

**IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY**

**CIV-2009-404-005572**

BETWEEN MALORY CORPORATION LIMITED  
Appellant

AND RODNEY DISTRICT COUNCIL  
Respondent

Hearing: 18 March 2010

Appearances: D A Kirkpatrick for the appellant  
B S Carruthers and N Tahana respondent

Judgment: 17 May 2010

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**RESERVED JUDGMENT OF PRIESTLEY J**

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*This judgment was delivered by me on 17 May 2010 at 4.45 pm  
pursuant to Rule 11.5 of the High Court Rules.*

*Registrar/Deputy Registrar*

*Date:.....*

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## **The issue on appeal**

[1] The appellant, by this appeal under s 299 of the Resource Management Act 1991 (the Act), challenges a judgment of the Environment Court, presided over by Judge J A Smith, delivered on 7 August 2009.

[2] The Environment Court upheld a September 2008 decision of the Rodney District Council (RDC) rejecting a request for private plan change.<sup>1</sup> RDC's rejection was pursuant to clause 25(4) of Schedule 1 of the Act.

[3] The issue on appeal, as counsel agreed, was essentially one of the correct interpretation and application of clause 25(4).

[4] The Court has been assisted by the competent and focused submissions of both counsel.

## **Background**

[5] The appellant is the successor of Cornerstone Group Limited (Cornerstone) which, in December 2007, made a request under clause 21 of Schedule 1 of the Act. The request was designed to bring about a plan change which would, if implemented, have permitted a substantial development in or around the Waimauku township to Auckland's north-west. The request specifically sought the introduction of a new Special 22 (Waimauku Estate Village) Zone to accommodate a 460 hectare mixed residential and community development beside State Highway 16. The development would incorporate 1,375 dwellings.

[6] RDC considered the request and rejected it. The rejection was grounded on clauses 25(4)(b), (c), and (d). Without detailing RDC's full reasons, its three grounds for rejecting of the appellant's application were:

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<sup>1</sup> Reported as *Malory Corporation Ltd v Rodney District Council* [2010] NZRMA 1 (ENC).

- a) The substance of the request had been considered and rejected (as a potential growth option as part of the Waimauku Structure Plan) by the Council within the last two years. (Clause 25(4)(b)).
- b) The request was not in accordance with sound resource management practice and had been considered and rejected as a potential growth option for Waimauku and was therefore in direct conflict with the Council's agreed policy outcomes for Waimauku. (Clause 25(4)(c)).
- c) The request was inconsistent with Part 5 of the Act because it would not, as required by s 75(3)(c), give effect to the Auckland Regional Policy Statement (ARPS) and would directly conflict with plan changes initiated by the Council designed to give effect to stated outcomes for Waimauku. (Clause 25(4)(d).)

### **Relevant background to Council's decision**

[7] A brief description is necessary to outline the arguably bipolar situation which applies in RDC's territorial area so far as Plans are concerned. Of critical importance are various steps the appellant took (or its predecessor Cornerstone) relating to its proposed Waimauku development in particular and the resource management relevance of those steps.

### ***Rodney District Plans***

[8] There were at the relevant time (and apparently still are) two District Plans relating to RDC's territorial area. The speed with which one plan is being phased out and the other plan made fully operational has been criticised in various Environment Court judgments.

[9] First there is the Operative District Plan, which is effectively a transitional plan carried across from the Resource Management Act's predecessor, the Town and Country Planning Act 1977. There have been a number of Plan Changes relating to

the Operative District Plan. The appellant's request related to Plan Change 55, which applied to rural areas.

[10] The second plan, having its statutory origins in the Resource Management Act, is the Proposed District Plan, which extends to all activities and areas in the District. This Plan was first notified in 2000. Decisions on numerous submissions were made in 2006, many of which have been subject to appeals to the Environment Court. These appeals appear to have delayed the implementation of the Proposed District Plan. Some chapters of it have yet to be finalised which include chapters relating to rural land and its zoning.

[11] Ms Carruthers was unable to inform the Court when the Proposed Plan would become operative. It is, however, nigh. Against that background, the fact that the appellant's clause 21 request related to the outgoing plan rather than the incoming plan, assumed some relevance.

### ***Waimauku consultations***

[12] Of great relevance is RDC's Waimauku Structure Plan which was adopted in May 2009. It was not in force when RDC rejected the appellant's private plan request (September 2008), although its preparation was well advanced and the consultation phases had been completed.

[13] A Structure Plan is derived in part from ARPS, s 2.6.2(8) which states that significant new areas proposed for urban development, or significant new areas proposed for countryside living purposes, must be provided through the Structure Planning process or some similar mechanism. Chapter 13 of RDC's Proposed District Plan, s 13.6.1.4, envisages structure plans being used as a regulatory mechanism to "manage the development of 'greenfield' areas and areas with residential or business zoning which are as yet undeveloped". The structure plans are designed to be included in the District Plan to give them statutory effect, and will remain in the District Plan until the bulk of the Structure Plan area has become urbanised.

[14] Ms Carruthers correctly submits that the structure plan process, although not set out in the Act itself, is a process stipulated in the various planning documents that sit below the Act. The process, in both the proposed District Plan and ARPS, is designed to manage the development of “greenfield” (presumably a modish word for rural) areas.

[15] From the evidence before the Environment Court and also from the Waimauku Structure Plan itself, it is apparent that RDC used the structure plan process to consider closely development policy in the Waimauku area and its rural surrounds. It consulted widely in that exercise. In so doing RDC followed an eight stage process. This process started in 2006, when RDC decided to review an earlier Structure Plan for the Kumeu/Huapai/Waimauku area which had been adopted in 1998. RDC thus initiated a structure planning exercise for Waimauku township and its rural hinterland.

