IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2017-485-769
[2018] NZHC 2304

UNDER	the Resource Management Act 1991
IN THE MATTER	of an appeal against a decision of the Environment Court pursuant to s 299 of the Act
BETWEEN	CATHARINE MARY MACKENZIE Appellant
AND	TASMAN DISTRICT COUNCIL Respondent

Hearing: 27 February 2018

Counsel: S Franks and A Dartnell for Appellant
C P Thomsen for Respondent

Judgment: 3 September 2018

JUDGMENT OF GRICE J

Table of contents

	Para No
Awaroa, Golden Bay	[1]
Background	[6]
The Submission	[10]
Decision of the Environment Court	[19]
Statutory framework for Plan Changes	[33]
Appeals from the Environment Court to the High Court	[42]
Grounds of appeal	[46]
No Separate Zone ground abandoned	[46]
Relief sought in Environment Court appeal	[47]
Reframed appeal	[49]
Issues	[51]

The Judge erred by failing to take into account relevant considerations causing him to misconstrue the content of either Plan Change 60 or Ms Mackenzie's submission [52]
How did the Environment Court Judge approach Ms Mackenzie's Submission? [52]
The Submission [55]
What was Plan Change 60 about? [59]
Cooperative living [60]
Other dwellings [63]
Subdivision prohibition [66]
Linkages between Plan Change 60 and the Submission [68]
Did the Judge err by misapplying or misinterpreting both limb one and limb two of the Clearwater/Motor Machinists test? [81]
Limb one of the Clearwater/Motor Machinists test [85]
Was the first limb applied too narrowly? [87]
Section 32 Evaluation Report [98]
The second limb of the Clearwater/Motor Machinists test [105]
Policy issues [114]
Further evidence [118]
Conclusion [119]
Costs [121]

Awaroa, Golden Bay

[1] Ms Mackenzie has owned land in the Golden Bay area of Awaroa since 1997. She and her family have their holiday home there. It is their tangata whenua.[1]

[2] The land is unique. It adjoins the Abel Tasman National Park and Marine Reserve. It has limited access – generally by boat or tramping in. Some landowners would like to see more flexible uses allowed for their land. For instance, to enable confined "hamlets" to be established on minimum sized land holdings in the area as well as common areas like "village greens" to be used by the public.

[3] The land is zoned Rural Residential Closed Zone (RRC), in which subdivision is prohibited.[2] Over the years Ms Mackenzie and other local landowners have spoken to the local authority, the Tasman District Council (the Council), about easing the restrictions on the use of the Awaroa RRC land. With that objective in mind,

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1 Oral submission of counsel for the appellant, Mr Franks.

2 Except in limited circumstances, such as boundary and similar adjustments: Tasman District Council *Tasman Resource Management Plan* (District and Regional Plan, 28 November 2015) at r 16.3.8.6.

Ms Mackenzie made a formal Submission[3] in response to a plan change proposed by the Council referred to as Plan Change 60 or PC60.[4]

[4] The Council rejected Ms Mackenzie's Submission on the basis it was outside the scope of PC60. Ms Mackenzie appealed this decision to the Environment Court (EC). The EC agreed. It was of the view that Ms Mackenzie's Submission was not on PC60, but rather was directed at the introduction of rules which would permit subdivision and denser settlement of the Awaroa RRC land. The Judge said as it was not "on" PC60,[5] it was not a valid Submission. He dismissed the appeal.[6]

[5] Ms Mackenzie appeals the decision of the EC.[7]

Background

[6] On 30 January 2016 the Council notified proposed changes in PC60 to aspects of its combined District and Regional Plan, the Tasman Resource Management Plan (the Plan). The changes related to the rural zones. The word "rural" in this context is a generic reference to land in Rural Zone, Rural Residential Zone and the RRC in the Plan. These are each separate zones.[8]

[7] The title of PC60 was: "Proposed Plan Change 60 Rural Land use and Subdivision Policy Review". A coloured brochure published by the Council invited submissions on PC60. It set out a summary of the background to and proposed changes in PC60. The proposed changes were described as changes to Rural One, Two and the Rural Residential Zones. The introduction in the brochure said:

> We are changing the rules about rural subdivision and land use to ensure greater protection of productive capacity, allow for flexibility of use and maintain rural character – while offering greater choices for landowners.

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3 For ease of reference I refer to the submission filed on behalf of five land owners in the Awaroa RCC (including Ms Mackenzie) as Ms Mackenzie's Submission.

