Areas (SNAs). Forest and Bird seeks declarations that the District Plan fails to recognise and provide for the protection of SNAs in accordance with its statutory obligations and seeks enforcement orders requiring the Council to (inter alia) notify a change to the District Plan to remedy that purported failure.

[4] The application (as initially filed) was accompanied by two supporting documents:

- An affidavit dated 2 September 2014 from Ms F J F Maseyk, an ecologist;[1]
- An affidavit dated 6 October 2014 from Mr G J Carlyon, a planning consultant.

[5] The documents filed by Forest and Bird identified up to 363 SNAs[2] which it contended ought be recognised in and given protection under the District Plan. As the proceedings were potentially of interest to a large number of property owners across the New Plymouth District whose properties contained SNAs which had been identified, Forest and Bird filed with its application a request for waiver of and directions as to service.

[6] Following a telephone conference with counsel for Forest and Bird and the Council the Court made (13 November 2014) and then amended (28 November 2014) directions providing for service of the proceedings to be effected by notice in various publications circulating in and beyond the New Plymouth District.

[7] Forty interested party notices[3] were received from persons and bodies who wished to participate in the proceedings. Subsequently a number of these parties combined their interests under the banner of Federated Farmers of New Zealand (Federated Farmers) or a group terming itself Property Owners Action Group (POAG) for the purpose of presentation of their cases to the Court. Twenty nine statements of evidence were lodged with the Court for consideration at our hearing. All of the various statements of evidence were pre-read by the Court but not all of those who had filed statements were required to confirm their evidence or be available for cross-examination (although many were).

[8] In addition to the statements of evidence which were received and considered by the Court, joint statements were received from:

[1] Supplemented by Supplementary Affidavit dated 17 March 2015.
[2] That figure was amended to 361 and recorded in a joint statement dated 2 August 2015.
[3] Some parties gave more than one notice.

- Witnesses G J Carlyon (for Forest and Bird), S A Hartley (for Federated Farmers), J A Johnson (for the Council) and F C Versteeg (for the Council) as to planning issues;
- Witnesses M M Dravitzki (for the Council) and F J F Maseyk (for Forest and Bird) as to the number of SNAs (refer footnote 2).

[9] Prior to commencement of the hearing Forest and Bird filed an interlocutory application seeking to strike out parts of the cases of various other parties. The Court declined to determine the strike out application prior to the hearing. The issues raised in the application were ultimately dealt with as part of the merits of the proceedings overall.

Background

[10] These applications have their origin in processes arising out of the Proposed New Plymouth District Plan (the Proposed Plan) which was notified in November 1998, more particularly the provisions of the Proposed Plan relating to the identification and protection of SNAs.[4] During the course of preparation of the Proposed Plan the Council had identified 164 areas in the District which were regarded as SNAs. Many of these SNAs were situated on land which was in public ownership (such as the DoC estate or Council Reserves) where it was considered that no further protection under the District Plan was necessary.

[11] The Proposed Plan as notified contained two appendices identifying SNAs which were situated on land in private ownership and accordingly were not subject to the same protection as land in public ownership:

- Appendix 20.2 (now Appendix 21.2-District Plan) identified 32 SNAs which were not subject to any form of legal protection;
- Appendix 20.3 (now Appendix 21.3-District Plan) identified 38 SNAs which were legally protected through covenants.[5]

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[4] The Proposed Plan became operative and is now the District Plan.

[5] G J Carlyon Affidavit, para 13 - also Issue 16 (Operative) District Plan - see definition of **Conservation Covenant** in District Plan.

[12] Notwithstanding identification of *unprotected* SNAs in Appendix 20.2, no rule was included in the Proposed Plan providing for their protection (for example by requiring resource consent for any modification of the SNAs). Instead the Proposed Plan provided for a series of non-regulatory methods for protecting SNAs combined with a monitoring programme. Forest and Bird and the Director General of Conservation appealed these provisions of the Proposed Plan seeking (inter alia) the inclusion of rules in the Proposed Plan to control the disturbance (felling, destruction or damage) of indigenous vegetation in SNAs which were not otherwise protected in some way.

[13] After the appeals were filed in 2002 there was a process of engagement between Forest and Bird, the Director General, the Council and various other parties with an interest in the SNA topic. This process led to resolution of the appeals in 2005. There were two outcomes:

- Agreement between the parties as to the form of a consent order which eventually issued from the Environment Court on 13 July 2005 (the Consent Order);
- Execution of a Memorandum of Understanding between the parties, dated 16 May 2005 (the MOU) putting in place a process to underpin the Consent Order and revise and update provisions of the District Plan relating to SNAs.

[14] For the sake of efficiency we simply adopt and repeat in this decision the descriptions contained in the affidavit of Mr Carlyon as to the matters addressed in the Consent Order and MOU:

> ***II. Environment Court Consent Order 2005***
>
> *18. The key matters addressed by the Consent Order included:*
>
> - *amended 'significance' criteria (to be contained within Appendix 20 of Volume 2 of the Proposed NPDP);*
> - *modified methods of implementation including, importantly, a rule controlling the disturbance of indigenous vegetation within areas identified as significant (rule OL47(aa) in the Consent*

Order, which subsequently became numbered rule OL 60 in the NPDP);

- *retention of a list of SNA's in Appendix 20.2 (subsequently numbered Appendix 21.2);*
- *retention of a separate appendix for those SNA's on private land that were legally protected through covenanting (Appendix 20.3 subsequently Appendix 21.3);*
- *a method to transfer legally protected SNA's from Appendix 20.2 into Appendix 20.3 without further formality;*
- *amendment to the definition of an SNA clarifying that the scope of the term excludes vegetation regenerated post plan notification;*
- *amendment to the definition of indigenous vegetation disturbance to exclude certain activities, namely disturbance for protection of human life, tree trimming necessary for current operation and maintenance of infrastructure and the collection of materials for scientific or cultural purposes.*

III. Memorandum of Understanding of 16 May 2005 (MOU)

19. *The MOU contained a framework for the review of sites against the revised SNA criteria in the NPDP. As part of the method for achieving this, an SNA liaison group was formed (the "SNALG"). The MOU required Council to retain, delete or add SNA's in line with the agreed significance criteria (page 5 of the MOU). It also provided for an investigation of provisions whereby affected landowners could 'offset' the restrictions that would occur as a consequence of SNA provisions being applied to their land. The following numbering of each commitment was used for reference purposes by the NPDC and will also be used in my evidence.*

- *'MOU 1': A review of the list of SNA's within the Proposed NPDP, allowing for the removal of sites no longer meeting (revised) criteria. This review was to be undertaken within 18 months from the date of ratification of the MOU.*

- *'MOU 2': A review of the list of SNA's with a view to adding further sites found to meet the revised significance criteria (within 24 months).*
- *'MOU 3': An assessment to consider 'mitigation' opportunities for landowners accruing economic cost as a consequence of owning SNA's (also within 24 months). This was to include consideration of transferrable development rights, tradeable development/subdivision rights, and bonus opportunities on undertaking development or subdivision. It also required consideration of waivers or reductions in financial and/or development contributions and the possibility of Council confirming a policy that it would levy financial or development contributions for the purposes of protecting significant natural areas.*
- *'MOU 4': A review of the Heritage Protection Fund. The focus of this was on increasing the amount of the fund and focussing resources on SNA's.*
- *'MOU 5': A review of Council's fees and charges policy in relation to consents involving SNA's (within 6 months).*
- *'MOU 6': A review of Council's rates policy applying to SNA's (within 6 months).*

20. *Importantly, the MOU provided that, within 24 months, a plan change would be notified providing for the SNA matters MOU 1, 2 and also MOU 3 if required (i.e. if the parties identified opportunities to address the economic matters covered by MOU 3 above).*
21. *It was agreed that variation to the timeframes, summarised above, could only occur by agreement between all parties to the MOU.*

The process described above is important in the context of these proceedings for at least two reasons.

[15] Firstly, because the changes to the Proposed Plan embodied in the Consent Order moved the approach to the protection of SNAs identified in Appendix 20.2

from a non-regulatory basis to a joint non-regulatory and regulatory basis. The Consent Order incorporated into the District Plan a Rule[6] regulating the extent to which there could be disturbance of indigenous vegetation in SNAs identified in Appendix 20.2 by requiring a restricted discretionary consent application for such disturbance. In short, it was determined that there should be rules controlling the disturbance of indigenous vegetation in SNAs identified in Appendix 20.2 of the Proposed Plan (now Appendix 21.2 of the District Plan).

[16] Secondly, under the MOU the Council agreed to undertake a process whereby it would be determined:

- Firstly whether the 32 SNAs identified in Appendix 20.2 (and which would become subject to the Rule) of the Proposed Plan should be retained or deleted;
- Secondly whether or not new SNAs would be added to the Appendix and hence become subject to the Rule.

This process was to be undertaken within 24 months of execution of the MOU (i.e. by 16 May 2007).

[17] The process which we have described is now recorded in Issue 16 of the District Plan which relevantly provides:

> *As a result of a District Plan appeal amended 'significance' criteria were applied to those areas listed in schedule 21.2 in appendix 21. A review was undertaken (2009-2012) to apply the amended criteria to these existing SNA to amend the extent of these areas in relation to new criteria. The review process confirmed that all of the sites identified in Appendix 21.2 meet the section 21.2 criteria for determining SIGNIFICANT NATURAL AREAS. The review process confirmed and adjusted where necessary the spatial extent of those SIGNIFICANT NATURAL AREAS. Ecological regions continue to be important in the identification of SIGNIFICANT NATURAL AREAS.*

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[6] Now Rule OL60. (There are also other relevant rules in the District Plan but the debate in this instance largely related to Rule OL60).

In summary Issue 16 records that the Council undertook a review of the 32 areas identified in Appendix 21.2 (previously 20.2), confirmed that they all met the SNA criteria and retained them in the District Plan subject to some spatial adjustments.

[18] Issue 16 then relevantly goes on to provide:

> *It is recognised that ecological values are not static and will continue to change over time as areas of indigenous vegetation respond to different environmental pressures/threats. Regular monitoring of INDIGENOUS VEGETATION in the New Plymouth District and application of 'significance' criteria will ensure that Appendix 21 is complete. INDIGENOUS VEGETATION will continue to be monitored throughout the District to determine if areas meet 'significance' criteria.*

This part of Issue 16 reflects the commitment made by the Council in the MOU to add further SNAs to the District Plan if other areas of indigenous vegetation are shown to meet the significance criteria. It acknowledges that SNAs are under environmental pressures/threats and that the identification of SNAs in Appendix 21 is not complete. Issue 16 does not refer to the 24 month deadline provided for in the MOU.

[19] The MOU provided for the establishment of a Significant Natural Area Liaison Group (SNALG) which would *participate in the achievement of the objectives* set out in the MOU.[7] The SNALG was to comprise representatives of the Council (which was to chair the group and provide administrative and logistical support), affected landowners, the Department of Conservation, Forest and Bird and Federated Farmers. The SNALG was established and duly commenced the functions envisaged in the MOU.

[20] The Council also commenced the processes envisaged in the MOU. For the purpose of our consideration the most important process was that contained in what Mr Carlyon referred to as MOU 2 namely a review of the list of SNAs within 24

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[7] MOU, page 2.

months with a view to adding further sites which meet the new significance criteria contained in the District Plan and which were to become subject to the rules regime. Notwithstanding that the review undertaken by the Council identified a number of further sites which might be added to Appendix 21.2, the Council has failed to complete the processes envisaged in the MOU (and recorded in Issue 16 of the District Plan) to add the further identified sites to the Appendix. It is that failure which has led to Forest and Bird seeking the declarations and enforcement orders in these proceedings.

[21] That background statement brings us to consideration of the determinative issues for this decision. We consider that those issues fall under the following heads:

- What constitutes a Significant Natural Area;
- The extent of SNAs in the New Plymouth District;
- The extent of indigenous habitat loss in the New Plymouth District from historic and current perspectives;
- What methods does the Council provide for the protection of SNAs in its District and do these methods provide the level of protection required by RMA;
- Consideration of the declarations requested by Forest and Bird in light of findings on the above issues;
- Consideration of the enforcement order applications made by Forest and Bird in light of the determination on the above issues.

What constitutes a Significant Natural Area?

[22] Forest and Bird contends that the duty to make provision for SNAs in the District Plan which it seeks to enforce through these proceedings arises out of the provisions of s6(c) RMA which relevantly provides:

> ***6 Matters of National Importance***
>
> *In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:*

> *(c) The protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna.*

[23] It is our understanding that the … *areas of significant indigenous vegetation and significant habitats of indigenous fauna* … which s6(c) seeks to protect as a matter of national importance include areas and habitats of regional and district significance, in this case the SNAs subject to these proceedings.

[24] Also relevant to our considerations in this regard are the provisions of s31 RMA which relevantly provides:

> ***31 Functions of territorial authorities under this Act***
>
> *(1) Every territorial authority shall have the following functions for the purpose of giving effect to this Act in its district:*
>
> *(b) the control of any actual or potential effects of the use, development, or protection of land, including for the purpose of –*
>
> *(iii) the maintenance of indigenous biological diversity:*

It is the combination of ss6 and 31(1)(b)(iii) which Forest and Bird contends gives rise to the duties which it seeks to identify and impose in this case.

[25] For the sake of completeness we record our understanding that reference to the maintenance of indigenous biological diversity in s31(1)(b)(iii) relates to the significant areas and habitats referred to in s6(c). That is confirmed by reference to the Regional Policy Statement for Taranaki (RPS)[8] which contains the following description of indigenous biodiversity (which we understand to mean the same as indigenous biological diversity):

> *Indigenous biodiversity here refers to biodiversity that is native to New Zealand, and much of which is found nowhere in the world. Native forest and shrub land cover extensive areas of Taranaki (approximately 40 %). These areas, along with Taranaki's rivers and streams, wetlands and*

[8] We note that the RPS postdates the District Plan but we do not think that is of any moment in these proceedings.

coastal marine area provide significant habitats for indigenous flora and fauna species, including threatened species.

[26] Notwithstanding the reference in s6(c) to areas of significant indigenous vegetation and significant habitats of indigenous fauna there is no definition in RMA as to what constitutes such significant areas and habitats. We note that Policies 1 and 2 of the Proposed National Policy Statement on Indigenous Biodiversity do include some description of and criteria for identifying such areas and habitats but also envisage that regional policy statements will include their own criteria which will be reflected in regional and district plans.