[16] The eight phases are accurately set out in Ms Carruthers’ submissions to which there is no challenge. They include:

- a) Background research, including consideration of key planning statutory and non-statutory documents.
- b) An assessment of environmental effects. These are comprehensively set out at para 2.3 of the Waimauku Structure Plan and headed “Constraints and Opportunity Summary” and which need not be detailed in this judgment.
- c) Developing and assessing future proposals. These aspects are dealt with in para 4 of the Waimauku Structure Plan under the heading “Proposed Land Use Structure for the Future”.
- d) Developing and notifying a draft structure plan.
- e) Three phases of extensive public consultation.

The last phase was the adoption of the Waimauku Structure Plan in May 2009.

[17] The appellant's predecessor, Cornerstone, was involved throughout the process, particularly during the consultation phases. Lying at the heart of Cornerstone's submissions was its Waimauku Estate Village concept, which involved significant urban growth in the area. During the second consultation phase, a comprehensive submission on the Constraints and Opportunities Summary section of the Draft Structure Plan was submitted by Cornerstone. The outcome of this strong submission was that RDC specifically included the substance of Cornerstone's proposals as one of its four future growth options in the third consultation phase. Cornerstone's proposal was the last of four options. It was categorised as involving significant urban expansion. The other three options were low density township (a more restrictive zoning); medium density township (the zoning status quo); and limited urban expansion on the south-east fringes of Waimauku.

[18] Evidence from RDC's agent at the Environment Court hearing, Mr R B Scott, refers to the extensive public consultation at the third phase. There were a project web page, five open days, and advertising, all of which were designed to seek feedback. Some 3,000 newsletters were dispatched with feedback forms. A total of 1,381 responses were received. The public feedback demonstrated strong support for the first option (low density town-zoning) and strong opposition to the Waimauku Estate proposal. This third consultation phase was carried out in February 2008, approximately seven months before RDC rejected the appellant's request.

[19] The feedback included a submission from the Auckland Regional Council (ARC) which considered the Cornerstone proposal would need to overcome significant issues, including transport, capacity, and a defensible boundary.

[20] The Structure Plan process, and in particular its various phases, are set out extensively in para 2 of the Waimauku Structure Plan.

[21] The Waimauku Structure Plan itself (there was a fourth phase of consultation in November/December 2008) devotes three pages to the Cornerstone proposal

including a marked aerial photograph. The report details the Cornerstone proposal along with the other three. Relevantly the Waimauku Structure Plan states:

This proposal provides for a large amount of growth with the Waimauku township to meet a high growth scenario for the township as proposed by the Cornerstone Group Ltd in the “Waimauku Estate” proposal. This is based on the location of Waimauku as a potentially suitable place for urban expansion (beyond the railway and on SH16 in close proximity to Auckland).

This proposal was submitted to the Council by Cornerstone Group Ltd at the previous stage of public consultation when feedback was sought on the constraints and opportunities research and the possible development of proposals. It should be noted that Proposal 4 was adopted as the high growth proposal for the Structure Plan and the details of the District Proposal were not developed by Council during the Structure Plan process but rather provided in Cornerstone Group Ltd’s submission.

Development proposals concerning the substantial land holding have been in the public domain since 2004. Rodney District Council included “Waimauku Estate” as a proposal in the Structure Plan process to enable the public an opportunity to formally assess the proposal’s general merits and provide feedback.

The developer has also lodged a Private Plan Change for the proposal and Council believes that a Structure Plan that has considered the proposal and has gone out to public consultation would be useful for assessing the Private Plan Change request.

It should be noted that the inclusion of this proposal does not in any way mean Council’s endorsement of or preference for the “Waimauku Estate” proposal.

[22] The Waimauku Structure Plan, the specific incorporation during relevant consultation phases of the Cornerstone proposal, and the entire consultative process are of considerable relevance to both RDC’s decision and the Environment Court’s judgment.

### **Relevant statutory provisions**

[23] To understand the appellant’s challenge it is necessary to set out the relevant Schedule 1 provisions.

[24] The relevance of Schedule 1 is to be found in s 73 which provides:

(1) There shall at all times be one district plan for each district prepared by the territorial authority in the manner set out in Schedule 1.

(1A) A district plan may be changed by a territorial authority in the manner set out in Schedule 1.

...

(2) Any person may request a territorial authority to change a district plan, and the plan may be changed in the manner set out in Schedule 1.

[25] The provisions of Schedule 1, so far as the appellant is concerned, relate to the implementation of the statutory (s 73(2)) right to request a change to the District Plan.

[26] I note that s 73(4) requires a local authority to amend a Proposed District Plan or District Plan to give effect to a regional policy statement in certain situations. That provision is not critical here but, in terms of the scheme of the Act, explains the background relevance of ARPS and the Waimauku Structure Plan.

[27] Applicable Schedule 1 provisions are:

## **Schedule 1**

### **Preparation, change, and review of policy statements and plans**

...

#### **Part 2**

Requests for changes to policy statements and plans of local authorities and requests to prepare regional plans

#### **21 Requests**

(1) Any person may request a change to a district plan or a regional plan (including a regional coastal plan).

...

(4) Where a local authority proposes to prepare or change its policy statement or plan, the provisions of this Part shall not apply and the procedure set out in Part I shall apply.