4 Tasman District Council *Plan Change 60* (Proposed Plan Change Notified Version, 30 January 2016).

5 *Mackenzie v Tasman District Council* [2017] NZEnvC 136.

6 At [31]; the EC also dismissed the substantive appeal which sought amendments to PC60 to allow subdivision. That is not appealed here.

7 *Mackenzie v Tasman District Council,* above n 5.

8 That the RRC zone is a separate zone is now accepted by Ms Mackenzie. She initially argued the RRC zone was a part of the Rural Residential Zone, but abandoned that ground of appeal before this Court.

[8] The development and use of Ms Mackenzie's land in Awaroa is strictly controlled under the Plan. Under r 16.3.8.7(a) of the Plan, subdivision is prohibited as follows:[9]

> Subdivision in the Rural Residential Closed Zone in … Awaroa… is a prohibited activity for which no resource consent will be granted.

[9] PC60 did not propose any change to that rule nor to any other provision in the Plan that would affect r 16.3.8.7.

The Submission

[10] Ms Mackenzie's Submission was not made in the prescribed form.[10] It did not provide the details of the specific provisions of PC60 to which it applied. That information was extracted from the Submission by the EC.

[11] In the EC, the Judge noted that the heart of Ms Mackenzie's Submission was set out at C of her written Submission:[11]

> C. The submission is made with regard to section 79 of the Resource Management Act, and contests the Council's omission to propose alteration of that zoning, or the rules and restrictions defining and affecting the Residential Closed zone. The submitters believe that they do require alteration involving consideration of the matters raised in this Review. The submitters note that some of the proposed changes go some way to acknowledge the widespread concern in Golden Bay that current restrictions on subdivision and occupancy are too inflexible or too restrictive, and result in serious interference with proper development that could enhance the environment, including its social, cultural and amenity values.

[12] The Submission then set out a list of grounds in support of the failure to propose changes to ensure that the Plan "… will enable them to achieve the purposes of the Resource Management Act …".

[13] At the Submission's second paragraph marked J[12], the specific relief was sought was that "… the land should be under rules which permit subdivision, and more

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9 Tasman District Council *Tasman Resource Management Plan*, above n 2.
10 The requirements are set out at [36] below.
11 *Mackenzie v Tasman District Council,* above n 5, at [3].
12 Two sequential paragraphs are marked "J" in the Submission.

dense settlement of the land…". The Submission stated in its concluding substantive paragraph:

> The submitters seek changes to achieve at least the flexibility that will apply to other rural residential areas, but reflecting the irrelevance of restrictions such as those designed to prevent loss of high value soils. They accept (and seek) conditions reflecting the unique character of the area. For example, that is why they do not necessarily expect conventional subdivision into equal rectangular blocks. They want criteria to limit the visual impact of multiple dwellings. They want consideration of offsets that will protect open space and provide for community uses.

[14] Mr Franks, appearing for Ms Mackenzie, said that the owners of RRC land in Awaroa supported her Submission. He said that they had taken every opportunity to urge the Council to introduce provisions allowing more flexible use of their land. Mr Franks emphasised that "flexibility" was not limited to the ability to subdivide. Ms Mackenzie did not want the land rezoned to allow the standard types of "oblong box" subdivisions. Rather she wanted to be able to use the land for special types of developments such as cooperative living. This could better accommodate different interests and groupings of owners and occupiers. This was a vision, he said, driven by the Wellington architect the late Ian Athfield who, with a group of others, had owned land in the Awaroa RRC.

[15] In the Notice of Appeal to the EC dated 23 February 2017, Ms Mackenzie specified the part of the Council's decision that she was appealing as follows:

(a) The failure to remove Awaroa from r 16.3.8.7, which generally prohibits subdivision in the RRC;

(b) The failure to remove Awaroa from r 16.3.20, which covers the principle reasons for the prohibition of subdivision in the RRC areas (including Awaroa) because of proximity to the coast and other special landscape features;

(c) The failure of PC60 to extend the new r 16.3.8.4A, which made new restricted discretionary subdivision rules apply to all relevant properties in the Rural Residential Zone, to the RRC;

(d) The failure of PC60 to extend the proposed r 16.3.8.4B, which made changes to discretionary subdivision in the Rural Residential Zone for cooperative living, to the RRC.