[27] The lack of such wider guidance is not an issue in this particular case as the District Plan itself contains the following description of SNAs in its Definitions Section:

> ***SIGNIFICANT NATURAL AREA*** *means an area of INDIGENOUS VEGETATION or a habitat of indigenous fauna that meets the criteria in Schedule 21.1 and is identified in Schedule 21.2 or Table 21.3 of Appendix 21. Except that, no vegetation that has regenerated since this plan was notified shall be regarded as a SIGNIFICANT NATURAL AREA.*

[28] The criteria referred to in the definition above are the criteria inserted into the District Plan pursuant to the Consent Order. The criteria are:

> ***21.1 Criteria for determining SIGNIFICANT NATURAL AREAS***
>
> *In determining whether a natural area is a SIGNIFICANT NATURAL AREA, the COUNCIL will consider the following criteria:*
>
> 1. *Occurrence of an endemic species that is:*
>   - *Endangered;*
>   - *Vulnerable;*
>   - *Rare;*
>   - *Regionally threatened; or*
>   - *Of limited abundance throughout the country.*
> 2. *Areas of important habitat for:*
>   - *Nationally vulnerable or rare species; or*

- *An internationally uncommon species (breeding and/or migratory).*

3. *Ecosystems or examples of an original habitat type, sequence or mosaic which are:*
   - *Nationally rare or uncommon;*
   - *Rare within the ecological region;*
   - *Uncommon elsewhere in that ecological district or region but contain all or almost all species typical of that habitat type (for that region or district); or*
   - *Not well represented in protected areas.*
4. *An area where any particular species is exceptional in terms of abundance or habitat.*
5. *Buffering and connectivity is provided to, or by the area.*
6. *Extent of management input required to ensure sustainability.*

We make the following observations regarding the criteria.

[29] Firstly, that the criteria are consistent with ***BIO Policy 4*** of the RPS which relevantly provides that:

> *When identifying ecosystems, habitats and areas with significant indigenous biodiversity values, matters to be considered will include:*
>
> *(a) the presence of rare or distinctive indigenous flora and fauna species; or*
>
> *(b) the representativeness of an area; or*
>
> *(c) the ecological context of an area.*

We consider that the criteria in Schedule 21.1 give effect to **BIO Policy 4** notwithstanding that the District Plan predates that Policy.

[30] Secondly that the criteria are consistent with Policy 11 of the New Zealand Coastal Policy Statement (NZCPS) [9] which provides:

Policy 11 ***Indigenous biological diversity (biodiversity)***

[9] As with the RPS, NZCPS postdates the District Plan but again we consider that is of no moment for the purposes of our considerations.

To protect indigenous biological diversity in the coastal environment:

(a) avoid adverse effects of activities on:

(i) indigenous taxa that are listed as threatened or at risk in the New Zealand Threat Classification System lists;

(ii) taxa that are listed by the International Union for Conservation of Nature and Natural Resources as threatened;

(iii) indigenous ecosystems and vegetation types that are threatened in the coastal environment, or are naturally rare;

(iv) habitats of indigenous species where the species are at the limit of their natural range, or are naturally rare;

(v) areas containing nationally significant examples of indigenous community types; and

(vi) areas set aside for full or partial protection of indigenous biological diversity under other legislation; and

(b) avoid significant adverse effects and avoid, remedy or mitigate other adverse effects of activities on:

(i) areas of predominantly indigenous vegetation in the coastal environment;

(ii) habitats in the coastal environment that are important during the vulnerable life stages of indigenous species;

(iii) indigenous ecosystems and habitats that are only found in the coastal environment and are particularly vulnerable to modification, including estuaries, lagoons, coastal wetlands, dunelands, intertidal zones, rocky reef systems, eelgrass and saltmarsh;

(iv) habitats of indigenous species in the coastal environment that are important for recreational, commercial, traditional or cultural purposes;

(v) habitats, including areas and routes, important to migratory species; and

(vi) ecological corridors, and areas important for linking or maintaining biological values identified under this policy.

We consider that the criteria in Schedule 21.1 give effect to the provisions of Policy 11 (which applies to those parts of the District which are within the coastal environment) notwithstanding that the District Plan predates NZCPS.

[31] Thirdly, that the criteria are not conjunctive. Only one of the criteria has to be met for an area to be considered as an SNA.

[32] Fourthly, we have reservations about the appropriateness of Criterion 6, the *extent of management input required to ensure sustainability.* We are uncertain as to precisely what this criterion means but it appears to suggest that an area will not be identified as an SNA if a high degree of management input is required to ensure its sustainability. It is difficult to see how the willingness, ability or capacity of a property owner to provide the necessary management input should be determinative of whether or not an area is an SNA. In any event, because of the disjunctive nature of the criteria, Criterion 6 largely appears an irrelevance. If any of the other criteria are met that is sufficient for an area to be considered to be an SNA irrespective of whether or not Criterion 6 is met.

[33] It will be apparent from consideration of the matters set out above that the District Plan contains specific criteria defining what constitutes SNAs. As we observed in para [18] (above), Issue 16 of the District Plan contemplates that areas of indigenous vegetation in the District will be regularly monitored and the significance criteria will be applied to them so that Appendix 21 can be updated by inclusion of areas which are found to meet the criteria.

[34] Accordingly, for the purposes of this decision we determine that:

- SNAs are areas identified as such through application of the criteria in Appendix 21.1 of the District Plan;
- The identified SNAs are significant areas of indigenous vegetation and/or significant habitats for the purposes of s6(c).

The extent of SNAs in the New Plymouth District

[35] Following execution of the MOU in May 2005 the Council took steps to implement the various agreements reached. These steps included a review of the list of SNAs with a view to adding further areas which met the significance criteria in Appendix 21.1. The Council employed ecological consultancy firm Wildland Consultants Limited (Wildlands) for this purpose.

[36] Amongst the functions which Wildlands undertook was the preparation of a series of reports (initially) identifying unprotected natural areas which had the potential to be SNAs through application of the Appendix 21.1 criteria and subsequently refining that assessment.

[37] Wildlands undertook that process using *desk-top* analysis. Potential sites were not assessed in the field but were identified using a process described in these terms:[10]

- *Recent digital, orthocorrected aerial photographs of the District were obtained.*
- *Protected natural areas (e.g. land administered by the Department of Conservation, QEII covenants, Council Reserves and Nga Whenua Rahui covenants) were superimposed onto the aerial photographs.*
- *The existing GIS layer of SNAs was also shown on the aerial photographs.*
- *Unprotected natural areas were identified using LCDB2*[11] *and shown on the photographs.*
- *Colour coding was used to show natural areas in threatened land environments as per the LENZ*[12] *- LCDB2 analysis (refer to Appendix 2).*
- *Topographical features such as rivers, ecologically-significant streams, wetlands, and key native ecosystems in Taranaki Region (Taranaki Regional Council) were named on the aerial photographs.*

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[10] Wildlands Report 2407 (October 2009) Draft for Discussion.
[11] Land Cover Database Version 2 – a digital map of New Zealand showing land cover grouped into 9 major land cover classes.
[12] Land Environments of New Zealand – an environmental classification of New Zealand produced by Landcare Research.

- *The resulting maps (based on digital aerial photographs) were assessed visually.*
  - *Areas identified by LCDB2 which were extremely small or fragmented or which comprised predominantly exotic vegetation were removed.*
  - *Additional sites were identified.*
  - *Boundaries were adjusted where there were large inaccuracies.*
- *Published and unpublished information was assembled and ecologists who are familiar with the study area were consulted.*

[38] The natural areas identified by Wildlands were assessed against the criteria in the District Plan (except for Criterion 6) and allocated to one of four categories described in these terms in Report 2407:

> *(1A) Natural areas of potential significance – Level 1A:*
> *Natural areas which probably meet one or more of the criteria in the District Plan and more than half the site is in 'acutely threatened' or 'chronically threatened' land environments.*
> *(1B) Natural areas of potential significance – Level 1B:*
> *Natural areas which probably meet one or more of the criteria in the District Plan and are situated in land environments that are not 'acutely threatened' or 'chronically threatened'.*
> *(2) Natural areas of potential significance – Level 2:*
> *Natural areas which probably meet a criterion but are not included in Level 1 because, for example, they are very small, or modified, or may be an existing Council Reserve.*
> *(3) Other natural areas:*
> *Natural areas which are not currently known to meet any of the criteria, based on this desk-top analysis.*

Wildlands Report 2407 identified some 500 sites occupying 32,444ha in Levels 1A – 3.

[39] The SNALG sought further analysis of Levels 1A and 1B sites using updated aerial photography from 2010. The final Wildlands Report[13] identified that there are 308 SNAs occupying 18,728ha in Levels 1A and 1B.[14] Wildlands explained the reason for the large number of sites which had been identified in its Reports in these terms:[15]

- *every patch of indigenous vegetation being treated as a separate site (i.e. even patches that are very close together were not 'amalgamated' to create a single site).*
- *indigenous vegetation frequently extending beyond the boundaries of protected areas, such as DoC-administered land. Each of these single 'protrusions' was treated as a separate site.*
- *the entire coastal strip being identified as a natural area, except for those parts that are already protected. However, the coastal strip comprises numerous sites, some of them very small, situated between various protected areas.*

[40] The Wildlands process and Reports were the subject of review by the Department of Conservation (DoC) at the request of the Council due to concerns on the Council's part as to the high number of SNAs which had been identified. The DoC review[16] took no issue with the underlying methodology used in preparation of the Wildlands Reports. It suggested some refinements and identified a number of other sources of data and information which might be used to refine application of the criteria identified in the District Plan. Nothing in the DoC review suggests any fundamental flaws in the Wildlands Reports or challenges the extent of SNAs identified in them.

[41] The Wildlands Reports were the subject of consideration by Ms Maseyk who was the only ecologist who gave evidence to the Court. She undertook a detailed critique of the Reports, the methodology used to complete them, the application of

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[13] Wildlands Report 2611a.
[14] Maseyk First Affidavit, Table 5.
[15] Wildlands Report 2407, para 6.1.
[16] Maseyk First Affidavit, Annexure E.

the significance criteria contained in the District Plan, the categorisation (Levels 1A etc) used by Wildlands and the conclusions reached as to identification of SNAs.

[42] Ms Maseyk broke down the conclusions of the Wildlands Reports in Table 7 of her First Affidavit.[17] That table identified that there were 363 (now reduced to 361) sites which potentially met the SNA criteria contained in the District Plan. That figure was further refined by the identification of 326 sites which could be listed as SNAs *with confidence*.[18] She considered that the remaining 37 sites should be regarded as potential SNAs but would require a site visit to confirm whether or not they met the SNA criteria. A key conclusion reached by Ms Maseyk was that desk-top methodologies can be relied on to identify natural areas and assess them for significance. She acknowledged that such methodologies will not be free of errors but considered that they were likely to be an improvement on methodologies that relied on field surveys.[19]

[43] The conclusions reached by Ms Maseyk were not challenged by the evidence of any other appropriately qualified ecologist. Nothing in her lengthy cross-examination led her to resile from the conclusions which she had reached or led the Court to the view that those conclusions were wrong.

[44] A degree of confirmation as to the accuracy of identification of SNAs in the Wildlands Reports (and confirmed by Ms Maseyk) is found in the evidence of Mr N K Phillips who appeared as a witness for the Council under witness summons. Mr Phillips is the Regional Representative for Taranaki of the Queen Elizabeth the Second National Trust (the QEII Trust).

[45] In addition to the work which he undertakes for the QEII Trust, Mr Phillips undertakes work on contract for the Council as landowner liaison looking at likely SNAs. The Council witnesses referred to these as LSNAs. The LSNAs in question are the SNAs identified in the Wildlands Reports.[20] Between January and July 2014

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[17] Para 178.
[18] Maseyk First Affidavit, para 179.
[19] Maseyk First Affidavit, para 188.
[20] NOE, pages 233-234.

Mr Phillips and an associate undertook site visits to a number of LSNAs located on what is known as the *ring plain* area of the New Plymouth District. Ninety two LSNAs were visited during that period. These were situated on 143 properties (the LSNAs often overlap property boundaries). Mr Phillips advised that the majority of the properties which he visited contained LSNAs which warranted protection of some sort whether by covenant or otherwise.[21]

[46] It is not clear from Mr Phillips' evidence if his liaison visits involved direct application of the SNA criteria in Appendix 21.1. However his evidence establishes that the LSNAs visited (and not included in Appendix 21.2) are areas which warrant protection in his view.

[47] Finally we note that the Council did not dispute that there are SNAs within its District which are not covered by the rules in the District Plan as they are not identified in Appendix 21.2. Ms Hughes QC acknowledged that in her opening submissions for the Council.[22] Further to that acknowledgment, Ms Johnson (one of the Council's planning witnesses) acknowledged that there were a... *whole number of sites that have been identified that meet the significant natural area criteria.*[23] She accepted Ms Maseyk's evidence as to the adequacy of the Wildlands Reports to identify SNAs in the District.[24]

[48] Having regard to all of the above evidence we conclude that, applying the criteria contained in Appendix 21.1, there are probably somewhere between 326 – 361 SNAs in the Council's District which are not identified in Appendix 21.2 of the District Plan and accordingly are not subject to the rules which protect those SNAs from inappropriate development. Extrapolating the areas contained in Ms Maseyk's Table 5 we understand that these SNAs occupy an area of approximately 21,900ha.

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[21] NOE, page 159.
[22] Council Opening Submissions, para 13.
[23] NOE, page 223.
[24] NOE, page 224.

The extent of indigenous habitat loss in the New Plymouth District from historic and current perspectives

[49] Evidence on this topic primarily revolved around the extent of historic loss of indigenous habitat in the New Plymouth District and the rate of ongoing loss. The two relevant witnesses on this topic were Ms Maseyk for Forest and Bird and Ms Dravitzki for the Council. Although there were some differences between them, these were comparatively minor in nature and did not go to the determinative issues we must resolve in these proceedings.

[50] According to Ms Maseyk the New Plymouth District comprises somewhere in the order of 220,592ha which falls into two Ecological Districts, Egmont and North Taranaki. Ms Dravitski estimated the area as being 220,550.23ha.

[51] There has been a pattern of modification of indigenous vegetation in Taranaki since the time of human occupation. This process was accelerated with the arrival of European settlers in 1840 which gave rise to extensive clearance of the lowland and coastal areas on the ring plain in particular. Ms Maseyk testified that indigenous vegetation cover within the District has been reduced to 44% of its original cover and comprises a total of 97,110ha. Although Ms Dravitzki did not identify a figure in hectares, she similarly identified that the extent of remaining cover of indigenous vegetation is 44% of the original cover.[25]

[52] Ms Maseyk advised that the remaining vegetation is not uniformly distributed across the Egmont and North Taranaki Ecological Districts. Seventeen percent of original vegetation remains in the Egmont Ecological District[26] while 64% of original cover remains in the North Taranaki Ecological District. The reason for the difference is that the *...areas that were most conducive for agricultural production and settlement were cleared first, fastest, and most extensively.*[27] In this instance that development primarily took place on the ring plain and surrounding areas in the Egmont Ecological District.

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[25] EIC, page 7, Table 2 (43.81%).
[26] Including areas outside the New Plymouth District.
[27] Maseyk First Affidavit, para 27.

[53] Ms Maseyk described this historical process in these terms:[28]

The large-scale loss of indigenous biodiversity from the New Plymouth District has resulted in a dramatic change in the landscape. This is particularly so in the lowland areas of the District which has shifted from a landscape previously dominated by indigenous biodiversity to one characterised by a matrix of mixed landcover dominated by exotic pastoral species and human settlement infrastructure. Indigenous vegetation has been largely reduced to small, discrete, isolated patches in the lowland areas, with larger more contiguous cover in the uplands.