#### **22 Form of request**

(1) A request made under clause 21 shall be made to the appropriate local authority in writing and shall explain the purpose of, and reasons for, the proposed plan or change to a policy statement or plan and contain an

evaluation under section 32 for any objectives, policies, rules, or other methods proposed.

### **23 Further information may be required**

...

(3) A local authority may, within 20 working days of receiving a request under clause 21, or, if further or additional information is sought under subclause (1) or subclause (2), within 15 working days of receiving that information, commission a report in relation to the request and shall notify the person who made the request that such a report has been commissioned.

(4) A local authority must specify in writing its reasons for requiring further or additional information or for commissioning a report under this clause.

(5) The person who made the request—

(a) may decline, in writing, to provide the further or additional information or to agree to the commissioning of a report; and

(b) may require the local authority to proceed with considering the request.

(6) To avoid doubt, if the person who made the request declines under subclause (5) to provide the further or additional information, the local authority may at any time reject the request or decide not to approve the plan change requested, if it considers that it has insufficient information to enable it to consider or approve the request.

### **25 Local authority to consider request**

(1) A local authority shall, within 30 working days of—

(a) Receiving a request under clause 21; or

(b) Receiving all required information or any report which was commissioned under clause 23; or

(c) Modifying the request under clause 24—  
whichever is the latest, decide under which of subclauses (2), (3), and (4), or a combination of subclauses (2) and (4), the request shall be dealt with.

(2) The local authority may either—

(a) Adopt the request, or part of the request, as if it were a proposed policy statement or plan made by the local authority itself and, if it does so,—

(i) The request must be notified in accordance with clause 5 of this Schedule within 4 months of the local authority adopting the request; and

(ii) The provisions of Part 1 of this Schedule must apply; and

- (iii) The request has effect once publicly notified; or
  - (b) Accept the request, in whole or in part, and proceed to notify the request, or part of the request, under clause 26.
- (2A) Subclause (2)(a)(iii) is subject to section 86B.
- (3) The local authority may decide to deal with the request as if it were an application for a resource consent and the provisions of Part 6 shall apply accordingly.
- (4) The local authority may reject the request in whole or in part, but only on the grounds that—
- (a) The request or part of the request is frivolous or vexatious; or
  - (b) The substance of the request or part of the request has been considered and given effect to or rejected by the local authority or Environment Court within the last 2 years; or
  - (c) The request or part of the request is not in accordance with sound resource management practice; or
  - (d) The request or part of the request would make the policy statement or plan inconsistent with Part 5; or
  - (e) In the case of a proposed change to a policy statement or plan, the policy statement or plan has been operative for less than 2 years.

## **27 Appeals**

- (1) A person who requests a plan change under clause 21 may appeal to the Environment Court against a decision referred to in subclause (1A) within 15 working days of receiving the decision.
- (1A) The decisions that may be appealed under subclause (1) are decisions—
- (a) to adopt or accept the request in part only under clause 25(2):
  - (b) to reject the request under clause 23(6):
  - (c) to deal with the request under clause 25(3):
  - (d) to reject the request under clause 25(4) in whole or in part.
- (2) The Environment Court may make such decision on any such appeal as it thinks fit.

[28] As is apparent from Mr Scott's affidavit in the Environment Court, the appellant's request, received on 27 December 2007, was processed. By letter dated 6

March 2008 a request for further information was made of Cornerstone's planner, such request covering 13 topics.

[29] Cornerstone's planner, by letter to RDC dated 7 July 2008, requested the Council to make a clause 25 determination, (as it was entitled to do under clause 23(5)(a)) without the benefit of the requested information. Cornerstone was of the view that some of the information requested was already in RDC's hands whilst other information was of an essentially technical engineering nature.

[30] Thus RDC, at a meeting dated 25 September 2008, proceeded to reject the private plan change request pursuant to clauses 25(4)(b), (c), and (d).

### **The Environment Court's judgment**

[31] The Court toyed with the possibility that clause 27(2) gave it wider powers on appeal than those which were available to RDC whose decision was being challenged. I deal with that aspect in a subsequent section of this judgment. The Court, in the event, grounded its decision solely on clause 25(4) matters.

[32] The Court stated at [16] that clause 25 was "intended to constitute a threshold test for adopting or accepting the request in whole or part". Reference was made to the High Court judgment of *Countdown Properties (Northland) Limited v Dunedin City Council*,<sup>2</sup> which dealt with a predecessor clause. The Court further referred to the Planning Tribunal decision *J Hall v Rodney District Council*<sup>3</sup> to the effect that Parliament had provided a right for individuals to request plan changes and to have them examined and decided on their merits unless one of the limited clause 25(4) grounds applied.

[33] The Court accepted the joint submission of counsel that the clause 25(4) threshold was intended only to be "a coarse filter".

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<sup>2</sup> *Countdown Properties (Northland) Limited v Dunedin City Council* [1994] NZRMA 145 (HC).

<sup>3</sup> *J Hall v Rodney District Council* [1995] NZRMA at 537, 546 (PT).

[34] The Court then turned to the clause 25(4)(b) issue of whether the substance of the appellant's request had been considered and rejected within the last two years. It referred to the Rodney District Plans as being "in a state of disarray for some considerable period of time". It was not yet possible, because of the interconnection of various topics before the Environment Court, to say that the provisions of the proposed Rodney District Plan were fully settled.

[35] Reference was made ([26] - [31]) to ARPS; to the importance of strengthening the metropolitan urban limit; and to the legitimate and close interest of ARC in urban development outside the metropolitan urban limit and currently zoned rural land.