[16] The relief sought in that Notice of Appeal included amendments to the rules removing the prohibition on subdivision in the RRC Awaroa area and allowing the rules for restricted discretionary subdivision in the Rural Residential Zone to operate in the RRC. The Notice further said:

> 8 The Appellant seeks the following relief:
>
> …
>
> (e) Directions to the Respondent to modify, delete or replace the Provisions to ensure the land in the Area is capable of reasonable use, or to remove the unreasonable burden of the prohibition on subdivision on the Appellant;

[17] No evaluation of the implications of these changes for the relevant RRC Awaroa area was provided with the Submission.

[18] The appeal was dismissed by the EC. This appeal arises from that dismissal.

Decision of the Environment Court

[19] The Judge began by noting that appeals from council decisions on the submissions made on the preparation of District and Regional plans are brought under cl 14 of sch 1 of the Resource Management Act 1991 (the Act). There are two requirements under cl 14(2). First the appellant must have made a submission "on" the proposed plan. Secondly, the appellant must have referred to the provision or matter under appeal in the Submission. The issue here, he said, was whether the Submission was "on" PC60.

[20] The Judge noted the leading authorities on that point are *Clearwater Resort Ltd v Christchurch City Council*,[13] and *Palmerston North City Council v Motor*

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[13] *Clearwater Resort Ltd v Christchurch City Council* HC Christchurch AP 34/02, 14 March 2003.

Machinists Ltd.[14] From these decisions he determined he should address the question in two parts. Namely, a submission would be "on" a plan change if it:[15]

(a) Addressed the extent to which the plan change would alter the pre-existing status quo; and

(b) Did not permit an appreciable amendment to a planning instrument without real opportunity for participation by those potentially affected.

[21] Limb one has two aspects. First, what is the "…breadth of alteration to the status quo entailed in the proposed plan change…" and secondly whether the "…submission addresses that alteration...".[16]

[22] In addressing the extent to which PC60 changed the pre-existing status quo, the Judge had regard to the evaluation report on PC60 provided by the Council pursuant to s 32 of the Act. In *Motor Machinists* Kós J noted that an analysis of the s 32 evaluation report was of assistance in considering whether a submission was within the ambit of a plan change.[17] The EC Judge in this case noted that an analysis using the s 32 evaluation report did not act as a test in its own right – but it was a means of analysing the status quo.[18]

[23] The Judge concluded that the evaluation report indicated the four key issues for PC60 were:[19]

(a) The management of the effects of subdivision and development, especially on small lots, on existing and potentially productive land and on rural character and amenity;

(b) The management of current rural living opportunities and provision for more diverse living opportunities;

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14 *Palmerston North City Council v Motor Machinists Ltd* [2013] NZHC 1290, [2014] NZRMA 519.
15 *Mackenzie v Tasman District Council,* above n 5 at [11]. I refer to the two limb test as the *Clearwater/Motor Machinists* test.
16 *Palmerston North City Council v Motor Machinists Ltd*, above n 14, at [80].
17 At [12].
18 *Mackenzie v Tasman District Council,* above n 5 at [13].
19 At [15].

(c) The management of the effects of business activities in rural zones; and

(d) Fixing technical problems with the plan that reduces its effectiveness and efficiency.

[24] He said that the evaluation report recorded that PC60 was a "limited in scope" review.[20] The proposed plan change did not include the rezoning of rural land nor were the zones around the district reviewed. He noted that a zoning location review was expected to follow as the next phase of work.[21]

[25] The Judge noted it was apparent from his consideration of the Plan that the RRC was a zone in its own right, separate from the Rural Residential Zone. While the RRC is subject to all of the restrictions of the Rural Residential Zone, it is also subject to additional restrictions that apply only to it.[22]

[26] One of the new objectives sought to be added to the Plan in PC60 was:[23]

> 7.2.2.2 Provision of opportunities for a range of residential living options within rural locations, including coastal and peri-urban areas, in the form of the Rural Residential Zone.

[27] Ms Mackenzie submitted to the EC that this extended the range of options within the RRC. The Judge disagreed. The RRC was a separate zone to the Rural Residential Zone. He affirmed his view that PC60 did not include the RRC and said:[24]

> [21] The Appellant's legal submissions identified a number of new Policies which flow from the objective, being:
>
> - **7.2.3.1A** To identify locations for residential living opportunities in rural, coastal and peri-urban areas (as the Rural Residential Zone) that are appropriate locations for their variety of qualities and features to allow for a rural lifestyle living choice.
>
> This policy provides the rationale for identification of areas for residential living being the Rural Residential Zone areas identified in the Map. No additional areas were zoned Rural residential by PC60.