[54] Ms Dravitzki undertook an analysis of the extent to which the remaining indigenous vegetation in the New Plymouth District was legally protected. The legal mechanisms for protection which she identified included QEII covenants, conservation covenants, Nga Whenua Rahui,[29] private protected land, private scenic reserve, DoC land, Council Reserve land and Appendix 21.3 land. She calculated that 53% of the remaining indigenous vegetation is legally protected by one of these mechanisms. Far and away the most significant proportion of that protected land is land in the DoC estate which makes up over 80% of the protected land on the basis of Ms Dravitzki's figures.[30]

[55] Ms Dravitzki estimated that if all the SNAs which have been identified by Wildlands and Ms Maseyk were given protection by being identified in Appendix 21.2, more than 80% of the remaining indigenous vegetation in the District would then be subject to some form of legal protection.[31] We were told by Ms Maseyk that the vast majority of the DoC estate falls within the North Taranaki hill country or Egmont National Park. Only a small proportion of remaining areas of indigenous vegetation in the lowland areas have some form of legal protection.[32]

[56] Ms Dravitzki undertook an analysis of changes in indigenous vegetation cover which had occurred in the New Plymouth District over three periods,

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[28] Maseyk First Affidavit, para 36.
[29] A fund for the protection of Maori land.
[30] Dravitski, 42,749.22ha – Maseyk, 50,025ha.
[31] Dravitzki EIC, para 15.
[32] Maseyk First Affidavit, para 17.

1996 – 2001, 2001 – 2008 and 2008 – 2012. Her analysis showed that during the period 1996 – 2012, 1,273.9ha had changed from an indigenous vegetation classification to an exotic based classification, a loss of 1.3%. It appeared that a substantial portion of that change arose out of reclassification of manuka and/or kanuka land which had undergone a change to grassland or gorse and/or broom. If that was excluded then the extent of the change was 0.1% which had led Ms Dravitzki to the view that indigenous vegetation coverage within the District was essentially stable.

[57] In cross-examination of Ms Dravitski, attention was drawn to Table 4 of her evidence. Table 4 was an identification of the extent of loss of indigenous vegetation within acutely threatened environments of the District.[33] It showed losses of 19.05ha for the 1996 – 2001 period, 29.91ha for the 2001 – 2008 period and 16.8ha for the 2008 – 2012 period. More detailed analysis was provided for the 2008 – 2012 period which indicates that most of the loss (9.47ha) arose out of reclassification of manuka/kanuka and none of the loss was within the areas identified as SNAs.

[58] Ms Maseyk commented on Ms Dravitzki's analysis in these terms:[34]

> *Ms Dravitzki's analysis does however confirm that some loss is occurring, and has continued to occur at each of the three time-steps presented (1996 – 2001; 2001 – 2008; 2008 – 2012), and most critically, loss has continued in the areas of the District that have historically lost the most and where indigenous vegetation has already been drastically reduced (e.g. threatened land environments such as occur on the ring plain and coastal areas).*

(The analyses undertaken by Ms Dravitzki and Ms Maseyk were based on identification of loss of areas of indigenous vegetation. We understand that the loss of indigenous vegetation is a surrogate for the wider loss of indigenous biodiversity).

[59] In her first affidavit, Ms Maseyk had commented on the effects of habitat loss in these terms:

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[33] Environments with less than 10% of original indigenous vegetation cover remaining.
[34] Maseyk Rebuttal Evidence, para 21.

53 *Even if the likelihood of deliberate clearance is low, the consequence of continued loss of indigenous biodiversity within NPD is high. This is all the more so in lowland areas of the District. In situations where habitat has been extensively reduced to the point there is very little left, any further losses have a disproportionate (and often permanent) impact. This is the case even when losses are small such as encroaching on the edges of patches of habitat.*

54 *Any further loss of habitat from private land on the ringplain is of particular consequence as lowland habitat is not well represented within Public Conservation Land. That is, there is no 'bank' of protected equivalent habitat elsewhere. For habitat types that are already very much reduced in extent, failure to protect what is left risks ultimate extinction of habitat.*

[60] In a supplementary affidavit[35] Ms Maseyk considered the loss of wetland habitat over the corresponding periods used in the analysis of loss of indigenous vegetation. Ms Maseyk's evidence was not contradicted and nothing in her cross-examination led us to the view that it was wrong. She identified that over the total period there had been a 5.5% loss in the total number of wetlands and a 4.7% loss in the total extent of wetland habitat. We did not understand that the wetlands which had been lost were necessarily SNAs which had been identified in the Wildlands report. It was our understanding that this evidence was advanced to support the proposition that there is a trend of ongoing loss of natural habitat in the New Plymouth District.

[61] The conclusion which we have reached from the evidence summarised above is that over recent years there has been only a small loss of indigenous vegetation in the areas which were analysed by Ms Dravitzki and Ms Maseyk. We are unable to be precise from the evidence given to us as to the extent of loss of areas which have now been identified as SNAs. However it appears from Ms Maseyk's evidence that the loss of indigenous vegetation has been in the areas that are most vulnerable to

[35] Maseyk Supplementary Affidavit, 17 March 2015.

such loss because ... *further clearance can equate to permanent loss of indigenous cover and the local extinction of species.*[36]

What methods does the Council provide for the protection of SNAs in its District and do these methods provide the level of protection required by RMA?

[62] This question lies at the heart of these proceedings. It was put in these terms by Ms Hughes QC in her opening submissions for the Council:

> *The Council accepts that there are SNAs within its district which are not currently covered by rules. That with respect is not the test, the test is does the palette of measures put in place by the Council meet its obligations under s6(c) and 31(1)(b)(iii)?*

We concur with that statement. In short, the Council says that it meets its obligations under ss6(c) and 31(1)(b)(iii)[37] through the palette of measures identified in the submissions of Ms Hughes QC and in the evidence of its planning witness Ms Johnson.

[63] It will be seen that s6(c) identifies the *protection* of significant indigenous vegetation and significant habitats of indigenous fauna as a matter of national importance. The word protection is not defined in RMA. We use it in the sense identified in decisions such as *Environmental Defence Society v Mangonui County Council*[38] and *Port Otago Ltd v Dunedin City Council*[39] as meaning to keep safe from harm, injury or damage. The only gloss which we would put on to that meaning is that it is implicit in the concept of protection that *adequate* protection is required.

[64] It is clear in our view that s6(c) imposes a duty on the Council to protect SNAs (*shall* (our emphasis) *recognise and provide for ... the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna*). That interpretation is consistent with the interpretation of sections 6(a) and (b) RMA applied by the Supreme Court in *Environmental Defence Society Inc v New Zealand*

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[36] Maseyk First Affidavit, para 47.
[37] See paras [22] and [24] (above).
[38] [1989] 3 NZLR 257 (CA) at 262.
[39] Decision No: C 4/2002.

King Salmon Company Limited[40] and in particular, the observation that ... *Sections 6(a) and (b) are intended to make it clear that those implementing the RMA must* (our emphasis) *take steps to implement that protective element of sustainable management.*[41] We appreciate that in the *King Salmon* case, the Supreme Court was dealing with natural character and outstanding natural features and landscapes in the coastal environment but we do not think that makes any difference to our interpretation of s6(c) in this instance.

[65] Notwithstanding the directive and obligatory nature of s6(c), we do not consider that a territorial authority is necessarily obliged to achieve the protection sought by incorporating rules in its district plan. The nature of the protection required to meet a territorial authority's duty in any given instance is one to be determined by that authority when preparing or reviewing its district plan.

[66] When preparing a district plan a territorial authority is obliged to prepare an evaluation report in accordance with s32 RMA and to have particular regard to that report when deciding whether or not to proceed with that district plan.[42] Section 32 states the relevant requirements for such evaluation reports in these terms:

> *(1) An evaluation report required under this Act must-*
>
> *(a) examine the extent to which the objectives of the proposal being evaluated are the most appropriate way to achieve the purpose of this Act; and*
>
> *(b) examine whether the provisions in the proposal are the most appropriate way to achieve the objectives by-*
>
> *(i) identifying other reasonably practicable options for achieving the objectives; and*
>
> *(ii) assessing the efficiency and effectiveness of the provisions in achieving the objectives; and*
>
> *(iii) summarising the reasons for deciding on the provisions.*
>
> ...

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[40] [2014] 1 NZLR 593, [2014] NZRMA 195, (2014) 17 ELRNZ 442 (SC).
[41] Para 148.
[42] Clause 5(1)(a), Schedule 1 RMA.

(2) An assessment under subsection (1)(b)(ii) must—

(a) identify and assess the benefits and costs of the environmental, economic, social, and cultural effects that are anticipated from the implementation of the provisions, including the opportunities for—

(i) economic growth that are anticipated to be provided or reduced; and

(ii) employment that are anticipated to be provided or reduced; and

(b) if practicable, quantify the benefits and costs referred to in paragraph (a); and

(c) assess the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the provisions.

In turn, the expression *provisions* is defined as meaning:[43]

(a) for a proposed plan or change, the policies, rules, or other methods that implement, or give effect to, the objectives of the proposed plan or change:

[67] It is clear from consideration of the above provisions of RMA that there may be methods of achieving the purpose of the Act as it relates to the sustainable management of SNAs other than the insertion of policies and rules in a district plan. As we have noted previously[44] the Council's case is that there is a palette of other measures (methods) in place adequately protecting those SNAs which are not presently identified in Appendix 21.2.

[68] We accept that the Council might conceivably meet its duty under ss6(c) and 31(1)(b)(iii) by means of such other methods and we will turn to consider their effectiveness in due course. Before doing so however we address what seems to be a mischaracterisation by the Council of the case presented by Forest and Bird in these proceedings. In her opening submissions Ms Hughes QC described the Council's position in these terms:

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[43] s32(6) RMA.
[44] Para [62] (above).

> 1. *The Council's position is and has consistently been, there is no merit in either of the Applications before this Court. They are with respect misconceived and simply cannot achieve the objective Forest and Bird have – that is to force the Council to impose a rules based regime to protect SNAs. It is as simple as this: if a matter is not measurable then it cannot be enforceable. Time has moved on in the last 10 years, attitudes have changed, the view of Forest and Bird regarding landowners and their engagement is historic and not current, the Act does not require a council to meet its obligations by imposing rules and furthermore a plan change is a complex process and this Court is quite simply not in the position to make orders compelling that plan change at this time.*[45] (our emphases)

[69] It is not correct for the Council to contend that Forest and Bird seeks to force it to impose a rules based regime to protect SNAs. As we observed in para [15] (above) a partially rules based regime was put in place by the Consent Order in 2005. The regime is not entirely rules based as other methods of protecting SNAs are also recognised in the District Plan however rules are part of the palette of methods for managing SNAs contained in the District Plan. In particular the disturbance of SNAs identified in Appendix 21.2 is controlled by restricted discretionary activity Rule OL60.

[70] As we then noted in para [18] (above) the District Plan contemplates that further SNAs (in addition to those presently identified in Appendix 21.2) are to be identified and made subject to rules. That interpretation of Issue 16 was acknowledged by Mr Versteeg (one of the Council's planning witnesses) in the following discussion with the Court:[46]

> *Q. But I think we've got to the point and I think you acknowledged that earlier on that the Plan is clear that SNAs that have been identified using the criteria which had been inserted in the Plan, should be added to the Plan?*

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[45] Council Opening Submissions, para 1.
[46] NOE, page 271.

A. That's correct.

Q. That was the clear intention wasn't it, there is no issue of that?

A. I agree with it.

[71] We have referred on a number of occasions to the expression used by Ms Hughes QC on the Council's behalf of there being a palette of measures in place to meet the Council's duty under ss6(c) and 31(1)(b)(iii). There can be no doubt that part of that palette is rules to protect SNAs which have been identified through application of the criteria contained in Appendix 21.1. Methods of Implementation 16.2(v) of the District Plan specifically says so. We note that this is consistent with and gives effect to ***BIO METH 19*** of the RPS which provides that:

> *Territorial Authorities will consider the following methods:*
>
> *Include in **district plans**, objectives, policies and methods, including rules, relating to the control of the use of land to maintain indigenous biodiversity in areas of significant indigenous or other vegetation and habitats of indigenous fauna.*[47]
>
> ...
>
> ***Significant Natural Areas***
>
> ...
>
> *Rules apply protecting these areas from inappropriate subdivision, use and development. ...*

[72] In light of that finding we consider the methods other than rules to protect SNAs provided for in the District Plan and whether the other methods would provide adequate protection should a significant number of SNAs contained in the District not be covered by the rules due to their not having been identified in Appendix 21.2.

[73] Issue 16 of the District Plan is **Degradation and loss of INDIGENOUS VEGETATION and habitats of indigenous fauna.** It contains the following Objective and Policy:

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[47] We also note that on page 88 the RPS records that ... *the South Taranaki and New Plymouth district councils have identified areas with locally important indigenous biodiversity values, which are referred to as 'Significant Natural Areas'.*

Objective 16

To sustainably manage, and enhance where practical, INDIGENOUS VEGETATION and habitats

Policy 16.1

Land use, development and subdivision should not result in adverse effects on the sustainable management of, and should enhance where practical, SIGNIFICANT NATURAL AREAS.

[74] Following Policy 16.1, Issue 16 sets out the methods of it implementation of that Policy. Thirty four methods are identified. We agree with Ms Hughes QC's submission that these constitute a wide ranging palette of measures. That palette is described under various group headings contained in the ***Methods*** section of the District Plan:

- Identification of significant natural areas (Methods 16.1, a – h)
  These provisions describe the process of identification of SNAs using the criteria in Appendix 21.1 and the inclusion of those SNAs in Schedule 21.2 (if they are unprotected) so that they become subject to the rules controlling disturbance of significant indigenous vegetation;
- Incentives (Methods 16.1, i – n)
  These provisions provide incentives for the protection and enhancement of SNAs by providing for benefits to landowners on subdivision if SNAs are protected, financial assistance and rating relief for the covenanting of SNAs, community awards and work schemes to encourage enhancement of SNAs and the like;
- Council action or works (Methods 16.1, o – t)
  These methods consider use of heritage orders and acquisition of land by the Council to protect SNAs, facilitation of agreements between the Council and landowners, the use of work schemes, investigating community based awards, rating relief and assisting landowners with pest control in SNAs;
- Control of activities on and in proximity to SNAs (Methods 16.1, u – x)
  Of particular significance under this head is Method (v) which identifies that ...*rules controlling the modification of INDIGENOUS VEGETATION*

identified as a SIGNIFICANT NATURAL AREA in Schedule 21.2 ... are to be one of the methods for controlling the modification of SNAs identified in Schedule 21.2. These provisions also address the legal protection of SNAs at the time subdivision occurs;

- Information, education and consultation (Methods 16.1, y – ee)
  These methods provide for public education about the protection of SNAs, advocating to other agencies to protect SNAs and generally encouraging community participation in such protection;
- Monitoring (Methods 16.1, ff – hh)
  These methods involve a monitoring plan in respect of SNAs.

[75] It became apparent after hearing the submissions of Ms Hughes QC on behalf of the Council and from Ms Johnson that the Council has put in place only a number of the other methods identified in Methods 16.1. In some cases these involve an amalgamation of a number of the identified methods. We briefly identify those methods which we understand to be in place.

[76] There are three relevant Rules included in the District Plan:

- Rule OL11 (relating to clearance of vegetation in the Coastal Hazard Areas);
- Rule OL17 (relating to clearance of vegetation in the Coastal Policy Area);
- Rule OL60 (relating to the clearance of vegetation in SNAs identified in Schedule 21.2).