[36] The Court then turned to the Waimauku Structure Plan and the consultation phase. It noted that the appellant's request had been considered as part of RDC's Structure Plan in its assessment of the various options for future growth in the Waimauku area. The Court stated:

[36] We accept that the 2008 Waimauku structure plan report has been through a process of assessment against the Act, environmental effects, the ARPS, the Auckland regional growth strategy, and we suspect the PC6 also. Furthermore, it has been through a consultative phase that has involved feedback meetings and even a council hearing before the structure plan was finalised. It has included such elements as public polls to ascertain preferences, and all of this has been assimilated into a detailed document, publicly available, known as the Waimauku structure plan adopted by Council in May 2009. This has not yet been notified as a plan change (or variation).

[37] The Court directly identified the central issue, so far as clause 25(4)(b) was concerned, on which the parties locked horns.

[39] We accept Mr Kirkpatrick's proposition that this structure planning process is not an RMA process. Nevertheless, the process addressed the matters which would be relevant in an RMA process and, particularly, the sustainable management of natural and physical resources. We also agree with Mr Loutit that cl 25(4) is not focused upon the procedure adopted, but rather upon the substance. The very use of the word "substance" in (b) demonstrates to us that the intention of the Act is that where the subject-matter has been considered by the council or court within two years, then the council may reject the application. The appeal process performs a proper check to ensure that such a limitation is not abused.

[40] Nevertheless, in this case the appellant's proposal was explicitly considered along with other proposals around the Waimauku area, and was

the least favoured of the four options. The option was included not because consultation had indicated it was an appropriate one, but because the Council became aware that the proposal was being promoted for a privately initiated plan change. On this basis it is clear that the substance of this matter has been considered by the Council in detail in a process which parallels the public and participatory process envisaged for a plan change. It is also relevant that the end result of the 2008 – 2009 structure plan process has resulted in a proposal similar to the draft plan inserted in ch 22 of the proposed plan.

[38] The Court's conclusion was the substance of the appellant's request had indeed been considered by RDC within the previous two years.

[42] We have concluded that this structure plan process was an appropriate consideration of the Malory proposals for several reasons:

(a) the ARPS specifically contemplates future urban development beyond the MUL as being addressed through structure plans developed prior to the notification of plan changes and/or any variation of the ARPS. Section 2.6.2(8) of the ARPS provides:

Significant new areas proposed for urban development, existing urban areas . . . are to be provided through the Structure Planning Process (or other similar mechanism);

(b) the proposal, the subject of this appeal, has been explicitly considered through that structure planning process. The similarities between option 4 and the Malory proposal are too great. We conclude that the Malory proposal, the subject of this appeal, was considered as part of the structure plan process;

(c) the area involved is a large one (464 ha) involving an increase in population from current 913 in Waimauku to the establishment of a new nearby town area of 1375 dwellings, with in excess of 3000 population. The sheer scale of the project means that particular consideration should be given to all surrounding issues before any plan change (or variation) is initiated. In this regard, the structure planning process has addressed these matters on a preliminary basis considering the wider range of alternatives; and

(d) that process in itself has been broad, public, and participatory.

[39] The Court noted RDC's decision, particularly the Waimauku Structure Plan policy, which was "a clear decision on the future direction of urban growth at Waimauku". The Court concluded:

[44] Throughout their reasons the Council uses wording such as "fair", "transparent" and "public feedback". We have concluded that the Council have not rejected this request simply because it conflicts with their conclusions as to the appropriate growth for Waimauku, but rather that the

structure plan represents the outcome of a detailed consideration of options addressing the substance of the request before it.

[40] The Court next turned to the clause 25(4)(d) ground of inconsistency with Part 5 of the Act. Part 5, which embraces ss 43 to 86, relates to standards, policy statements, and plans (both regional and district).

[41] RDC had relied on s 75(3)(c) which imposed the obligation for a District Plan to give effect to any regional policy statement. In that regard RDC had referred to s 2.6.2(8) of ARPS as the preferred method to investigate and evaluate opportunities for urban expansion and growth in rural area. The Court, at [46], did not agree that section of ARPS necessarily precluded a private plan change request.

[42] Nonetheless the Court was of the view that the request had the potential to undermine ARPS.

[53] However, this is not a proposal for a variation of the ARPS and we conclude that as it stands this provision could undermine the ARPS. If it was possible for district councils (with or without private initiated changes) to simply add in new urban areas then a key purpose of the ARPS is immediately and seriously compromised. Given the superior status of the ARPS we remain concerned that a change to the district plan without a contemporaneous or earlier change to the ARPS may in practical terms be seen as being inconsistent with, or even contrary, to the ARPS given its clear directive nature in relation to urban development.

[43] In the event the Court held (at [59]) that on the basis of s 75(3) and clause 35(4)(d) alone they would not have concluded that the request should have been rejected. However, the Part 5 matters were regarded as being “disquieting given our conclusions on the other matters”.

[44] The Court finally turned to the remaining clause 45(4)(c) ground which, on its face, requires analysis of whether a request accords with the somewhat nebulous concept of “sound resource management practice”.

[45] The Court’s approach at [60] was that the concept of sound resource management practice went well beyond the former statutory test of “planning merit” and included “fundamental issues as to appropriate process, timing, and the like. It can include non-planning matters such as engineering, cultural, and other issues.”