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20 At [17].
21 At [16].
22 At [19].
23 Tasman District Council *Plan Change 60*, above n 4, cl 3.3.4 sch 1.
24 *Mackenzie v Tasman District Council,* above n 5 at [21] – [22].

- **7.2.3.1B** To encourage low impact design solutions for subdivision and building development in all rural zones.

This is a general encouragement applying in all rural zones seeking to achieve low impact design solutions.

- **7.2.3.1C** To enable further subdivision and residential development within any existing Rural Residential Zone location where the land:

  (a) is not affected by coastal, flood, stormwater, geotechnical or earthquake hazard; and

  (b) can accommodate the proposed development without adverse effects on landscape, rural, rural residential or coastal character and amenity values; and

  (c) can be adequately serviced for water, wastewater, stormwater and road access.

This Policy does not refer to the Rural Residential Closed Zone and again applies to the existing Rural Residential Zones identified in the Map.

- **7.2.3.1D** To enable further subdivision and residential development to urban densities within any existing Rural Residential Zone location where the land:

  (i) is in close proximity to an urban residential area and is appropriate to become part of the urban form of that settlement; and

  (ii) is not affected by coastal, flood, stormwater or geotechnical hazards; and

  (iii) can accommodate built development without adverse effects on character and amenity values; and

  (iv) can be adequately serviced for water supply, wastewater, stormwater and transportation.

This Policy does not refer to the Rural Residential Closed Zone and again applies to the existing Rural Residential Zones identified in the Map.

[28] The Judge's comments above relating to policies 7.2.3.1C and 7.2.3.1D were incorrect. These rules apply to RRC as the definition of Rural Residential Zone in Chapter 2 of the Plan includes the RRC. These changes apply to the RRC because it shares the land use rules with the Rural Residential Zone. They do not affect prohibition on subdivision in RRC. In my view these are errors of detail which would not affect the Judge's conclusion. As the Judge said:

> [22] A number of Rule changes reflecting the proposed new relevant Objective and Policies follow in PC60. None of those rule changes relate to applicable subdivision rules in the Rural Residential Closed Zone. It is readily apparent from detailed examination of PC60, including the s 32 evaluation and all of the various amendments made, that there was no intention on the Council's part to change the status quo of subdivision rules in the Rural Residential Closed Zone land at Awaroa (or elsewhere in the district).

[29] The Judge also referred to the fact that under r 16.3.20 of the Plan, under which the purpose of subdivision prohibition in the RRC was explained as being for the protection of the "Coast and special landscape features". The Judge noted these protected features were not in the "four key issues" which the Council's review considered, nor was it something which PC60 sought to address.[25] These features were matters of national importance and should have been at the forefront of consideration and analysis had there been any intention of addressing issues relating to them.[26]

[30] The Judge concluded Ms Mackenzie's submission did not meet limb one of the *Clearwater/Motor Machinists* test. He said PC60 did not seek to change the status quo in relation to subdivision in the RRC. For that reason, Ms Mackenzie's Submission did not seek to address the extent to which PC60 altered the existing status quo.[27]

[31] As to the second limb, (b), of the *Clearwater/Motor Machinists* test the Judge noted that PC60 did not relate to changes in the subdivision rules in the RRC, and therefore it would not have been clear that this topic might have been the subject of submissions. He said that an interested person considering the provisions of PC60 would not reasonably anticipate that an outcome of the process might be changes to the Plan like those requested by Ms Mackenzie. They would not engage in the plan change process, and would be denied the opportunity to be heard on the subject of subdivision in Awaroa.[28] Therefore, Ms Mackenzie was also unable to satisfy the second limb of the *Clearwater/Motor Machinists* test.

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25 The four key issues identified by the Environment Court are set out above at [23].
26 *Mackenzie v Tasman District Council,* above n 5, at [24].
27 At [25].
28 At [27].

[32] The Judge found Ms Mackenzie had no right of appeal, as there had been no valid Submission. Therefore, her appeal which sought changes to the Plan by removing the prohibition on subdivision and related rules, was also dismissed.

Statutory framework for Plan Changes

[33] Plan changes are proposed amendments to the District Plan and are governed by s 73 of the Act. The process is governed by sch 1 of the Act.[29] In preparing a proposal for a District Plan change, s 74 of the Act provides matters to be considered by a territorial authority, which include:[30]

> …
>
> (d) its obligation (if any) to prepare an evaluation report in accordance with section 32; and
>
> (e) its obligation to have particular regard to an evaluation report prepared in accordance with section 32; and
>
> (ea) a national policy statement, a New Zealand coastal policy statement, and a national planning standard; and
>
> (f) any regulations.