[77] The primary covenanting method applied by the Council is support for the QEII covenant programme. The Council pointed to the fact that there is a very active QEII programme in the New Plymouth District. Support for and involvement in such a process is one of the methods contemplated by the District Plan. Combined with that is the landowner liaison programme which was referred to in the evidence of Mr Phillips.

[78] Ms Johnson advised that the Council gives 100% rates relief for sites which have a QEII covenant[48] (presumably pro rata with the property area) and provides assistance for the fencing of QEII covenanted areas through its nature heritage fund.[49] We understand that rating relief and assistance with fencing also apply to other forms of covenant but the QEII covenanted areas are the most common recipient. Obviously all of these are highly commendable initiatives of a positive nature. However it was apparent that the QEII covenanting process goes only so far in meeting the obligation of protection contained in s6(c).

[79] Mr Phillips advised that there are now 360 QEII covenants registered or in the process of registration in the New Plymouth District.[50] That was up from approximately 80 at the time he commenced work for QEII 16 years ago. It transpires that of the SNAs identified in the Wildlands report but not included in Appendix 21.2, only about 5% are subject to QEII covenants or are undergoing that process notwithstanding that the Taranaki area has the highest proportion of QEII covenant funds allocated to it of any area in New Zealand. Mr Phillips advised that his funding allocation for the current year enabled covenanting over 15 properties in the whole Taranaki Land District (not just the New Plymouth District) and that 13 properties had been approved already. That means that it would take 10 years at the current rate to approve funding for all of the 143 properties containing LSNAs which Mr Phillips had visited earlier this year (assuming that all of the property owners wish to participate in the covenanting process). The reality is that the QEII process cannot protect all of the SNAs identified in the Wildlands reports. Mr Phillips acknowledged that.[51]

[80] A further means of protection identified in the Council evidence was the keeping of an SNA database. This is also one of the methods contemplated in Methods 16.1.[52] Ironically the database contains all of the SNAs identified in the Wildlands reports listing them under the LSNA label. That identification of itself provides no protection for the SNAs in the absence of their identification in

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[48] NOE, page 235.
[49] NOE, page 234.
[50] EIC, para 10.
[51] NOE, page 159.
[52] Method 16.1 (f).

Appendix 21.2. Mr Carlyon testified[53] that ... *Of the approximate 18,728 ha of LSNAs, as at 21 August 2014 only 2.8 % or approximately 530 ha were subject to protection (this figure being based on those sites protected through a QEII Covenant).*

[81] Those methods identified above are in reality the palette of other measures which the Council has put into place and which it contends meets its obligations under ss6(c) and 31(1)(b)(iii). Underlying that contention was the Council's view that rules protecting SNAs are unnecessary because there is no longer any *appetite* in the District for clearance of SNAs.[54] Ms Hughes QC put that proposition in these terms:[55]

4. *More than anything, the Council wishes this Court to understand that in its experience there has been a significant sea-change in the attitude of landowners. Whereas historically, landowners sought to exploit the economic possibilities of their land and resisted any effort to consider the environment, now farmers are amongst the most ardent of environmentalists. The 274 parties you heard from yesterday demonstrate precisely the point: they voluntarily plant trees – lots of them, the voluntarily fence their waterways and they voluntarily fence their SNAs. From the Council's perspective they have found farmers increasingly of the view that they must leave their land better than they found it and the Council wishes to work collaboratively with the farmers to ensure the protection of SNAs. The Council's view is that is best achieved by demonstrating trust in the landowners and monitoring their activities.*
5. *It is certainly true that there will always be the odd renegade, who seeks to act in a manner contrary to the interests of the environment but such persons are rare and if a truly unique environment was identified on any property as opposed to remnants of bush in a generic sense, then the Council would move to protect the truly unique or threatened.*

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[53] Affidavit, para 69.
[54] Council Opening Submissions, para 8.5.
[55] Council Opening Submissions, paras 4-5.

[82] The Council submission drew support from a number of the parties and witnesses that appeared before us. It is apparent from the evidence which we considered that many landowners in the District actively seek to protect areas of their properties containing indigenous vegetation and habitat. Some landowners do so through formal covenanting processes with bodies such as QEII and the Council and some simply do so *off their own bat* to protect these features for future generations. We ask ourselves whether or not those facts mean that there should not be rules contained in the District Plan protecting SNAs (not just *truly unique or threatened* areas as suggested by the Council) from modification or more directly in this case whether or not the Council should be free to ignore the clear intention of the District Plan that areas of significant indigenous vegetation and significant habitats which met the SNA criteria should be identified and made subject to the rules contained within it.

[83] The first answer to that question is that it has already been determined that there should be such rules. They were incorporated into the District Plan by the Consent Order. Method 16 specifies that further SNAs will be identified and made subject to the rules.

[84] A point made by a number of parties in opposition to the Forest and Bird applications was that the primary threat to SNAs is not unauthorised disturbance of vegetation within them (which is controlled by Rule OL60) but rather the effects of stock intrusion.[56] It was contended that the only way to prevent stock intrusion is by fencing and that rules do not (and cannot) require compulsory fencing whereas the provision of funds from QEII Trust and the Council for fencing is part of the QEII covenanting process.

[85] We are inclined to concur with the submission made by QEII Trust that the QEII covenant process which involves collaboration with land owners and the fencing of SNAs has the potential to be a better form of protection than the imposition of rules which do not achieve the fencing of SNAs. However, that acknowledgement must be considered in the context that the QEII process can only

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[56] Eg NOE (Mr Phillips) page 151.

cover a limited amount of the District's SNAs and that there are those who are not interested in participating in it in any event.

[86] In our view the fact that the QEII covenant process may provide a better form of protection than rules does not mean that there should not be rules in place to protect vegetation in SNAs from damage or destruction by those who do wish to undertake works within them. We refer to the point made on behalf of the Council that there should be a palette of measures in place. Any single measure on its own might be insufficient to provide the appropriate level of protection. It is the combination of such measures which is important.

[87] Next, we observe that we have some difficulty with propositions advanced based on the perceived attitude of landowners. The Council's claim that attitudes have changed[57] appears to us to be a somewhat flimsy basis to advance the case which it did at this hearing. Even if it could be proven to be correct, we have substantial reservations as to whether or not leaving the protection of SNAs up to the attitude of the landowners of the District provides the level of protection of significant indigenous vegetation and habitats required by s6(c). Ms Hughes QC acknowledged that there might always be the odd renegade who will act contrary to the general attitude.

[88] The possibility that there might be those who act contrary to the general attitude must also be considered in the context that at least in some parts of the District small losses of habitat can have a disproportionate effect and that failure to protect what is left risks ultimate extinction of some habitats. We do not go so far as Mr Carlyon who contended that voluntary protection will not ever achieve the requirement of s6(c).[58] We consider that is something which must be assessed in any given instance. Factors such as the nature and extent of the voluntary protection and the extent and vulnerability of particular areas of significant indigenous vegetation and significant habitats will all be factors to be taken into account in determining whether or not rules are required.

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[57] Para [81] (above).
[58] Affidavit, para 84.

[89] In any event the contention as to landowner attitude was not supported by the only piece of *hard* evidence which we saw in this regard. Paragraphs 32-35 of Ms Dravitzki's evidence made a summary of Mr Phillips' visits to landowners on the ring plain whose properties contained SNAs. As we noted previously, 143 properties were involved. Ms Dravitzki's analysis of the interviews which Mr Phillips had undertaken with the landowners established that out of 168 or 169 landowners interviewed, 61.3 percent were either actively managing and/or keen to covenant land contained in the SNAs. Alternatively, the survey indicated that 52 landowners (30 percent) were neither keen to actively manage nor to covenant the SNAs on their land. That seems to us to be a significant proportion of landowners whose attitude is somewhat different to that which underpinned the Council's position in these proceedings.

[90] What ultimately emerged as the heart of the issue in this regard was the contention advanced by the planning witness for Federated Farmers (Mr Hartley) that if 361 SNAs became subject to the rules in the District Plan there might be a landowner backlash and that people who might otherwise voluntarily protect the SNAs would not fence those areas and might even remove fences. Mr Versteeg contended that making the identified SNAs subject to rules might ... *potentially lead to removal and/or degradation of indigenous vegetation which would not otherwise occur.*[59]

[91] A number of the witnesses called by the various parties or who gave evidence on their own account spoke of the detrimental effects on property owner goodwill and willingness to voluntarily protect SNAs which would come about if their properties became subject to control by rules. We accept that the witnesses genuinely and strongly hold such views. One witness gave evidence of converting an SNA area of ten hectares into pine and redwood plantation because of the possibility that it could become subject to rules.[60] Notwithstanding that evidence, we have a number of observations/reservations about this proposition.

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[59] Versteeg EIC, para 36.
[60] R McGregor, EIC.

[92] Firstly, the proposition is directly contrary to the Council's contention that the residents of the District have a commitment to the protection of SNAs. If that is the case, it is difficult to see how they could logically object to being subject to a rule or rules seeking to do precisely the same thing and then destroy native vegetation out of spite.

[93] Secondly, it appears to us that there is at least a possibility that such an attitude is fostered by a misunderstanding as to the nature of the controls imposed by the rules in question. By way of example, we refer to the evidence of witnesses:

- A Barrett - that SNAs are *untouchable*;[61]
- W F Petersen - that identification of land as SNAs is *taking control of our freehold title land;*[62]
- R C Goodwin - that farmers wish to have *control over our own farm and native bush*;[63]
- R McGregor - that identification of SNAs is *property theft;*[64]
- M J Evans - that rules would prevent formation and maintenance of access tracks;[65]
- M W Redshaw that identification of SNAs is a *huge invasion of ownership rights.*[66]

[94] We accept that the views expressed to us are genuinely held, but in our view they misrepresent or overstate the effect of rules. They need to be considered in the context that the primary rule under consideration in this case (Rule OL60) does not prohibit undertaking works, removal of vegetation or disturbance of land within the SNAs. It makes such activities a restricted discretionary activity for which consent may be granted subject to consideration of the assessment criteria contained in the Rule.

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[61] EIC, para 5.
[62] EIC, para 11.
[63] EIC, page 1.
[64] EIC, page 1.
[65] NOE, page 364.
[66] NOE, page 382.

[95] We accept that some indigenous vegetation disturbance activities which land owners might previously have undertaken as of right within SNAs would become subject to control by the rules in the District Plan if the SNAs identified by Wildlands and Ms Maseyk are included in Appendix 21.2. However that outcome must be assessed in the context that:

- The outcome of identification of SNAs is not as draconian as some parties to these proceedings apparently consider;
- The identification and protection of significant areas of indigenous vegetation and significant habitats of indigenous fauna is a matter of national importance;
- The identification of SNAs and subsequent imposition of controls by way of restricted discretionary activity rules have no practical effect on persons who wish to retain and enhance such areas on their own land as many of the witnesses wish to do;
- It appeared to us that to at least some extent, the opposition to the identification of SNAs and their being subject to rules was a philosophical opposition to landowners being subject to any control over the activities which they might undertake on their land. That opposition has to be measured in the context of s6(c) RMA and the duty imposed on local authorities to identify and protect areas of significant indigenous vegetation and significant natural habitats. The sustainable management of New Zealand's natural and physical resources requires that on occasions the exercise of private property rights will be subject to controls.

[96] Having regard to all of those considerations, we make the following findings on the issue of the methods which the Council provides for the protection of SNAs in its district and whether or not those methods provide adequate protection as required by s6(c) RMA:

- The Council provides a wide-ranging palette of methods in its District Plan to protect SNAs;
- Viewed in their entirety the palette of methods provides the protection of SNAs required by s6(c);

- The methods include rules which control the disturbance of indigenous vegetation in SNAs identified in Appendix 21.2 by requiring that restricted discretionary activity consent is obtained for such activities;
- Reliance primarily on QEII Covenants and associated methods to protect SNAs does not provide the protection required by s6(c) RMA because of the limited extent of SNAs subject to the QEII covenanting process and the limited capacity of that process to cover all (or even a substantial proportion) of the SNAs which have been identified in the New Plymouth District;
- Reliance primarily on community attitude (uncritically accepting the proposition that its existence has been proven) to protect SNAs does not provide the protection required by s6(c) because it does not take account of those who might have a different attitude and the high vulnerability of at least some SNAs identified in the evidence of Ms Maseyk;
- The protection of SNAs which the District Council is obliged to recognise and provide for requires the application of the full palette of methods identified in the District Plan, including the identification of SNAs in Appendix 21.2 and the application of rules to them.

[97] In light of those various findings, we now consider the remaining issues as to the making of declarations and the issue of enforcement orders.

Declaration

[98] The declarations sought by Forest and Bird are set out in para [2] (above). In summary, Forest and Bird seeks a declaration that the District Plan contravenes RMA because:

- It fails to adequately recognise and provide for the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna in the New Plymouth District contrary to s6(c) by failing to include in Appendix 21.2 of the District Plan SNAs which have been identified applying the criteria contained in Appendix 21.1;

- It has not been prepared in accordance with the Council's function under s31(1)(b)(iii) of controlling the actual or potential effects of the use, development or protection of land for the purpose of maintenance of indigenous biological diversity;
- It does not give effect to the provisions of NZCPS or the RPS.

[99] In her submission for POAG Ms Hill contended that there are jurisdictional barriers to the Court making at least some of the declarations sought by Forest and Bird. In particular, she contended that:

- There is no jurisdiction for a general declaration that a district plan breaches the Act or has not been prepared in accordance with a council's functions under the Act;
- There was no jurisdiction to declare whether a provision of the District Plan contravened the Act.

POAG was the only party to raise the above jurisdictional issues and did not dispute that there was jurisdiction to make declarations relating to the NZCPS and the RPS.

[100] In addressing those propositions we have considered the following provisions of s310 RMA:

Scope and effect of declaration

A declaration may declare—

(a) The existence or extent of any function, power, right, or duty under this Act, including (but, except as expressly provided, without limitation)—

(i) any duty under this Act to prepare and have particular regard to an evaluation report or to undertake and have particular regard to a further evaluation or imposed by section 32 or 32AA (other than any duty in relation to a plan or proposed plan or any provision of a plan or proposed plan); and

(ii) any duty imposed by section 55; or

(bb) whether a provision or proposed provision of a district plan,—

(i) contrary to section 75(3), does not, or is not likely to, give effect to a provision or proposed provision of a national policy statement, New

Zealand coastal policy statement, or regional policy statement; or

(ii) contrary to section 75(4), is, or is likely to be, inconsistent with a water conservation order or a regional plan for any matter specified in section 30(1); or

(c) whether or not an act or omission, or a proposed act or omission, contravenes or is likely to contravene this Act, regulations made under this Act, or a rule in a plan or proposed plan, a requirement for a designation or for a heritage order, or a resource consent; or

(h) any other issue or matter relating to the interpretation, administration, and enforcement of this Act, except for an issue as to whether any of sections 95 to 95G have been, or will be contravened.

[101] Dealing with the last matter (s310(h)) first, we observe that this provision gives the Court a wide power to make declarations on issues or matters other than those specifically identified in s310(a)-(g).