[46] It was on the timing aspect of sound resource management practice that the Court seized:

[66] Mr Kirkpatrick notes that sound resource management practice cannot go so far as to address the detail or the merits of the proposal. For our part, we have concluded that the reference to sound resource management practice is intended to address the question of merit at only a coarse scale. We consider that at the heart of sound resource management practice must surely be sustainable management, the purpose of the RMA. If a private plan change clearly does not accord with the purpose and principles of the Act then it should be a non-starter. Under the previous legislation, the question was whether the issue had little or no planning merit. The current requirement for sound resource management practice includes this question of planning merit, but goes wider to include issues of timing and procedure.

[47] At [67] the Court strongly concluded the appellant's request did not represent sound resource management practice for five reasons which were articulated in [68] of its judgment:

[68] ...

- (a) the application is timed subsequent to the commencement of a structure plan consideration by the Council, and prior to the finalisation of the proposed plan for the Rodney District;
- (b) it would require revisiting fundamental growth issues which have been at large in the Auckland region for well over a decade relating to questions of urban growth beyond the MUL;
- (c) it requires consideration of the Rodney District proposed plan, and in particular this would be assisted by having that plan finalised and the relationships between the ARPS and the Rodney district plan settled. In this regard, the final terms of PC6 may be of assistance in understanding the extent and meaning of the provisions of the AWS as they affect the district plans;
- (d) it is clear that Rodney District intend to promulgate their own Waimauku structure plan, and this will have ramifications in terms of both the regional policy statement and the district plan. This would be better to occur in the context of the proposed Rodney district plan 2000 rather than overlap with the different nature of PC55; and
- e) we are concerned that the introduction of a change of this fundamental nature over a large area this late in the proposed plan process has the potential to subvert the planning process and the orderly disposition of plan appeals under both the proposed plan and under PC6.

[48] The Court went on to refer to the effect on the public were the request to have been accepted, which would then have led to public notification processes.

[69] We are concerned that the public and participatory process envisaged for plan changes could be undermined by allowing this private plan change to confuse and overwhelm members of the public who have an interest in this particular issue. We doubt that the general members of the public would understand how this process could be engaged when there has been so much effort, expenditure and time put into the proposed plan provisions and also the structure plan process.

[49] The Court thus concluded that RDC was correct in holding the request did not accord with sound resource management practice.

### **Discussion of points on appeal**

[50] It is convenient to outline and evaluate the parties' submissions under the headings of the five questions of law which form the basis of the appeal.

[51] Mr Kirkpatrick's submissions canvassed five questions of law based on ten alleged errors in the Environment Court's judgment, which in turn subdivided into eight grounds of appeal.

[52] I deal with the five questions of law and their various facets in turn.

***Was the Environment Court correct in holding it had a discretion on an appeal from a private plan change decision which went beyond the scope of the matters set out in clause 25(4) of Schedule 1 of the Act?***

[53] Only brief discussion is needed on this question. Counsel were essentially agreed that the Environment Court had not invoked the questionable discretion to reach its conclusion.

[54] The appeal point arose from an obiter observation of the Court at the outset of its judgment:

[11] Mr Kirkpatrick pressed upon the Court that it is limited on appeal to the reasons given by the council. He submitted that if the Court were to move to consider the merits of the application that would be to engage in a later stage of the intended process.

[12] For current purposes, we are content to commence our analysis

under cl 25, but consider that the Court's powers on appeal are not limited to those of the council. Nevertheless, in the first analysis we intend to examine the grounds of rejection given by the council before considering the broader application of the Act and its central purpose of sustainable management.

[55] The question arises out of clause 27 which confers a right of appeal to the Environment Court against decisions relating to private plan changes. The clause goes on to provide:

**27 Appeals**

...

(1A) The decisions that may be appealed under subclause (1) are decisions—

- (a) to adopt or accept the request in part only under clause 25(2):
- (b) to reject the request under clause 23(6):
- (c) to deal with the request under clause 25(3):
- (d) to reject the request under clause 25(4) in whole or in part.

(2) The Environment Court may make such decision on any such appeal as it thinks fit.

[56] The issue is whether clause 27(2) confers on the Environment Court a discretionary power which is wider than the exercised power which is being appealed.

[57] It is difficult to discern what the Court had in mind when it asserted that its powers on appeal are not limited to those of the Council. Certainly it is a truism that an appellate body's general powers are more extensive than the powers of the body being appealed from. But there are clear limits to the scope of an appellate body's discretion.

[58] The powers of a local authority, as they relate to clause 21 requests, are clearly limited to:

- a) Rejecting a request if it considers it has insufficient information (clause 23(6)).

- b) Adopting the request in whole or in part (clause 25(2)).
- c) Treating the application for resource consent (clause 25(3)).
- d) Rejecting the request on one of the five grounds stipulated in clause 25(4).

[59] On administrative law principles, it is hard to see how the discretion conferred on the Environment Court on appeal by clause 27(2) could confer any discretionary power beyond that exercised by a local authority. Certainly that seems to have been the view expressed by the Environment Court in *Gillman Wheelans Ltd v Selwyn District Council*.<sup>4</sup> Looking at the scheme of Schedule 1, the clause 27(2) discretion would not permit the Environment Court, prior to notification, to embark on a merits examination.

[60] In any event, as Ms Carruthers noted in her submissions, the Court did not, for the purposes of the appeal, assert nor exercise a discretion beyond the scope of the limited matters contained in clause 25.

***Was the Court entitled to take into account matters not expressed in clause 25(4) or able, by reasonable implication, to be incorporated into that sub-clause?***

[61] Mr Kirkpatrick's broad submission here was that the Court referred to a number of matters which, although arguably relevant to a consideration of the merits of a plan change, did not arise under clause 25(4).