[34] The s 32 evaluation report referred to at s 74(1)(d) deals with the extent to which the proposal will change the rules or method in a plan. The report must evaluate whether the proposal is the most appropriate way to achieve the objectives of the plan change.[31] This evaluation occurs through an examination of whether there are other reasonably practicable options for achieving the objectives, an assessment of the efficiency and effectiveness of the options in achieving the objectives, and a summary of the reasons.[32] The report must consider the benefits and costs of the options available, and the risk of acting or not acting if there is uncertain or insufficient information about the subject matter.[33] As Kós J said in *Motor Machinists*, this element "…introduces a precautionary approach to the analysis...".[34] The evaluation

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29 Resource Management Act 1991, s 73(1A).
30 Section 74(1).
31 Section 32(1)(a).
32 Section 32(1)(b).
33 Section 32(2).
34 *Palmerston North City Council v Motor Machinists Ltd*, above n 14, at [34].

report is available for public inspection when the proposed plan change is publicly notified.[35]

[35] District Plan changes must be notified.[36] The notification process is intended to ensure that if there is to be any plan change that will directly affect a land owner they will be informed of these potential changes.

[36] Following this notification, any person[37] may make a submission on the proposed plan change under cl 6 of sch 1 of the Act. The submission *must* be made on the prescribed form.[38] The form provides:

> The specific provisions of the proposal that my submission relates to are:
>
> [*give details*].
>
> My submission is:
>
> [*include –*
>
> - *whether you support or oppose the specific provisions or wish to have them amended; and*
> - *reasons for your views*].
>
> ...
>
> I seek the following decision from the local authority:
>
> [*give precise details*].
>
> I wish *or* do not wish to be heard in support of my submission.
>
> …
>
> (Emphasis added)

[37] In the words of Kós J in *Motor Machinists*: [39]

> [38] … It will be seen from that that the focus of submission must be on "specific provisions of the proposal". The form says that. Twice.

[38] Following receipt of submissions prepared by the Council a summary of submissions is published. This is in far narrower terms than the notification of the plan change as to scope, content and timing. There is no requirement that the territorial

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35 Resource Management Act 1991, s 32(5).
36 Clause 5 of sch 1.
37 With some exceptions listed in cl 6 of sch 1.
38 Clause 6(5) of sch 1; Form 5 of sch 1 of the Resource Management (Forms, Fees and Procedure) Regulations 2003.
39 *Palmerston North City Council v Motor Machinists Ltd*, above n 14.

authority notify individual landowners directly affected by a change sought in a submission. Clause 7 of sch 1 provides:

> **7 Public notice of submissions**
>
> (1) A local authority must give public notice of –
>
> (a) the availability of a summary of decisions requested by persons making submissions on a proposed policy statement or plan; and
>
> (b) where the summary of decisions and the submissions can be inspected; and
>
> (c) the fact that no later than 10 working days after the day on which this public notice is given, the persons described in clause 8(1) may make a further submission on the proposed policy statement or plan; and
>
> (d) the date of the last day for making further submissions (as calculated under paragraph (c)); and
>
> (e) the limitations on the content and form of a further submission.
>
> (2) The local authority must serve a copy of the public notice on all persons who made submissions.
>
> …

[39] The right to make further submissions is limited both as to who can make a submission and what that submission can address:[40]

> **8 Certain persons may make further submissions**
>
> (1) The following persons may make a further submission, in the prescribed form, on a proposed policy statement or plan to the relevant local authority:
>
> (a) any person representing a relevant aspect of the public interest; and
>
> (b) any person that has an interest in the proposed policy statement or plan greater than the interest that the general public has; and
>
> (c) the local authority itself.

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[40] Clause 8 of sch 1 was amended in 2009. The Resource Management (Simplifying and Streamlining) Amendment Bill 2009 restricted the scope for further submission, in part due to the number of such submissions routinely lodged, and the tendency for them to duplicate original submissions.

…

(2) A further submission must be limited to a matter in support of or in opposition to the relevant submission made under clause 6.