[102] Section 310(a) enables the Court to make a declaration as to the existence of any duty under the Act. We have previously identified that the Council has a duty to adequately recognise and provide for the protection of SNAs in its District. No party to these proceedings suggested that was not the case.

[103] Section 310(bb)(i) authorises the Court to declare whether or not provisions or proposed provisions of a district plan give effect to provisions or proposed provisions of NZCPS or an RPS. There was no dispute that these provisions enable us to make declarations regarding these matters.

[104] Section 310(c) authorises the Court to declare whether or not an act or omission or a proposed act or omission contravenes or is likely to contravene RMA. Read at the broadest level, it arguably authorises us to declare whether the Council's omission to include the identified SNAs in Appendix 21.2 is a breach of its duty under s6(c).

[105] Viewed in the round, we have no hesitation in finding that the issue of the appropriate degree of protection required for areas of significant indigenous vegetation and significant habitats of indigenous fauna is an issue relating to the interpretation, administration and enforcement of RMA which the Court is empowered to consider pursuant to s310(h).

[106] In addition to the submissions which it made as to jurisdiction, POAG also contended that even if the Court had jurisdiction to do so, it was not appropriate for it to grant the relief sought by Forest and Bird. It advanced a number of reasons for that.

[107] The first and second reasons are related and are essentially a contention that the Court should not interfere with a territorial authority's decision-making process in undertaking a review of its district plan. We will consider that matter further in this decision as part of our determination whether or not to make enforcement orders.

[108] The third issue raised by POAG was that the Court is not empowered to make declarations which might affect the rights of persons who are not parties to proceedings. Firstly, we observe in that regard that there was wide public notification of and publicity given to these proceedings as a result of directions made by the Court. Irrespective of that however, the ultimate outcome of the applications made by Forest and Bird (should they all be granted) would be the initiation of a plan change which would be notified and where affected parties would have rights of submission and hearing. No effect on the rights of persons arises directly out of these proceedings of themselves.

[109] The next ground of opposition was the contention that the Court cannot make a declaration when factual matters are in dispute. The *Trolove* case[67] is cited as authority for that proposition. *Trolove* does not support the proposition that the Court cannot resolve contested facts during the course of declaration proceedings if it has to. Judge Skelton noted in *Trolove* that there will be circumstances where the Court has to do exactly that. Nothing in the provisions of s310-311 RMA precludes

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[67] *Trolove (re an application)* Decision No: C 52/94.

the Court from making findings of disputed fact in declaration proceedings. We agree that it is preferable that declaration proceedings come before the Court on the basis of agreed facts, however that might not be possible in any given instance for any number of reasons. If the Court declined to deal with declarations on the basis that there were disputed facts, any party to declaration proceedings could easily *derail* them by raising factual disputes.

[110] In any event, we do not consider that there are significant factual disputes as to matters which lie at the heart of these proceedings. One of the matters which surprised the Court in hearing this case was the lack of dispute in certain fundamental respects. By way of example, in her submission for POAG Ms Hill raised the issue of *ground truthing* to validate the identified SNAs. In fact there was no substantive evidence contradicting that of Ms Maseyk that the desktop exercise undertaken by Wildlands was sufficient to accurately identify SNAs in the New Plymouth District. Nor was there any suggestion in the evidence that we heard that the criteria contained in the District Plan and applied by Wildlands and Ms Maseyk to identify SNAs are not valid criteria. POAG suggested that a *more nuanced approach* to their application might be appropriate[68] but no evidence was advanced in that regard. The issue in dispute in these proceedings is not whether or not there are a substantial number of SNAs in the New Plymouth District which are not protected by rules in the District Plan. Rather the issue is whether or not SNAs should be protected by rules (as the District Plan contemplates) or whether the Council was entitled to rely on *other methods.* That is a question of opinion and law rather than fact.

[111] POAG contended that there was *no utility*[69] in the Court making declarations as to whether or not the District Plan gives effect to NZCPS and the RPS as these documents postdate the District Plan. The District Plan is obliged to give effect to the provisions of both of these documents notwithstanding that they postdate the District Plan.[70] We consider that any ruling we may make as to whether or not the

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[68] POAG submission para 25.

[69] POAG submission para 16.8(e).

[70] Sections g75(3)(b) and (c) RMA.

District Plan gives effect to NZCPS and the RPS is a matter which the Council might properly take into account in undertaking a review of its District Plan. There are a number of provisions of both of those documents which are directly relevant to our considerations in this case, namely:

- Policy 11 NZCPS which seeks to protect indigenous biological diversity in the coastal environment by avoiding adverse effects on indigenous vegetation types that are threatened or naturally rare[71]and on habitats of indigenous species that are threatened or naturally rare[72] and by avoiding significant adverse effects on areas of predominantly indigenous vegetation[73] (inter alia);
- Bio Policies 1-4 of the RPS, with particular reference to Bio Policy 3 which provides that...*Priority will be given to the protection, enhancement or restoration of terrestrial, freshwater and marine ecosystems, habitats and areas that have significant indigenous biodiversity values.* The commentary to Bio Policy 3 notes that...*controls or measures to be adopted to protect, enhance or restore indigenous biodiversity values will be focused on particular ecosystems, habitats and areas deemed to be 'significant'.*

The District Plan gives effect to these Policies through the process of identification of SNAs and their inclusion in Appendix 21.2 which we have described but the Council has omitted to undertake that process.

[112] POAG pointed to the fact that ten years had elapsed since the MOU was signed and contended that delay in bringing the proceedings over that period was such that granting the relief sought by Forest and Bird was no longer appropriate, particularly as the Council is now engaged in its ten year plan review. To some extent, this contention appeared to us to be an attempt to lay the blame for any delay at the door of Forest and Bird rather than the Council which had undertaken to carry out the process of application of the SNA factors. We will return to the matter of the Council review process when we consider the enforcement order application.

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[71] Policy 11(a)(iii).

[72] Policy 11(a)(iv).

[73] Policy 11(b)(i)

[113] Those various findings above bring us to determine the question of whether or not we ought make a declaration as sought by Forest and Bird or some other appropriate declaration (as we are entitled to do[74]). In considering that matter, we refer to the following findings which we have made:

- The SNAs identified by application of the criteria contained in Appendix 21.1 of the District Plan are areas of significant indigenous vegetation and significant habitats of indigenous fauna for the purposes of s6(c) RMA - para [34] (above);
- Applying the criteria contained in Appendix 21.1 there are probably somewhere between 326 – 361 SNAs in the New Plymouth District – para [48] (above);
- A number (we are unable to be precise as to the exact number) of the SNAs are situated in parts of the District which are most sensitive to the loss of indigenous vegetation because of the reduced extent of that vegetation and its vulnerability to local extinction of species – paras [59] and [61] (above);
- Persons exercising functions under the Resource Management Act (including the Council) have a duty to recognise and provide for the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna pursuant to s6(c) RMA – para [64] (above);
- Method 16.1(v) of the District Plan contemplates that the identified SNAs will be made subject to rules controlling their modification – para [71] (above);
- The Council's duty to protect SNAs requires application of the full palette of methods provided in the District Plan, including the identification of SNAs in Appendix 21.2 and the consequent application of rules to them because the other methods of protection primarily relied on by the Council (covenanting under QEII process and voluntary protection) do not provide an adequate level of protection – para [96] (above).

[74] Section 313(a) and (b).

[114] Having regard to the above findings we hereby make declarations that:

(1) New Plymouth District Council has a duty to recognise and provide for the protection of SNAs within its District which have been identified using the process contained in Appendix 21.1 of its District Plan - (s310)(a);

(2) The Methods of Implementation 16.1 (including the application of rules pursuant to Method 16(v)) contained in the District Plan if implemented in their entirety give effect to the relevant provisions of the New Zealand Coastal Policy Statement and Regional Policy Statement for Taranaki which seek to protect indigenous biodiversity – s310(bb)(i) and s310(h);

(3) The omission of the New Plymouth District Council to include in Appendix 21.2 of its District Plan SNAs which have been identified applying the criteria in Appendix 21.1 –

- Contravenes its duty to protect areas of significant indigenous vegetation and significant habitats of indigenous fauna pursuant to s6(c) RMA – s310(a), (c) and (h);
- Fails to give effect to relevant provisions of the New Zealand Coastal Policy Statement and Taranaki Regional Policy Statement – s310(bb)(i) and (h).

Enforcement Order

[115] The making of the above declarations leads us to consider what (if any) enforcement orders might now be made. The enforcement orders sought by Forest and Bird are set out in para [2] (above). In summary, Forest and Bird seeks orders that:

- The Council notifies a plan change and notifies the review of its District Plan which is currently pending to include in Appendix 21.2 all 361 SNAs which have been identified;
- When the Council undertakes a review of its District Plan, it includes rules relating to the protection of SNAs;

- That further work be undertaken to identify and include as SNAs other natural areas of the District which are difficult to identify through desktop analysis or are considered to be protected by other methods.

[116] The scope of enforcement orders which may be made by the Court is set out in s314 RMA. The particular provision of s314 which Forest and Bird contends provides the basis for the orders which it seeks is s314(1)(b)(i) which relevantly provides:

> ***314 Scope of enforcement order***
>
> *(1) An enforcement order is an order made under section s319 by the Environment Court that may do any 1 or more of the following:*
>
> *(b) require a person to do something that, in the opinion of the court, is necessary in order to –*
>
> *(i) ensure compliance by or on behalf of that person with this Act*
>
> ...

[117] We have previously found[74] that the Council is in contravention of its duty to recognise and provide for the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna. On the face of it, that finding enables us to make an order requiring the Council to do something which is necessary for it to ensure compliance with the Act. Accepting that as being the case, the two questions for determination are:

- Can we make the orders sought by Forest and Bird?
- Should we make the orders sought by Forest and Bird?

[118] The first relief which Forest and Bird seeks is an order that the Council notifies a change to the District Plan to include the identified SNAs within it by incorporation into Appendix 21. Forest and Bird contends that any plan change which might emerge from these proceedings would be a relatively limited and discrete exercise. While that might be the case we have concerns about the extent to which we might direct the Council regarding that matter.

[74] Para [114] above.

[119] Schedule 1 RMA prescribes the way in which a plan change must proceed. In this instance, it would be necessary for the Council to prepare the proposed plan change and consult with various identified persons and bodies. During this process it is required to prepare and consider an evaluation report on the proposed change in accordance with s32 RMA before determining whether or not to proceed with the change.[75] It is only after it has completed that process that the Council may notify any plan change.[76]

[120] Although it is reasonable to expect that in undertaking its evaluation the Council would have regard to any findings which we might make in these proceedings, we do not consider that it is possible for us to fetter the Council's considerations in doing so. The evaluation to be made under s32 and the form of any plan change which emerges from that evaluation is a matter which is within the functions of the Council and not one which is open to the Court to direct or usurp. Ultimately the Court's functions in the plan change process arise under the appeal processes available under RMA and the provisions of s293 rather than at the *front end* of the process.

[121] The second enforcement order sought by Forest and Bird relates to a review process under s79 RMA. Section 79(1) RMA requires local authorities to review provisions of regional and district plans if they have not been the subject of a proposed plan review or change by that local authority during the previous ten years. The District Plan which has been subject of consideration in these proceedings became operative on 15 August 2005 and the Council has commenced a review of it pursuant to s79.

[122] The provisions of RMA relating to plan reviews are notably brief and deficient of requirements for process and time limits. It is apparent from consideration of s79 that the review process is a precursor to the plan change process contained in s73 and Schedule 1. We consider that our enforcement powers under s314(1)(b)(i) would extend to ordering a Council to undertake a review pursuant to

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[75] Clause 5(1)(a), Schedule 1.
[76] Relevant provisions of s32 are set out in para [66] (above).

s79 if it had failed to do so, but we do not consider that it is open to us to prescribe the form of that review. Again we consider that the Court's power to address issues arising out of a review arise under the appeal processes in Schedule 1 in respect of any changes to the District Plan which the Council decides to make or not to make.

[123] Even if we were wrong in our assessment as to whether or not we can be as directive as Forest and Bird wish as to the plan change or review processes, we do not consider that we should make enforcement orders as sought. A number of the parties to the proceedings before us contended that the District Plan review process is the appropriate vehicle for consideration of the issues which Forest and Bird has put before the Court and we consider that there is merit to that proposition.

[124] The review process is mandatory on the Council and is currently underway. We have reservations about imposing on the Council the significant costs and complications inherent in requiring undertaking of a plan change process concurrent with the review process. The primary opposition of Forest and Bird to the review process appeared to be one of timing. We observe that in undertaking its review the Council is obliged to comply with s21 RMA and avoid unreasonable delay.

[125] The fact that the plan review process is underway also leads us to question whether or not it is *necessary* to order the Council to commence a coincidental plan change to address these issues which might properly be subject to review. Even if the Court was to direct the Council to undertake the change process and it was to do so as promptly as is reasonable, the requirements as to consultation and evaluation mean that such change will inevitably overlap and coincide with the review process.

[126] Having regard to these factors our view is that we should not exercise such jurisdiction as we might have to direct the processes sought by Forest and Bird by way of enforcement order and we decline to make the enforcement orders sought.

Costs

[127] Notwithstanding that it was unsuccessful in obtaining enforcement orders, Forest and Bird has obtained declarations addressing the issues which it put before the Court. We consider that it is appropriate for us to consider an award of costs against the Council arising out of that process and we reserve costs accordingly. Any costs application from Forest and Bird is to be made and responded to in accordance with the Environment Court Practice Note 2014.

DATED at WELLINGTON this 17th day of December 2015.

For the Court:

B P Dwyer
Environment Judge

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

Decision No. [2018] NZEnvC 84

IN THE MATTER	of the Resource Management Act 1991
AND	of appeals under clause 14(1) of the First Schedule of the Act in relation to the Proposed Invercargill District Plan
BETWEEN	DIRECTOR-GENERAL OF CONSERVATION (ENV-2016-CHC-91) POWERNET LIMITED (ENV-2016-CHC-92) ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NEW ZEALAND (ENV-2016-CHC-99) TRANSPOWER NZ LIMITED (ENV-2016-CHC-100) Appellants
AND	INVERCARGILL CITY COUNCIL Respondent

Court:	Environment Judge J R Jackson (Sitting alone under section 279(1) of the Act)
Hearing:	at Invercargill on 19 March 2018
Appearances:	P Williams for Director-General of Conservation P E Anderson for Royal Forest and Bird Protection Society of New Zealand Incorporated R Lindsay for PowerNet Limited M Morris for Invercargill City Council L de Latour for Southland Regional Council
Date of Decision:	1 June 2018
Date of Issue:	1 June 2018

INTERIM DECISION

A: Under clause 15(2) of the First Schedule to the Resource Management Act 1991 the Court directs subject to Order B that the definition of "Indigenous Vegetation" in the proposed Invercargill District Plan be amended to read:

> Indigenous vegetation means vegetation containing vascular and non-vascular plants and fungi that are indigenous or endemic to the ecological districts covering the City.

B. Leave is reserved for the parties to address the court on the issues raised in part 5 of the Reasons provided the issue is raised with the Registrar by 22 June 2018, preferably with a proposed speedy timetable for brief submissions and if necessary brief evidence on the reserved issues.