[62] The extraneous matters which Mr Kirkpatrick identified were numerous. They included:

- a) The Court's reference to the current state of the District Plan including the comment about RDC's Plans having been in a state of disarray for some time.

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<sup>4</sup> *Wheelans Ltd v Selwyn District Council* (ENC Christchurch C065/2009, 27 August 2009).

- b) The Court's comment at [56] that the rural town (urban zone) of Waimauku as shown on ARPS maps did not include the Waimauku Estate area. Counsel submitted that the ARPS maps do not define anything at Waimauku and that the expansion of the township would be assessed at the merits stage.
- c) The Court's comments at [57] that a private plan change would require rezoning and amendments to the objectives and policies of the proposed Rodney District Plan. This overlooked that the proposed private plan change constituted a new zoning with its own objectives and policies. Again, the extent to which changes to the District Plan might be necessary would involve a merits assessment.
- d) The Court's comment at [69] (*supra*) that the clause 21 request would undermine public and participatory processes. (As is apparent from a latter section of this judgment I consider the Court's comment in that regard to be of considerable relevance to the clause 25(4)(b) and (c) rejection grounds).

[63] Mr Kirkpatrick made the cogent submission, with which I agree, that the relevant wording of clause 25, which came into force on 6 July 1993 replacing its predecessor (the former clause 24 which operated for just under two years), made it very clear that clause 25 did not permit a merits examination. The predecessor clause permitted a local authority to refuse a plan change proposal if it had little or no planning merit; or the proposal and its impact had not been described with sufficient clarity to be readily understood; or the proposal would make the policy statement or plan inconsistent with other national or regional policy statements. Because none of these rejection grounds had been carried across beyond July 1993, submitted Mr Kirkpatrick, such matters as merits and ARPS were irrelevant considerations.

[64] Counsel pointed to the Court's references to *Countdown Properties (Northland) Ltd v Dunedin City Council*<sup>5</sup> and *J Hall v Rodney District Council*,<sup>6</sup> authorities dealing with the old clause 24(b)(iii) which were to the general effect that rejection was permitted where a proposed plan change had more than "minimal planning worth." These references, perhaps, suggested the Court considered a merits assessment was necessary.

[65] I uphold Mr Kirkpatrick's submission that, unless one of the limited rejection grounds in clause 25(4) exists, the request must proceed to public notification, submissions, and a hearing in accordance with the well-established procedures of the Act. But I did not consider the Court has erred in its references to *Countdown* and *Hall*. Indeed in [21] of its judgment the Court specifically identified the question it needed to address as being the "three ... threshold tests under clause 25(4) rather than address the broader issues of the merits of the plan change...."

[66] Nor do I consider, despite references to ARPS in various sections of its judgment, that the Court has misdirected itself or given impermissible weight to regional policy statements in its consideration of clause 25 criteria. At [26]-[29], the Court referred to ARPS in the context of discussing the disarray of the Rodney District Plans. Although this was in the section addressing clause 24(4)(b), I am satisfied that this discussion was by way of background. ARPS is relevant as the context of the structure plan process, which is the consultation process that counsel below had submitted justified rejection of the proposal under clause 25(4)(b). Reference to ARPS in the context of clause 25(4)(d) and consistency with Part 5 of the Act was appropriate and, indeed, inevitable.

***Is a non-statutory consultation process sufficient consideration in terms of clause 25(4)(b)?***

[67] I consider this question lies at the heart of the dispute between the parties. Early in this judgment I have sketched the emergence of and consultations

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<sup>5</sup> *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 (HC).

<sup>6</sup> *Hall v Rodney District Council* [1995] NZRMA 537 (PT).

surrounding the Waimauku Structure Plan. The input of the appellant throughout that process was significant.

[68] The reality is that the appellant's clause 21 request for a plan change can have no other purpose but to revisit its Waimauku Estate Village concept. Had RDC adopted, or more likely accepted, the request under clause 25(2), then the notification and a merits assessment under the Act's procedures would have followed.

[69] The Court gave close consideration to the history and the clause 25(4)(b) ground. Its conclusion at [44] (*supra*) was that the Waimauku Structure Plan flowed from a detailed consideration of various options and which had addressed the substance of the appellant's request.

[70] The question raises neat issues of interpretation and administrative law. The components of clause 25(4)(b) are specific:

- The substance of the request, or a part of it.
- The substance has been considered and either rejected or given effect to by the local authority or Environment Court.
- Such consideration must have been within the past two years.

[71] I see the policy of the provision as being to confer on local authorities a discretion to reject a private request for a plan change under clause 21 if, within the previous two years, the substance of the request has already been considered. The two year embargo (not a lengthy period) is doubtless designed to discourage repetitive notifications of resource management issues which are substantially the same, with all the attendant costs and delays.

[72] Mr Kirkpatrick submitted that the consultation process which preceded the emergence of the Waimauku Structure Plan was a non-statutory process undertaken by RDC. It was not a statutory process prescribed by the Act. There was no right of

appeal to the Environment Court from the process. Thus the prior consideration (which should include a merits consideration) to which clause 25(4)(b) extends does not come into play.

[73] In short, is a non-statutory consultation process sufficient “consideration” for clause 25(4)(b) purposes? In the context of this dispute, clause 25(4)(b) can only apply if RDC’s rejection (at the end of a lengthy consultation process) of the Waimauku Estate Village concept for Waimauku Structure Plan purposes is the equivalent of rejection by RDC for clause 25(4)(b) purposes.