[40] Kós J summarised the possible effect of a plan change brought about by a submission as follows:[41]

> [43] … what was intended by clause 8 was to ensure that persons who are directly affected by submissions proposing further changes to the proposed plan change may lodge a further submission. The difficulty, then, is not with their right to lodge that further submission. Rather it is with their being notified of the fact that such a submission has been made. Unlike the process that applies in the case of the original proposed plan change, persons directly affected by additional changes proposed in submissions do not receive direct notification. … *Rather, they are dependent on seeing public notification that a summary of submissions is available, translating that awareness into reading the summary, apprehending from that summary that it actually affects them, and then lodging a further submission. And all within the 10 day timeframe provided for in clause 7(1)(c). Persons "directly affected" in this second round may have taken no interest in the first round, not being directly affected by the first.* ... The result of all this, in my view (and as I will explain), is to reinforce the need for caution in monitoring the jurisdictional gateway for further submissions.
>
> (Emphasis added)

[41] Clause 14 of Sch 1 of the Act provides for appeals from Council decisions on the preparation of district and regional plans to the EC as follows:

> **14 Appeals to Environment Court**
>
> (1) A person who made a submission on a proposed policy statement or plan may appeal to the Environment Court in respect of—
>
> (a) a provision included in the proposed policy statement or plan; or
>
> (b) a provision that the decision on submissions proposes to include in the policy statement or plan; or
>
> (c) a matter excluded from the proposed policy statement or plan; or
>
> (d) a provision that the decision on submissions proposes to exclude from the policy statement or plan.
>
> (2) However, a person may appeal under subclause (1) only if—

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41 *Palmerston North City Council v Motor Machinists Ltd,* above n 14.

(a) the person referred to the provision or the matter in the person's submission **on** the proposed policy statement or plan; and

(b) the appeal does not seek the withdrawal of the proposed policy statement or plan as a whole.

…

(Emphasis added)

Appeals from the Environment Court to the High Court

[42] Section 299 of the Act provides that a party to a proceeding before the EC may appeal to the High Court on a question of law in any decision, report, or recommendation of the EC. Appellate intervention is, therefore, confined to a point of law and only justified if the EC can be shown to have:[42]

(a) applied a wrong legal test; or

(b) come to a conclusion without evidence or one to which on the evidence it could not reasonably have come; or

(c) taken into account matters which it should not have taken into account; or

(d) failed to take into account matters which it should have taken into account.

[43] How much weight the EC chooses to give relevant policy or evidential considerations is a matter solely for the EC. This cannot be reconsidered as a question of law.[43] Similarly, the merits of the case dressed up as an error of law will not be considered.[44] Planning and resource management policy are, for obvious reasons, matters that will not be considered by this Court.[45]

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42 *Ayrburn Farm Estates Ltd v Queenstown Lakes District Council* [2012] NZHC 735 at [34], citing *Countdown Properties (Northlands) Ltd* v *Dunedin City Council* [1994] NZRMA 145 (HC).

43 *Stark v Auckland City Council* [1994] 3 NZLR 614 (HC); *Mariarty v North Shore City Council* [1994] NZRMA 433 (HC).

44 *Young v Queenstown Lakes District Council* [2014] NZHC 414 at [19] citing *Sean Investments Pty Ltd v MacKeller* (1981) 38 ALR 363 (FCA).

45 *Russell v Manukau City Council* [1996] NZRMA 35 (HC).

[44] It is insufficient for an error of law simply to be identified, the error must be a material one, impacting the final result reached by the EC.[46]

[45] Finally, in *Guardians of Paku Bay Association Inc v Waikato Regional Council*, the High Court recognised the deference to be shown to the EC as an expert tribunal when determining planning questions:[47]

> [33] The High Court has been ready to acknowledge the expertise of the Environment Court. It has accepted that the Environment Court's decisions will often depend on planning, logic and experience, and not necessarily evidence. As a result this Court will be slow to determine what are really planning questions, involving the application of planning principles to the factual circumstances of the case. No question of law arises from the expression by the Environment Court of its view on a matter of opinion within its specialist expertise, and the weight to be attached to a particular planning policy will generally be for the Environment Court.

Grounds of appeal

No Separate Zone ground abandoned

[46] Mr Franks, for Ms Mackenzie, abandoned the ground that the EC Judge had wrongly treated the Awaroa RRC zone as a separate zone. That issue, therefore, was not before me.