C. There is no order for costs.

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REASONS

1. Introduction

1.1 The issues, the parties and the witnesses

[1] This decision is about one issue: the appropriate definition of "indigenous vegetation" in the proposed Invercargill District Plan ("the City Plan") under the Resource Management Act 1991 ("the RMA" or "the Act").

[2] There are four relevant appeals. They are from:

- the Royal Forest and Bird Protection Society of New Zealand Incorporated ("Forest and Bird");
- the Director-General of Conservation ("the DGC");
- PowerNet Limited; and
- Transpower New Zealand Limited.

[3] There were two interested section 274 parties who took part in the hearing:

- The Southland Regional Council ("SRC");
- Federated Farmers of New Zealand Incorporated ("Federated Farmers").

[4] I received thoughtful and considered evidence from a number of witnesses:

- Mr B D Rance (ecology) and Ms N A N Yozin (planning) for the Director-General of Conservation;
- Dr S Walker (ecology) and Ms N L Sitarz (planning) for Forest & Bird;
- Ms M Justice (planning) for PowerNet Ltd;
- Ms K L Reilly (law and resource management) for Federated Farmers NZ; and
- Ms E A Devery (planning) for Invercargill City Council ("ICC").

[5] Two of those witnesses – Dr Walker and Ms Reilly – were unable to attend the hearing, but all parties have agreed their evidence should go on the record. Accordingly, I have read that evidence and considered it with the rest. No question of credibility was raised in respect of any of the witnesses; any differences between them were honest,

reasonable differences of opinion.

1.2 Background: the City's ecosystems

[6] Invercargill City is part[1] of three ecological districts: the "Southland Plains" in the north, "Waituna" to the southeast and "Foveaux" to the southwest. Extensive parts of the latter two ecological districts are in the coastal environment (so the New Zealand Coastal Policy Statement applies to them). In the opinion of Mr B D Rance, a well-respected ecologist who is employed by and gave evidence for the DGC, Invercargill City includes a wide range[2] of indigenous plants and ecosystems within its boundaries. The indigenous ecosystems include forests, shrublands, tussockland, wetlands and coastal ecosystems (including estuaries). In all there are 27 indigenous ecosystems present[3]. Some ecosystems, for example "manuka shrublands", may occur as both original and secondary vegetation types[4].

[7] Mr Rance stated that of those ecosystems[5]:

- 14 ecosystems have suffered a "high extent of loss";
- four ecosystems are wetlands; and
- three are naturally rare wetlands.

[8] I received a careful summary of the indigenous biodiversity within those ecosystems from Mr Rance, supplemented by further evidence from Dr S Walker, a leading ecologist. I will attempt to summarise it further here. My task is not made easier by the fact that Mr Rance did not confine his discussion to "ecosystems" or "habitats" but used other group descriptors. For example, he wrote that native shrubland "communities" include some original vegetation types[6] (including "ecotones" on the margins of wetlands, the coast or estuaries). Other shrublands may be successional resulting from past vegetation clearance or disturbance.

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1 B D Rance evidence-in-chief 4.2 [Environment Court document 8].

2 B D Rance evidence-in-chief 5.1 [Environment Court document 8].

3 B D Rance evidence-in-chief 5.3 and Attachment 1 [Environment Court document 8]. Mr Rance uses Singers J D and Rogers G M (2014) *A Classification of New Zealand's terrestrial ecosystems* Science for Conservation *325* (Department of Conservation, Wellington).

4 B D Rance evidence-in-chief 5.4 [Environment Court document 8].

5 B D Rance evidence-in-chief 5.5 [Environment Court document 8].

6 B D Rance evidence-in-chief 7.4 [Environment Court document 8].

[9] Most of Invercargill City outside the urban areas and estuaries is rural land with farming or agriculture as the predominant use, with some lifestyle blocks. Pastoral farming or agricultural use has led to the modification of some indigenous vegetation. The presence of urban and semi-urban areas including Invercargill, Bluff, Makarewa, Otatara, Myross Bush, Omaui, and Green Hills has contributed to high levels of (mainly past) indigenous vegetation loss and disturbance by logging, forest clearance, forest fragmentation, and stock grazing[7].

[10] The creation of urban areas and associated gardens has been a mechanism for the introduction of a wide range of exotic and non-local native plants. The latter are of conservation concern[8], because they compete with indigenous vegetation. Examples of non-local native plants identified by Mr Rance are lacebark (*Hoheria sexstylosa*), and three *Coprosma* species: karamu (*robusta*), *C. grandiflora* and taupata (*C. repens*).

[11] It is also important to recognise the dynamisim of ecosystems and their functioning. As Dr Walker wrote[9]:

> Mr Rance emphasises in his evidence that successional ecosystems are indigenous vegetation that form a characteristic part of the vegetation cover and ecological character and composition of Invercargill City. I agree, and add that these successional ecosystems ('developing indigenous ecosystems') are also needed to maintain biodiversity in and beyond the City. This is especially so given the context of extensive past loss, which will have legacy effects that continue to contribute to future loss of biodiversity. Maintenance of biodiversity in the City is therefore likely to require active restoration of new areas of developing indigenous ecosystems, as well as protection of those that remain.

1.3 Rules in the City Plan

[12] Areas which qualify under section 6(c) RMA have been identified in the proposed City Plan as Significant Natural Areas ("SNAs"). The objectives, policies and rules regarding those areas have been settled.

[13] The chief remaining issues as to biodiversity relate to the appropriate controls in the plan in respect of other biodiversity values (i.e. those that do not qualify as SNAs). The parties say they have agreed the objectives and policies in respect of these but have

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7 B D Rance evidence-in-chief 6.1 and 6.2 [Environment Court document 8].
8 B D Rance evidence-in-chief 6.8 [Environment Court document 8].
9 S Walker evidence-in-chief 15 [Environment Court document 11].

some disagreement over the rules. It will assist in the formulation of those rules if a definition of "indigenous vegetation" can be settled. Although that phrase is used in section 6(c) RMA, it is not defined.

1.4 The statutory framework and the higher order documents

The District Plan

[14] Under the RMA the ICC as territorial authority has a function[10] of, in short, maintaining indigenous "biological diversity". The last two words are defined[11] as meaning:

> ... the variability among living organisms, and the ecological complexes of which they are a part, including diversity within species, between species, and of ecosystems.

I have used the common abbreviation of the phrase "biodiversity".

[15] Amongst other things the biodiversity function includes protecting areas of significant indigenous vegetation[12] and of having particular regard to "the intrinsic values of ecosystems"[13]. The latter is an intricate task because intrinsic values are defined in section 2 RMA as meaning:

> **intrinsic values**, in relation to ecosystems, means those aspects of ecosystems and their constituent parts which have value in their own right, including—
>
> (a) their biological and genetic diversity; and
>
> (b) the essential characteristics that determine an ecosystem's integrity, form, functioning, and resilience.

[16] In preparing its district plan the ICC must consider and give effect to all the matters set out in sections 74 and 75 of the RMA. Most relevantly this requires any rules (including definitions) to accord with Part 2 of the Act, and to give effect to any National Policy Statement ("NPS") and to the regional policy statement ("RPS") amongst other obligations of less relevance in the context of these proceedings (at this stage).

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10 Section 31(1)(b)(iii) RMA.

11 Section 2 RMA.

12 A matter of natural importance under section 6(c) RMA.

13 Under section 7(d) RMA.

The New Zealand Coastal Policy Statement

[17] There is one NPS which is relevant: The NZ Coastal Policy Statement. A considerable area of the district is within the coastal environment so the NZCPS contains a number of relevant policies. The most relevant is Policy 11 which states:

> **Indigenous biological diversity (biodiversity)**
>
> To protect indigenous biological diversity in the coastal environment:
>
> (a) avoid adverse effects of activities on:
>
> (i) indigenous taxa that are listed as threatened or at risk in the New Zealand Threat Classification System lists;
>
> (ii) taxa that are listed by the International Union for Conservation of Nature and Natural Resources as threatened;
>
> (iii) indigenous ecosystems and vegetation types that are threatened in the coastal environment, or are naturally rare;
>
> (iv) habitats of indigenous species where the species are at the limit of their natural range, or are naturally rare;
>
> (v) areas containing nationally significant examples of indigenous community types; and
>
> (vi) areas set aside for full or partial protection of indigenous biological diversity under other legislation; and
>
> (b) avoid significant adverse effects and avoid, remedy or mitigate other adverse effects of activities on:
>
> (i) areas of predominantly indigenous vegetation in the coastal environment;
>
> (ii) habitats in the coastal environment that are important during the vulnerable life stages of indigenous species;
>
> (iii) indigenous ecosystems and habitats that are only found in the coastal environment and are particularly vulnerable to modification, including estuaries, lagoons, coastal wetlands, dunelands, intertidal zones, rocky reef systems, eelgrass and saltmarsh;
>
> (iv) habitats of indigenous species in the coastal environment that are important for recreational, commercial, traditional or cultural purposes;
>
> (v) habitats, including areas and routes, important to migratory species; and
>
> (vi) ecological corridors, and areas important for linking or maintaining biological values identified under this policy.
>
> [footnotes omitted]

[18] While on the subject of national policy statements, it is regrettable that there is no NPS on indigenous biodiversity after 26 years of the RMA and about eight years from formal promotion of the idea.

The Southland Regional Policy Statement

[19] The district plan must give effect to the Southland Regional Policy Statement ("the RPS") which contains two relevant objectives. The first[14] is (in summary) to identify the indigenous ecosystems and habitats at risk to further loss and degradation. In passing I observe that it is not obvious to me that the (proposed) City Plan implements this objective: identifying SNAs is not necessarily the same thing. In fact, it appears from the evidence on this proceeding that the SNA identification may omit some of the most vulnerable ecosystems. The second[15] objective is to maintain indigenous biodiversity in Southland and protect areas which qualify under section 6(c) RMA.

[20] Important implementing provisions in the RPS are:

> **Policy BIO.4 – Maintain indigenous biodiversity**
> Manage a full range of indigenous habitats and ecosystems to achieve a healthy functioning state, and to ensure viable and diverse populations of native species are maintained, while making appropriate provisions for lawful maintenance and operation of existing activities.
>
> In giving effect to this policy, regard will be had to the following potential adverse effects:
>
> (i) fragmentation of, or reduction in the extent of, indigenous vegetation or habitats of indigenous fauna;
> (ii) fragmentation or disruption of connections and linkages between ecosystems or habitats of indigenous fauna;
> (iii) loss of, or damage to, buffering of ecosystems or habitats of indigenous fauna;
> (iv) loss of reduction of rare or threatened indigenous species' populations or habitats.
>
> ...[16]
>
> Maintenance of indigenous biodiversity is required in addition to protecting identified areas of significant indigenous vegetation and significant habitats of indigenous fauna. This requires regulatory and non-regulatory measures that encourage retention and protection of remaining areas of indigenous biodiversity and their enhancement. It does not necessarily mean maintaining every individual specimen or plant or animal, rather it requires an understanding of the importance of an area or habitat and its contribution to maintaining genetic, species and ecosystem diversity. Measures that encourage the maintenance of indigenous biodiversity include recognition of: the range of ecosystem services provided by

14 Objective BIO.1 Southland RPS.
15 Objective BIO.2 Southland RPS.
16 Part of explanation omitted.

indigenous biodiversity; the importance of ecological connections/corridors and buffer areas; the need to control a range of potential adverse effects of land activities and discharges on indigenous biodiversity; the need to control animal and plant pests; and avoiding, remedying or mitigating adverse effects on indigenous biodiversity.

[21] That policy is complemented by a later one which reads:

> **Policy BIO.10 – Role of landowners**
> Recognise the critical role of private landowners in maintaining or enhancing and actively managing the remaining indigenous biological diversity that occurs on private land.

The explanation for this policy goes further by stating "the co-operation of private landowners is vital" to preventing further indigenous biodiversity losses. It also states (and this was affirmed in the evidence of Ms Reilly) that often the costs of protecting indigenous biodiversity (and its ecosystem services) are borne by individual landowners whereas the benefits go to all. Those statements are not unproblematic. While I accept that obviously they might apply to anthropocentric values (like landscape) it is less obvious that they should apply to biodiversity values. Indigenous ecosystems may be life-supporting primarily for indigenous biodiversity but ultimately they support all humans including those who may own the land.

2. The concerns and the competing evidence

2.1 The concerns of the parties

[22] The evidence was remarkably wide-ranging for a dispute about a definition.

[23] For Forest and Bird Dr Walker wrote[17]:

> In the City and elsewhere in New Zealand, ongoing loss of indigenous ecosystems, plant communities (vegetation) and associated species is a cumulative process. Multiple effects contribute to loss at different times and in different locations by increasing disturbance, reducing species' populations, and/or fragmenting species' distributions. Individual effects may be relatively small, but collectively multiple effects can have very large impacts. In my experience, cumulative effects are facilitated by policies that allow multiple decisions to be made (or not made) that enable individually 'minor' or 'insignificant' adverse effects on ecosystems to occur at different times. This death by a thousand cuts can occur, for example, through permitted activities. Cumulative effects can also be promoted by a strong focus on

17 S Walker evidence-in-chief 12 and 13 [Environment Court document 11].

ecologically significant[18] ecosystems, which may lead to only the 'best' ecosystems and or only parts of continuous areas of indigenous vegetation being deemed worthy of retention, remediation or mitigation.

Avoiding many of the anticipated effects of climate change on indigenous biodiversity requires avoiding cumulative effects. For example, to allow movement and resilience in the face of changing conditions it is important to:

(a) protect species at geographic and environmental limits, and outliers (which are likely to have distinct traits and important adaptive variations[19]);
(b) protect multiple large populations of species;
(c) avoid continuing habitat fragmentation and/or reductions in the area of available habitat for species – and indeed, to actively restore and increase habitat area in many areas that have been greatly depleted, such as the City.

[24] In relation to the definitional issue Dr Walker wrote[20]:

I consider that a very broad and inclusive definition of 'indigenous vegetation' would be required if it is to cover the wide range of types that are important for maintaining indigenous biodiversity in (and beyond) the City. Specifically:

(a) the definition should include vegetation in which native species account for very low proportions of the cover and total number of species present. There are many ecosystems that are dominated[21] in cover by exotic species and that are important, essential, or critical habitats for indigenous species, and/or are important for reasons given in my paragraphs 15 to 18. These need to be regarded as indigenous vegetation if indigenous biodiversity is to be maintained;
(b) for the same reasons, there is certainly no ecological justification, in my opinion, for requiring 'dominance' of indigenous species (in number, biomass or cover) as a qualifier. Furthermore, in the cool temperate ecological setting of Invercargill, most of the young ('early seral') ecosystems will be on a pathway of succession to native dominance over time, even if they have very small numbers or little cover of indigenous species now. This is a very different situation to that in Northland (for example) where tall introduced species are more competitive and likely to 'co-opt' the successional process and dominate for long periods;
(c) native (i.e. indigenous) plant species should be broadly defined. That is, 'plants' should encompass non-vascular plants such as lichens, mosses, and fungi as well as vascular plants.

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18 Her footnote reads: "in the sense of section 6(c) RMA".
19 Her footnote reads: "adaptive variation is the genetic variation within species that is available to natural selection and therefore can lead to adaptation to new conditions".
20 S Walker evidence-in-chief 19 [Environment Court document 11].
21 Her footnote reads: "I assume that dominance means >50%".