[74] Mr Kirkpatrick’s submission was the subclause was not engaged. The structure plan process was not statutory. There was no right of appeal. The reference in the subclause to a prior rejection by the Environment Court suggested the scope of the subclause was limited to a statutory process which included a right of appeal. The Court at [39] in its judgment accepted that the structure plan process was not a statutory process. But the Court was nonetheless wrong when at [39] it said the non-statutory process “addressed the matters which would be relevant in an RMA process and particularly the sustainable management of natural and physical resource” and again at [40] where it said “...the substance of this matter has been considered by the council in detail in a process which parallels the public and participatory process envisaged for a plan change”.

[75] I note the Court additionally observed at [40] that the end result of the 2008-2009 Structure Plan process had resulted in a proposal similar to the draft plan being inserted in Chapter 22 of RDC’s Proposed District Plan.

[76] Ms Carruthers accepted that the structure plan process was not set out in the Act but it was nonetheless a process specified in planning documents which sat below the Act, in this case both ARPS and the Proposed District Plan. Both those documents contemplated the process being followed to manage the development of greenfield areas. The Waimauku Structure Plan process had involved each of the four options being considered against the Act, assessment of the proposals’ environmental effects, and consideration of key planning documents such as ARPS. Additionally there had been extensive public consultation.

[77] There is nothing in subclause (b), submitted Ms Carruthers, to suggest that the consideration within the previous two years was limited to statutory matters. The substance of the Waimauku Estate Village concept had engaged the Act's criteria and had involved a robust process including extensive public consultation.

[78] I am not prepared to hold, in an absolute way, that clause 25(4)(b) applies only to statutory processes (which will usually lead to notification, submissions and a merits assessment) and can never apply to non-statutory processes. Nor am I prepared to hold in an absolute or general way that all non-statutory processes will fall inside the ambit of the subclause.

[79] In my judgment the range and applicability of the clause will ultimately depend on the context of a clause 21 request being considered by a local authority. In this case, as I have discussed previously in my judgment, Cornerstone had significant input into the Waimauku Structure Plan process. The Waimauku Estate Village concept became one of four specific options, considered by the public during the consultation phases, and considered by RDC. Were RDC to have accepted the appellant's clause 21 request, then notification would have followed and the substance of the consultation process - objections, submissions, and hearings - would, in respect of the Waimauku Estate Village option, have to be repeated.

[80] It would be idle to suggest (Mr Kirkpatrick did not) that the substance of the appellant's request is significantly different from the Waimauku Estate Village option which it was pursuing and which RDC ultimately rejected in the Waimauku Structure Plan process. The process has also led to anticipatory changes being made to the Proposed District Plan.

[81] In the context of this dispute I see little merit in interpreting clause 25(4)(b) as encompassing solely a statutory process. Were Mr Kirkpatrick's argument correct, then RDC would have little option but to accept the request under clause 25(2)(b) and proceed to notification, with an inevitable repetition of the extensive non-statutory process which surrounded the emergence of the Waimauku Structure Plan.

[82] My conclusion is that both RDC and the Environment Court were correct to conclude that the substance of the appellant's request had been considered and rejected in the last two years.

*Does the phrase “sound resource management practice” appearing in clause 25(4)(c) include matters of the substance of the plan change and its planning merit?*

[83] RDC invoked clause 25(4)(c) to reject the appellant's request. The reason given for the request not being in accordance with sound resource management practice was that it had been considered and rejected as a potential growth option for Waimauku “and was therefore in direct conflict with the Council's agreed policy outcomes for Waimauku”.

[84] Leaving aside for the moment the meaning of “sound resource management practice” RDC's articulated reason strikes me as being more relevant to the subclause (b) ground.

[85] The legislative history of clause 25(4)(c) has some relevance. But, as Ms Carruthers observed, the legislative material cast little light on the meaning of the words. Subclause (c) was introduced by the Resource Management Amendment Bill in 1992. The words of the subclause replaced two of the predecessor provisions in the now repealed clause 24, which were:

- (iii) The proposal has little or no planning merit; or
- (iv) The proposal and its environmental impact has not been described with sufficient clarity for it to be readily understood.

But the concepts of a request proposal having negligible or no merit, or being obscure or incomprehensible, are not identical with not according with sound resource management practice.

[86] The words “sound resource management practice” are not defined in or used elsewhere in the Act. Mr Kirkpatrick, both in the Environment Court and on this appeal, identified a large number of Planning Tribunal and Environment Court cases

where the words have been used. They have extended to such diverse topics as the processing of applications; a method in a plan; site suitability; statements in evidence; grounds of appeal or reply. I note that some of these categories are essentially procedural.

[87] It seems to me that to ascertain whether a request accords with sound resource management practice must inevitably involve a merits assessment. The appellant's fundamental submission on all aspects of the appeal was that local authorities' assessment of clause 21 requests should not involve any merits assessment other than at a threshold level.

[88] There appears, on the authorities to which I have been referred, no definitive answer to the question of what constitutes sound resource management practice. The expression was recently examined by Judge Newhook in *Kerikeri Falls Investments Ltd & Anor v Far North District Council*.<sup>7</sup> Judge Newhook at [31] in an aside added the words "whatever that is". However, at [47] the Court, again expressing a proper uncertainty over the words, said that they "must, if it is to have a meaning, be referable to the purpose and principles of the Act in Part 2". The Judge went on to observe that, to the very limited extent that the merits of a case are relevant under clause 25, the purpose of the Act would be best served by acceptance of a request with consequential notification.