Relief sought in Environment Court appeal

[47] The relief sought by Ms Mackenzie in the EC Notice of Appeal is specific. It seeks the easing of the subdivision prohibition in Awaroa RRC by various means.[48] The Council says that the relief sought was the lens through which the EC viewed the appeal. It further says the specified relief must assist to confirm the ambit of the Submission. In addition, the Council says, no useful purpose would be achieved by allowing the appeal as the relief in the Notice of Appeal to the EC seeks changes to the subdivision rules in Awaroa RRC which was not raised in PC60.

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46 *Countdown Properties (Northlands) Ltd* v *Dunedin City Council* [1994] NZRMA 145 (HC).

47 *Guardians of Paku Bay Association Inc v Waikato Regional Council* [2012] 1 NZLR 271 (HC).

48 Ms Mackenzie sought an amendment of rr 16.3.8.4A, 16.3.8.4B, 16.3.8.7, 16.3.20 to the end that the prohibition on subdivision over RRC Awaroa land be removed. Ms Mackenzie also sought the Council be directed to alter provisions within the Plan to "…ensure the land in [Awaroa] is capable of reasonable use, or to remove the unreasonable burden of the prohibition on subdivision on [Ms Mackenzie]."

[48] In my view the relief sought in the appeal does provide some confirmation that the Judge was correct in his view that the Submission was about the prohibition of the subdivision in Awaroa RRC. The Judge did not rely on this to shortcut his decision. He considered the points raised by Ms Mackenzie which suggested the Submission was wider. I do the same and for that purpose put in the relief sought in the Notice of Appeal to one side.

Reframed appeal

[49] At the outset of the hearing, Mr Franks indicated he did not intend to follow the Notice of Appeal nor his filed written submissions. Mr Franks' oral submissions were wide ranging and presented a smorgasbord of issues most of which related to the proposition that the Council should allow to landowners more flexible and denser use of their Awaroa RRC land.[49] While his submissions did cover a lot of ground they were largely elaborations on the matters set out in Ms Mackenzie's written submissions before the EC and this Court.

[50] In the written Submissions, Ms Mackenzie noted the basis on which an appellate court will interfere with decisions on questions of law as set out in *Countdown Properties*, which I have set out above at [42].[50] Ms Mackenzie claimed the EC Judge made all of those errors and that they materially affected the outcome of the decision.

Issues

[51] To bring some order to the wide-ranging submissions made of behalf of Ms Mackenzie, I propose dealing first with the issues advanced by her which underpin the argument that her Submission was "on" PC60. These are:

(a) The Judge erred by failing to take into account relevant considerations causing him to misconstrue the content of either PC60 or Ms Mackenzie's Submission. Specifically, he failed to consider:

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[49] He also noted his personal interest in the proceedings as the husband of Ms Mackenzie and a regular visitor to the family holiday home there.

[50] *Countdown Properties (Northland) Ltd v Dunedin City Council* [1994] NZRMA 1345 at 153.

(i) That Submission was not only about the "subdivision" rules or rezoning (including rule changes) in the RRC as the Submission was much wider. It was also about better use and intensification of the use of the Awaroa RRC land.

(b) The judge erred by misapplying or misinterpreting both limb one and limb two of the test assessing whether a submission was "on" a plan change as set out in in *Clearwater* and *Motor Machinists*.[51] Specifically:

(i) The EC misapplied the legal tests on whether or not a submission is "on" a plan change; and

(ii) The EC misapplied the legal tests which consider the effect on the persons potentially affected if the Submission had been accepted as within scope by the Council.

The Judge erred by failing to take into account relevant considerations causing him to misconstrue the content of either Plan Change 60 or Ms Mackenzie's submission

How did the Environment Court Judge approach Ms Mackenzie's Submission?

[52] Ms Mackenzie's Submission was not in the prescribed form as required under cl 6.[52] Therefore examining the specific provisions of PC60 to which the Submission related, ascertaining what it supported and opposed and what decision was required (with precise details) fell to the EC Judge. He concluded that the heart of the Submission was at [C]. That paragraph contests the Council's omission to propose alteration of RRC zoning or the rules and restrictions defining and affecting the RRC. It also seeks alteration to those rules and restrictions. Finally, it notes that current restrictions on subdivision and occupancy are too inflexible, or to restrictive and result in serious interference with proper development.[53]

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51 *Clearwater Resort Ltd v Christchurch City Council*, above n 13; *Palmerston North City Council v Motor Machinists Ltd*, above n 14.

52 Resource Management Act 1991, cl 6 of sch 1.

53 The full text of "C" of the submission is set out at [11] above. *Palmerston North City Council v Motor Machinists Ltd,* above n 14, at [3].