[25] There are a number of potentially important facts (if correct) in that passage. One in particular is the emphasis on the dynamic nature of ecosystems with its insight (again if correct but it seems very plausible to me) that seral indigenous ecosystems can change to other indigenous ecosystems. From a completely different perspective Ms Reilly for Federated Farmers stated that the Society recognised the importance of protecting biodiversity but was concerned about the effects of vegetation clearance rules on practical farming operations and financial viability. She wrote[22]:

> Any definition adopted must account for, and appropriately give weight to and recognise that minor elements of common indigenous vegetation may inhabit exotic pasture. At what threshold does indigenous vegetation that is interspersed amongst improve pastures get captured by the policy framework? Should the plan's definition for indigenous vegetation encompass the fungi kingdom for instance, and if so, what are the practical impacts of this from a plan user perspective?
>
> Secondly, what are the unintended consequences of such a broad and generic definition? Our members prefer that definitions are adopted that are unambiguous, and provide clarity and certainty for plan users: one that avoids the need to engage an ecologist for their opinion before commencing any number of typical farming related activities.

[26] On the other hand, Dr Walker wrote[23]:

> For example, I understand that it is proposed to permit clearance of areas of indigenous vegetation as large as 500 and 1000 square metres within defined time periods. Many patches of remaining indigenous vegetation and naturally uncommon ecosystems in the City are now much smaller than 500 square metres in extent. A single permitted clearance event could completely extinguish an entire naturally uncommon ecosystem, for example. Clearance of 500 square metres would also significantly reduce the size of a number of important remaining wetlands, shrublands and forest remnants. Multiple events of this nature would undoubtedly greatly and cumulatively diminish the remaining indigenous vegetation and lead to an acceleration of biodiversity loss, in my opinion. Permitted clearance of areas an order of magnitude smaller (i.e. 50 to 100 square metres) would also have cumulative adverse effects (albeit slower). Furthermore, in my experience it is far from straightforward to ensure that such 'area-over-time' limits are being complied with, especially in non-forest vegetation.
>
> In my experience, an exemption for indigenous vegetation that has undergone past agricultural 'improvement' (e.g. over sowing, topdressing) is undesirable because it can make rules unenforceable and lead to perverse outcomes. This is because it is generally

22 K L Reilly evidence-in-chief 36 and 37 [Environment Court document 16].

23 S Walker evidence-in-chief 22 and 23 [Environment Court document 11].

> very difficult to establish just what activities occurred in the past and how often (making enforcement impractical) and the exemption can create an incentive to undertake such improvement. Furthermore, areas that have been thoroughly modified by past agricultural intensification can still retain value as habitats for indigenous flora and fauna and/or potential for their recovery.

I accept that provisions as to areas should not be included in definitions if that can be avoided.

[27] In fact, Federated Farmers agree with Forest and Bird that there should be a simple definition with one important qualification. Federated Farmers considers there should also be a definition of "improved pasture". Ms Reilly refers to the definition in the Christchurch City Plan which reads:

> Improved pasture in relation to sub-chapter 9.1 Indigenous Biodiversity and Ecosystems of chapter 9 Natural and Cultural Heritage, means an area of pasture:
>
> (a) where exotic pasture grass and herb species are the visually predominant vegetation cover; and
>
> (b) that:
>
> (i) is used for livestock grazing and has been routinely so used since 1 June 1996; or
>
> (ii) at any time on or after 1 June 1996 was modified or enhanced for the purpose of livestock grazing by cultivation, irrigation, over sowing, top-dressing and/or direct drilling.

[28] The associated rule in the CCC Plan then reads:

> Rule 9.1.4.1.1 – Permitted Activity Standards – P1 Indigenous Vegetation Clearance
> Any indigenous vegetation clearance shall be limited to clearance for one or more of the following:
>
> (1) the operation, maintenance and repair, within 2 metres either side, of fences, access tracks, buildings, fire ponds, gates, stock yards, troughs and water tanks;
>
> (2) clearance necessary for the removal of pest plants and pest animals in accordance with any regional post management plan or the Biosecurity Act 1993;
>
> (3) for the purpose of maintaining improved pasture;
>
> (4) conservation activities;
>
> (5) to implement a conservation covenant established under the Conservation Act 1987 or any other Act specified in the First Schedule of the Conservation Act 1987;
>
> (6) clearance of any understory of indigenous vegetation as a result of harvesting an existing forestry area or maintenance of forestry access or firebreaks.

Ms Reilly noted[24] a similar approach was taken in the Hurunui District Plan.

[29] Ms Reilly wrote that the difficulty perceived by Federated Farmers with adopting the "indigenous vegetation" definition proposed by Forest and Bird, without an accompanying definition for 'improved pasture' is this[25]:

> The Invercargill District Plan's existing rules have largely been agreed to through prior mediation processes based on the Council's decisions-version definition, and if the court was to adopt a simple, very generic definition capturing all and any indigenous vegetation, however small or insignificant, without a corresponding improved pasture definition and rule, then there are going to be considerable ongoing difficulties with the workability of the plan, given very strict area restrictions now proposed by the Department of Conservation, particularly for clearance of non-significant vegetation undertaken prior to 2006. We note that other plans have consistently settled on 20 years as a clearance measurement point and understand that this isn't possible here, for reasons explained [later].

[30] For PowerNet Ms Justice was of the opinion[26] that any definition of indigenous vegetation should: … exclude some indigenous vegetation where its dominance is below [a] nominated threshold to enable practical application of … biodiversity rules without unnecessarily limiting land use activities. With respect to the witness, the word "unnecessarily" in that sentence encapsulates one of the core problems when considering the safeguarding of ecosystems and their biodiversity: in relation to New Zealand's declining biodiversity what limitations on land use are "unnecessary"?

2.2 The competing definitions

[31] The Southland RPS includes a definition of "indigenous vegetation" as follows:

> Means any local indigenous plant community through the course of its growth or succession consisting primarily of native species and habitats normally associated with that vegetation type, soil or ecosystem or having the potential to develop these characteristics. It includes vegetation with these characteristics that has been regenerated with human assistance following disturbance or as mitigation for another activity, but excludes plantations and vegetation that have been established for commercial harvesting.

That definition was included in the decisions version of the City Plan and is the subject

24 K L Reilly evidence-in-chief 48 [Environment Court document 16].
25 K L Reilly evidence-in-chief 5 [Environment Court document 16].
26 M Justice evidence-in-chief 26 [Environment Court document 15].

of the appeals.

[32] Although they have some disagreements over the rules, Forest and Bird and Federated Farmers agree there should be a simple definition reading:

> Indigenous vegetation means vegetation containing plant species that are indigenous or endemic to the area/site.

[33] The DGC seeks a fuller definition as follows[27]:

> Indigenous vegetation means any indigenous vascular and non-vascular plant (including terrestrial algae, cyanobacteria, lichens, fungi, mosses, liverworts, hornworts) community which contains a naturally occurring native species of the [City Plan] and may include exotic vegetation as part of that plant community. Where there is doubt regarding the vegetation type, the assessment of a suitable qualified ecologist will be used to determine the status of an area.

[34] PowerNet seeks this definition[28]:

> Indigenous vegetation means any vascular and non-vascular plant community that consists predominantly of naturally occurring native species of the Invercargill District. For the purposes of this definition, predominance is measured as either:
>
> (a) naturally occurring native species comprising at least XX% coverage by area to be cleared or at least XX% of the total number of species present in that plant community; or
>
> (b) naturally occurring native species comprising at least XX% coverage in plant communities where naturally occurring native species make up the tallest stratum.
>
> Where predominance is unclear, the assessment of a suitably qualified ecologist will be used to determine the status of an area, and such assessment shall be determinative of the matter.

[35] The ICC itself suggests this definition[29]:

> Indigenous vegetation means any vascular or non-vascular plant community that consists of naturally occurring native species of the Invercargill City District. For the purposes of identifying an 'area' of indigenous vegetation, to determine compliance with Rules 3.1.5 to 3.1.7 an 'area' is that dominated by indigenous vegetation but may include exotic species interspersed throughout. Dominance is measured as either:
>
> - locally indigenous species comprising at least x% coverage by area to be cleared or

27 N Yozin evidence-in-chief 8.1 [Environment Court document 9].
28 M Justice evidence-in-chief 23 [Environment Court document 15].
29 E A Devery evidence-in-chief 83 [Environment Court document 18].

x% of the total number of specimens present; or

- locally indigenous species comprising at least x% coverage, in plant communities where locally indigenous species make up the tallest stratum.

Where predominance is unclear, the assessment of a suitably qualified ecologist will be used to determine the status of an area, and such assessment shall be determinative of the matter.

[36] Finally, I note that the Resource Management (National Environmental Standards for Plantation Forestry) Regulations 2017 ("the Plantation Regulations") contain this definition:

> **Indigenous vegetation** means vegetation that is predominantly vegetation that occurs naturally in New Zealand or that arrived in New Zealand without human assistance.

3. Some heuristics for stating definitions under the RMA

[37] The Environment Court's decision in *Royal Forest and Bird Protection Society of New Zealand Incorporated v Innes*[30] ("*Innes*") was also concerned with the definition of "indigenous vegetation" and is thus of potential relevance to this case. That was an enforcement proceeding concerned with discing of land at Hawea Flats in the Queenstown Lakes District. The definition in the Queenstown Lakes District Council's District Plan read:

> **Indigenous vegetation**
> Means a plant community in which species indigenous to that part of New Zealand are important in terms of coverage, structure and/or species diversity.

[38] The Environment Court stated[31]:

> ... the rule owes its origins to compromise and poor regulatory process. Consequently, it is unacceptably fraught with complexity and uncertainty. In this context, we stop short of declaring it *ultra vires*. Firstly, that is because we have only had opportunity to apply the lens of Mr Innes' unfortunate circumstances to it. Secondly, in that context and with the help of court-directed expert witness conferencing amongst the three ecology and botany experts, we have elicited a meaning as we later address. We have no jurisdiction to declare it void for unreasonableness.

The decision illustrates the difficulties with using a value-laden word such as "important"

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30 *Royal Forest and Bird Protection Society of New Zealand Incorporated v Innes* [2014] NZEnvC 72.

31 *Innes*, above n 30 at [21].

within an indigenous vegetation definition and the potential ambiguity such drafting can create.

[39] More generally a definition or a rule should be sufficiently certain. Ms de Latour, for the SRC, referred to the recent High Court decision of *Man O' War Farm Ltd v Auckland Council*[32], a case concerning the definition of "coastal hazards" in the proposed Auckland Unitary Plan. Coastal hazards were defined to include "any land which may be subject to erosion over at least a 100-year time frame", along with some more technical qualifications. Whata J referred[33] to cases holding that regulations can be void for uncertainty. He then held first that the general part of the definition was void as it gave "no guidance as to the requisite probability required", and the time frame provided "envisages a broad evaluative assessment capable of engendering considerable scientific debate"[34]. Second, he held that the definition created "a degree of uncertainty and could make it difficult to identify whether … a resource consent [would be needed]"[35].

[40] Counsel also referred to other Environment Court decisions. In *Re Lower Hutt City Council* the Environment Court held[36] that a district plan must be "comprehensible to a reasonably informed, but not necessarily expert reader. If it is not, then its validity is certainly in question". In *Christchurch City Council v Aidanfield Holdings Ltd*[37] the High Court said the test is "what would an ordinary, reasonable member of the public, examining the scheme [now plan] have taken"?

[41] In *Carter Holt Harvey Limited v Waikato Regional Council*[38] ("*CCH*") the Environment Court stated that the interpretation of matters within a permitted activity rule which involved input of site-specific expert analysis and judgement, was not appropriate for a permitted activity rule[39]. In this case, where the definition is proposed to support a range of permitted activities, it is important that compliance with the rule can be objectively ascertained.

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32 *Man O'War Farm Ltd v Auckland Council* [2017] NZHC 1349.

33 Applying *University of Auckland v Auckland Council* [2017] NZHC 1150 at [14], citing *Transport Ministry v Alexander* [1978] 1 NZLR 306 (CA) at 311 per Cooke J; *McEldowney v Forde* [1971] AC 632; *Official Assignee v Chief Executive of the Ministry of Fisheries* [2002] 2 NZLR 722 (CA) at [82] per Thomas J, and *Power v Whakatane District Council* HC Tauranga, CIV-2008-470-456, 30 October 2009 at [45].

34 *Man O'War Farm Ltd v Auckland Council* above n 32 at [13].

35 *Man O'War Farm Ltd v Auckland Council* above n 32 at [14].

36 *Re Lower Hutt City Council* EnvC W046/07 at [10].

37 *Christchurch City Council v Aidanfield Holdings Ltd* [2010] NZRMA 92 (HC) at [42].

38 *Carter Holt Harvey Ltd v Waikato Regional Council* EnvC, A123/2008, 6 November 2008.

39 *CCH* above n 38 at [132].

[42] The cases cited appear to be potentially conflicting on the degree of subjectivity permissible in a definition or rule. On the one hand, there is High Court authority for the proposition that a reservation of a subjective judgement to a territorial authority in determining whether an activity is a permitted activity is not acceptable: *T L and N L Bryant Holdings Ltd v Marlborough District Council*[40] ("*Bryant*"). On the other hand, in *Waimakariri District Council v North Canterbury Clay Target Association*[41], after referring to *Bryant*, the Environment Court stated that "the fact that a rule requires judgement does not necessarily make it *ultra vires*. The question is whether undue subjective discretion is conferred". Fortunately, in this decision I do have to resolve where the line should be drawn in a general way; as so often the answer will depend on the facts and context.

Summary

[43] Finally, the planner called by Forest and Bird, Mr N L Sitarz, referred[42] to a publication by the Ministry for the Environment called *National Planning Standards: Definitions*[43] which contains some useful observations as to what terms should not be defined. The suggested heuristics include the following matters:

(0) a term should not be defined if it has a plain ordinary meaning or is defined in the RMA[44];
(1) a definition should be certain in its application (and avoid the need for "interpretation");
(2) conversely, a definition should if possible avoid using words involving a value-judgment such as "dominant", "predominantly", "primarily" or "important";
(3) preferably the definition should be comprehensible to a reasonably informed layperson (not merely to experts);
(4) a definition should not retain a discretion to the local authority as to whether an activity falls within it;
(5) a definition should not be a "de facto rule" or attempt to cover matters which

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40 *T L and N L Bryant Holdings Ltd v Marlborough District Council* [2008] NZRMA 485 (HC) at [50].
41 *Waimakariri District Council v North Canterbury Clay Target Association* [2014] NZEnvC 114 at [23]. (This decision was appealed to the High Court and Court of Appeal, but not on this question).
42 N L Sitarz, evidence-in-chief Attachment 4 [Environment Court document 12].
43 *National Planning Standards: Definitions* (2017) MFE Discussion Paper G.
44 p 12 *National Planning Standards: Definitions* (2017) MFE Discussion Paper G.

are more appropriate for rules.

In most situations that appears to be a convenient summary of the approach to take.