[89] When dealing with Mr Kirkpatrick's submission to it, the Court appears to have accepted his submission that the reference to sound resource management practice in subclause (c) could only address the question of merit on a coarse scale (at [66]). The Court then expressed the view that;

... at the heart of sound resource management practice must surely be sustainable management, the purpose of the RMA. If a private plan change clearly does not accord with the purpose and principles of the Act then it should be a non-starter.

I see nothing wrong with this approach, particularly having regard to the predecessor provision of a power to reject requests which had little or no planning merit.

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<sup>7</sup> *Kerikeri Falls Investments Ltd & Anor v Far North District Council* ENC Auckland A068/09, 17 August 2009.

[90] The Court then went on to conclude that “sound resource management practice” extended, not only to matters of substance, but also to matters of timing and procedure. On the timing aspect the Court considered the request infringed against sound resource management practice, particularly because of the temporal proximity of the application to the structure plan process and the intended promulgation of the Waimauku Structure Plan (supra [45]). And in [69] of its judgment (supra) the Court pointed to the public being confused and overwhelmed if, in the wake of the structure plan process, the private plan change was allowed to proceed. For these reasons the Court concluded the request did not accord with sound resource management practice.

[91] Mr Kirkpatrick, relying on Judge Newhook’s observations in *Kerikeri Falls*, submitted the words used in subclause (c) referred to matters of practice such as methods, techniques, plans, or zones, and not to matters of substance. There is nothing about the appellant’s proposal which offended against sound resource management practice. Indeed Mr Scott, a witness in the Environment Court, had acknowledged that the proposal had been prepared in accordance with the relevant provisions of the District Plans.

[92] In counsel’s submission the reasons advanced by the Environment Court in [68] were essentially matters of timing or substance. As to the Court’s observations in [69], that accepting the request would undermine the public and participatory process, this demonstrated a bias on the Court’s part in favour of RDC’s Waimauku Structure Plan Proposal.

[93] Ms Carruthers’ submission was that timing was important. The implementation of Chapter 7 “Rural” of RDC’s Proposed Plan was imminent. It did not represent sound resource management practice to notify the appellant’s request for public comment when the request involved a change to the provisions of Plan Change 55 which would soon become obsolete. Furthermore, it infringed against sound resource management practice to allow a private request to undermine the structure planning process which had led to the Waimauku Structure Plan. The request embodied a proposal which was significantly different from the now adopted Structure Plan.

[94] I share the concerns of the Environment Court that, had the request proceeded, it would have caused a considerable degree of public confusion and might undermine the structure plan process and prior public consultation. The public consultation phase had been extensive and had engaged a large number of people ([18] supra). Those reasons, however, fit more easily under subclause (b) than (c).

[95] It would be unhelpful for me, in the context of this appeal, to embark on some definition of what are clearly very broad words. I agree with Judge Newhook the words “sound resource management practice” should, if they are to be given any coherent meaning, be tied to the Act’s purpose and principles. I agree too with the Court’s observation that the words should be limited to only a coarse scale merits assessment, and that a private plan change which does not accord with the Act’s purposes and principles will not cross the threshold for acceptance or adoption.

[96] But whether a procedural matter, such as timing, is caught by the words is problematic. There is inevitably a degree of overlap between practice, procedure, and substance, but the concepts are not identical.

[97] I accept that there is nothing about the appellant’s proposal which offends against sound resource management practice. The issue is whether the timing of the appellant’s request offends.

[98] In general terms I think it is drawing a long bow to hold that a timing issue (assuming a request’s timing is not frivolous or vexatious) will result in an otherwise unobjectionable proposal offending. But, in the particular factual context of the appellant’s request and its proximity to the Structure Plan processes, I am not prepared to hold that, on that specific issue, the Environment Court was wrong. I consider that the proximity to which I have referred makes this case unique.

[99] I also consider that Ms Carruthers is correct when she submits that to accept a private plan request which would lead to notification of a change to a Plan which is within months of its death, could not, in these unique circumstances, be sound practice.

***Does consistency with Part 5, in terms of clause 25(4)(d) require consistency with district or regional planning documents?***

[100] RDC gave, as its third ground for rejecting the appellant's clause 21 request, inconsistency with Part 5 of the Act, because s 75(3)(c) required it to give effect to ARPS in its District Plan.

[101] The Court, for its part, did not agree that the provisions of ARPS were as strong as RDC had suggested. The Court noted that ARPS tilted against high intensity residential development in a rural area (at [52]). The Court at [53] pointed out the proposal was not one to vary ARPS, but that it could undermine ARPS. As a matter of policy it was concerned by any ability of district councils to add new urban areas thereby seriously compromising ARPS.

[102] But the Court held at [59] it could not conclude, on the basis of the clause 25(4)(d) issue, that the appellant's request should be rejected, although it felt aspects of the ARPS issue were "disquieting" given the Court's conclusions on other matters.

[103] I agree with Ms Carruthers' submission that the clause 25(4)(d) issue was not a basis for the Court's decision. The Court did not reject the appeal on that ground. Thus I consider that the ground, and the Court's reasoning process relating to it, were not material to the Court's overall decision. I thus decline to examine that issue any further.

**Result**

[104] Of the five questions of law raised by the appellant as its grounds for appeal the first and fifth require no decision from this Court. On the second question, the third question decisively, and on the fourth question in a limited context, I have held against the appellant.

[105] My conclusion is that the judgment of the Environment Court dated 7 August 2009 is correct.

**Costs**

[106] Because the respondent has succeeded it is entitled to costs. Leave is reserved to the parties to submit memoranda in the unlikely event of them being unable to resolve costs.

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**Priestley J**