4. Consideration

4.1 The scheme of the RMA with respect to biodiversity and indigenous vegetation

[44] In part 2 of the RMA there are three provisions that are particularly important and relevant to biodiversity issues. They are the obligations:

- to "safeguard ... the life-supporting capacity of ... ecosystems" (section 5(2)(b) RMA);
- to "... protect ... areas of significant indigenous vegetation and significant habitats of indigenous fauna" (section 6(c)); and
- to have particular regard to the "intrinsic values of ecosystems" (section 7(d) recalling that is a defined[45] term).

[45] Five points should be made here about the scheme of the RMA in relation to indigenous biodiversity. First, the primary responsibility of local authorities when exercising their functions in respect of indigenous biodiversity is part of the very definition of "sustainable management": to safeguard the life-supporting capacity of ecosystems.

[46] Second, the recognition and protection of areas of significant indigenous vegetation, nationally important as it is, is an extension of that primary obligation. If an ecosystem or part of an ecosystem (being in either case an area of indigenous vegetation or a habitat of indigenous fauna) is found to be significant then that ecosystem is to be protected in itself, not merely to have its life-supporting capacity protected.

[47] Third, safeguarding (or protecting) the life-supporting capacity of ecosystems includes in each case having particular regard to each of its components including – as the definition of 'intrinsic values'[46] implies – the composition of its biological and genetic diversity, and in particular, the essential (biotic and abiotic) characteristics of:

45 Section 2 RMA.
46 Section 2 RMA.

- the ecosystem's integrity (e.g. what space does it occupy at a given time? Is an occurrence at the limit of the ecosystem's extent of occurrence?);
- its form (what are the characteristics of its environment – the geomorphology, topography, soils, climate, indigenous and other species of flora and fauna, patterns of distribution, natural processes and other relevant constituents identified in the definition of "environment" in s2 RMA;
- its functioning (e.g. is it a seral or 'climax'[47] ecosystem? What are the external processes that apply to it? – climate change? pests? weeds? How are the natural cycles and feedback loops – the Carbon, Nitrogen, Phosphorus cycles and others – being changed?); and
- Its resilience (e.g. at what point is a degraded ecosystem irretrievably doomed to "collapse" or can it recover?)

[48] The fourth minor point is that the phrase "indigenous vegetation" only occurs in three places in the RMA: in section 6(c) of the Act and twice elsewhere[48] in its machinery provisions. Each time it occurs it is part of the wider phrase first used in section 6(c); "areas of significant indigenous vegetation". In this case, I am advised that these areas within the City – the "SNAs" – have already been identified. So, the need for a definition is not obvious, and might conceivably confuse resolution of the issues. However, I proceed on the basis that the phrase might be used in objectives, policies and rules other than those simply relating to section 6(c) RMA.

[49] Fifth, there are three stages to the proper performance of the territorial authorities' functions in respect of biodiversity and they should be carried out in a logical order. The stages are:

(1) to identify the issues to be dealt with (usually as questions). While there is (now) no obligation to include a list of issues in a plan[49] it is difficult to state objectives and policies without having at least an implicit list of issues to be answered;

(1A) as a subset of (1) to identify the biodiversity (roughly the endemic flora[50] and fauna) and the ecosystems in which it lives;

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47 'Climax' is in inverted commas because the idea of an endpoint for ecosystems which are inherently dynamic is probably incorrect; the term is used (usually) to denote mature trees.

48 Section 86B, and section 149N RMA.

49 Section 75(2)(a) RMA.

50 Some problems with this are discussed later.

(2) to state the objectives and policies[51] which must be formulated (amongst other things) in accordance with the provisions of Part 2[52] and any NPS[53] and so as to give effect to any NPS and RPS[54]; and

(3) to state the rules[55] and methods[56] to implement the policies.

[50] Consequently, I consider that the definition of "indigenous vegetation" should be stated in that wider statutory context, not simply for the application of section 6(c) RMA, especially in the circumstances of these proceedings where the SNAs have already been identified. Also, stating definitions appears to be part of the first stage identified above. Logically it comes before the statement of objectives, policies and rules in the district plan.

[51] What are the biodiversity issues for Invercargill City? The City Plan states that[57]:

> **The significant resource management issues for biodiversity:**
>
> 1. Invercargill's indigenous ecosystems have been reduced in diversity and extent over time and while further subdivision, land use change and development has the potential to pose risks in some areas, it also provides opportunity for enhancement[58].
> 2. Amenity values can be adversely affected by clearing and altering areas of indigenous biodiversity.

With respect, those are unhelpful statements rather than questions (which is what an issue under the RMA is).

[52] It seems to me that the issues on the evidence before me include:

- is a definition of "indigenous vegetation" required and, if so, what should it be?
- what are the ecosystems which need safeguarding?
- in particular, which indigenous ecosystems are most threatened?

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51 Section 75(1)(a) and (b) RMA.
52 Section 74(1)(b) RMA.
53 Section 74(1)(ea) RMA as added by section 59 Resource Legislation Amendment Act 2017.
54 Section 75(3)(a) to (c) RMA: this and the paragraph in the previous footnote are an odd doubling up in the Act.
55 Section 75(1)(c) RMA.
56 Section 75(2)(b) RMA.
57 City Plan 2.3.1.
58 Decision 16/10.

- what are the essential characteristics[59] of the ecosystems?
- specifically, what are the flora and fauna which are some of the essential characteristics of the "integrity, form, functioning and resilience" of all particular endemic ecosystems?
- how should an ecosystem which is part of farming or exotic forestry be managed?
- how can safeguarding a degraded endemic ecosystem be reconciled with managing the other resources of the farming or forestry ecosystem so as to enable landowners and occupiers to provide for their wellbeing?
- or, as a more focused version of the last question: should the right of a farmer to clear an area of native rushes in a corner of a paddock be restrained by a rule in the plan, and should the right of an infrastructure company to clear a small patch of native scrub for a structure be managed by a rule in the plan?
- what are the areas of significant indigenous vegetation in the City?
- what incentives can be given to landowners to safeguard the biodiversity on their land?

[53] Only the first question has to be resolved in this decision. I mention the others because I consider that the dispute between the parties – courteously and carefully expressed as it has been – is complicated by two considerations. First, the parties appear to be so concerned with the later questions in the implicit list of issues that they are trying to write their preferred answers to those questions when answering the logically prior questions. I consider it is more useful to consider the issues in the logical order.

[54] Second, the dispute over the application of the phrase "indigenous vegetation" may be affected by over-reliance in the City Plan on section 6(c) RMA. As I have said, the fundamental obligations in respect of biodiversity are those in section 5(2)(b) RMA which seek to "safeguard ... the life-supporting capacity of ecosystems". In a sense section 6(c) is only an (important) adjunct to that bottom line in the RMA. The emphasis[60] on the "significance" criteria, rather than more simply on assessing the deterioration on the path to the collapse of each ecosystem may have coloured the debate over the application of section 6(c) RMA.

59 See the definition of "intrinsic values" [of ecosystems] in section 2 RMA.
60 In part 2.3 of the City Plan.

4.2 The Southland Regional Council definition and the PowerNet proposal

[55] The Southland RPS version was the definition put forward in the notified City Plan. Its use of "primarily" suffers from the same uncertainty as the QLDP reference to "dominance" did in the *Innes* case. I do not consider this definition further. It should not stay in the City Plan.

[56] Similarly, the PowerNet's proposed definition is equally uncertain when it uses the words "predominantly" and "predominance". The test for the latter trespasses into matters that should be left for rules. I am not underestimating the importance of the issue about how much native vegetation needs to be present. That is clearly a crucial issue, but in my view, that should be resolved in a policy and/or rule. Obviously, the proportion of "indigenous vegetation" in any occurrence of an ecosystem is important.

4.3 The DGC's proposal

[57] A large difficulty I see with this definition[61] is its practical complexity, as Ms Reilly pointed out[62] for Federated Farmers. This point is implicitly conceded by the DGC's definition when it includes the qualification "where there is doubt regarding the vegetation type, the assessment of a[n] ... ecologist will be used".

[58] A further compounding difficulty is that algae, cyanobacteria, lichens and fungi are not technically plants but in fact inhabit other "kingdoms"[63]. If they are not plants or (possibly) fungi and protists then perhaps they should not be classed as vegetation. Confusingly, the RMA also uses the phrase "marine vegetation" (in the definition of a "raft"[64]) and the word "seaweed" (see "aquaculture"). Superficially that suggests "marine vegetation" and "seaweed" should be treated as in categories of their own on traditional statutory interpretation principles. However, such an approach suggests the RMA is written with an overall thematic and verbal consistency. That may possibly have been correct in 1991 but it has since disappeared under the Parliamentary smith's blows on the drafting anvil.

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61 Quoted above at [33].

62 K L Reilly evidence-in-chief 34 to 37 [Environment Court document 16].

63 Traditionally Australasian texts identify five 'kingdoms': Animalia, Plantae, Fungi, Protista and Monera. US texts split the latter into two giving six kingdoms in total. Contemporary science apparently eschews the concept of 'kingdoms'.

64 Section 2 RMA.

4.4 The ICC's proposed amendment

[59] The ICC itself suggests a change from its decision version. The ICC's proposal is to include a dominance component within the definition of "indigenous vegetation". That is problematic both from the practicality and ecological points of view. It is impractical in a definition – but may be useful in a rule. However, the whole concept of "dominance", while it may be useful when considering section 6(c) significance, is of much less relevance when considering the safeguarding of (say) a naturally uncommon ecosystem as Dr Walker observed[65]:

> However, Mr Rance's evidence ... shows that plant communities which might appear (to non-experts) to be only subtly different from those of 'limited concern' can be of considerable importance for indigenous biodiversity. For example, 'native rushes in paddocks' are of limited concern, whereas 'more extensive, concentrated or intact areas of native rushland' such as those adjacent to Otakau Stream are of considerable importance.
>
> It is unrealistic, in my opinion, to expect to identify simple 'one size fits all' criteria (e.g. 20% indigenous cover or 20% of plant species indigenous) that will reliably distinguish indigenous vegetation of high importance for maintaining indigenous biodiversity from that which is less important.

[60] Both the ICC and the DGC's proposed definitions suggest that where "predominance" is unclear, the question should be determined by a suitably qualified ecologist. That suggests the definition is not capable of ready application by a layperson. More troubling is that it may reserve too much discretion to experts to be valid.

[61] To overcome some of those difficulties the use of a "dominance threshold" of x% coverage by area x% of the total number of specimens present" has some attraction as it appears to overcome some of the limitations with simply using words such as 'important', 'dominant' or 'primarily'. In my view, such standards or thresholds are better left for rules rather than included in definitions. That would allow some further distinctions to be made of the kind that may be necessary to respond to the issues raised by Dr Walker's evidence. For example, thresholds might be lower for identified rare or naturally uncommon ecosystems than for other indigenous ecosystems.

65 S Walker evidence-in-chief 25 and 26 [Environment Court document 11].

4.5 Federated Farmers, and Forest and Bird

[62] The Forest and Bird/Federated Farmers' definition has the advantage of being simple and, in my view, readily applicable in most circumstances to a reasonably informed layperson. I accept there will be difficulties in specific cases such as where there are some rushes (*Juncus* species) in a paddock, or where the plants are very small and/or non-vascular such as algae, liverworts etc. But situations such as that can be covered by rules.

[63] Similarly, while I accept that the Forest and Bird/Federated Farmers' definitions leave open the "area/site" in which the indigenous vegetation is found and its density, the former issue could be covered by reference to ecological districts and the latter would be more appropriately dealt with in rules rather than definitions. That is especially so since different rules might apply, for example in the coastal environment (to give effect to Policy 11 NZCPS) or where some of the indigenous vegetation is threatened under the criteria set out in the DGC's Departmental Guidelines or in the IUCN *Red List Criteria for Threatened Species*.

4.6 Conclusions

[64] As I suggested earlier, the first question is "why have a definition at all?" "Vegetation" has, as one of its standard meanings, the phrase "plants collectively"[66], so why define it further especially since it does not seem necessary for the definition of SNAs under section 6(c) RMA? There are two further answers to this: the first is that "plants" is ambiguous – does it include seaweeds, cyanobacteria, lichens, fungi or liverwort and hornworts? Second, there is the practical need to confine vegetation to 'local vegetation' bearing in mind the safeguarding of indigenous biodiversity aim of section 5(2)(b) RMA.

[65] Since I have held that a definition would be useful, I further hold that generally the most appropriate definition is that put forward by Federated Farmers, and Forest and Bird. The remaining issue is whether the concept of 'plants' needs to be more focused given the references by witnesses (and proposed definitions) to terrestrial algae, cyanobacteria, lichens, fungi, mosses, liverworts and hornworts as part of "vegetation".

[66] Jurisdictional difficulties aside (for the moment) the two most obvious approaches

66 The Shorter Oxford English Dictionary 3rd Edition (1985 Clarendon Press, Oxford) p 2457.

would be:

(1) to include all biota (living things) that are not animals in 'vegetation'; or
(2) to restrict vegetation to a more traditional dictionary definition of vascular and non-vascular plants (this has the advantage of including seaweed) and fungi.

[67] I prefer the second approach. I consider vascular and non-vascular plants and fungi fall within the rather imprecise term "vegetation" but that should be the limit. Most key indicator species (for the purposes of ecosystem classification) should be caught by this rather unscientific drawing of lines. It seems to press the meaning of vegetation too far to include bacteria even though in colloquial use we speak of "gut flora", and many plants rely on bacteria both in and around their phloem and xylem and root systems for their wellbeing and survival in their ecosystems, and fight bacteria as pathogens (e.g. fireblight on apples and pears). Further a very wide definition as in the first approach may exceed jurisdiction.

[68] As for the area choosing in which the vegetation is to be indigenous, the obvious answer is "Invercargill City". But ecologically the City's boundaries mean nothing. It seems to me much more relevant to make the endemicity area the Ecological Districts of which the City is passed. Since the witnesses did not really address this issue in any detail, this decision will be interim in case the parties wish to be heard on it.

5. Outcome

[69] I conclude provisionally that the most appropriate definition is as follows:

> Indigenous vegetation means vegetation containing vascular and non-vascular plants and fungi that are indigenous or endemic to the ecological districts covering the City.

[70] My decision will be interim first so the parties can be heard on the appropriateness of reference to ecological districts in the definition; and second so that the witnesses can advise the court whether the phrase "vascular and non-vascular plants and fungi" and/or whether it leaves an obvious taxonomic hole or raises another problem (e.g. inconsistency). For example, there seem to be two schools of thought on whether fungi are non-vascular plants.

[71] I regret that the definition adopted may mean that some of the agreements between the parties as to contested objectives, policies and particularly rules may now unravel. However, as I have explained, the logical order is to state the definitions and identify the areas (and ecosystems) they apply to first and then to work out the appropriate objectives, implementing policies and methods.

[72] The way forward seems complex on the evidence put forward for this hearing. There are no obvious answers to conundrums posed by the thoughtful evidence of Dr Walker and the frank evidence of Ms Reilly, some of which I have quoted. In particular, I am not able to rule in this decision on the utility of including a definition of "improved pasture". For reasons discussed briefly in my section on heuristics for definitions, the definitions quoted by Ms Reilly look problematic to me. But answers should be found by careful analysis of the ecosystems and of the threats to their indigenous biodiversity. At least for those parts of the City within the coastal environment, Policy 11 of the NZCPS should give considerable assistance.

J R Jackson
Environment Judge