[53] The EC Judge also referred to [J] of the Submission, which sought that the Awaroa land be under the rules which permit subdivision and more dense settlement of the land. The Judge said:[54]

> [4] The submission went on to set out a number of grounds supporting the submitters' belief that either the zoning of the land at Awaroa or the relevant subdivision rules required change. It is not necessary to set them out in full here. It is apparent from paragraph J of the submission that the relief which the submitters sought was that "the land should be under rules which permit subdivision, and more dense settlement of the land". The submission went on to state:
>
> > The submitters seek changes to achieve at least the flexibility that will apply to other rural residential areas, but reflecting the irrelevance of restrictions such as those designed to prevent loss of high value soils. They accept (and seek) conditions reflecting the unique character of the area. For example, that is why they do not necessarily expect conventional subdivision into equal rectangular blocks. They want criteria to limit the visual impact of multiple dwellings. They want consideration of offsets that will protect open space and provide for community uses.
>
> In short, the Appellant sought the uplifting of the prohibition on subdivision applicable to her land contained in the Rural Residential Closed Zone. That could be achieved by either a change of zoning or change of rules.

[54] The Judge had the District Plan and PC60 in front of him.[55] He specifically referred to relevant parts of the PC60 and the plans including the maps.[56]

The Submission

[55] Ms Mackenzie said she was urging the Council to consider more flexible methods enabling the Awaroa landowners to use their land better. This was described as advancing "… the intensification objectives with permission for more dwellings which PC60 proposed by alternative rule changes". Ms Mackenzie argues the Submission was wide enough to encompass a call to explore innovative methods which would allow better use of the Awaroa RRC land.

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54 *Mackenzie v Tasman District Council,* above n 5, at [4].

55 The Judge did not have the decision version of PC60 before him and it was not in the bundle before me. It is publicly available, however, on the Tasman District Council's website. For the purposes of citation and establishing what was in the decision versus notified version I have cited decision reports throughout this judgment. The decision reports incorporate the proposed changes following the consideration of submissions. At this hearing, Ms Mackenzie argued that the decision to include a definition of "cooperative living" and related changes to the Rural Residential zone discretionary activity rules supported the appeal grounds. I refer to that argument below.

56 *Mackenzie v Tasman District Council,* above n 5, at [2], [18], [19] and [23].

[56] Mr Franks, for Ms Mackenzie, said that the Submission only mentioned "zone" three times and "subdivision" six times. In comparison, it mentioned other rule changes to the zone 10 times including referring to intensification, low impact design, sharing and visual impact. Mr Franks pointed to these comparisons as a crude way of supporting his argument that Ms Mackenzie's Submission was not seeking a zoning alteration or a variation of the subdivision rules in the RRC Awaroa area but was rather looking to obtain the introduction of a higher level of rules and objectives which would allow for a greater flexibility and intensification of Awaroa RRC land use.

[57] The Submission pointed to the attractiveness of Awaroa and the need to allow greater appreciation and public use of the land as well as innovative ways to intensify use of the land by landowners. He said from this would be followed later by detailed rules to amend what was permitted in the zone including a re-examination of the virtual blanket prohibition on subdivision.

[58] Ms Mackenzie says that the Judge wrongly took a "precautionary approach … to … submissions proposing more than an incidental or consequential further changes to a notified proposed plan change."

What was Plan Change 60 about?

[59] Mr Franks said that PC60 indeed did cover the wider issues of intensification of land use. This was illustrated specifically by a number of matters which were dealt with in PC60. Two particular illustrations were elaborated on in submissions. The first was that the notified decision version of PC60 introduced the concept of "cooperative living" to the Rural Residential Zone.[57] Secondly that some incidental changes to rules, including provisions related to sleepouts made changes which applied to the RRC.[58]

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57 Tasman District Council *Decision Report 604 – Change 60: Co-operative Living* (9 December 2016), r 16.3.8.4B.

58 Tasman District Council *Plan Change 60*, above n 4, rr 17.8.3.1 and 17.8.3.1A.

Cooperative living

[60] "Cooperative living" is the use of land and buildings where a legal arrangement exist for collective ownership or use of the land or buildings.[59] PC60 introduced this definition into the Plan. It contemplates both land use and subdivision. PC60 as notified did not include cooperative living rules for the Rural Residential Zone.[60] It only included those rules for Rural One and Two zones.[61]

[61] Counsel for the Council said that the *decision* version of PC60 provided for a new land use rule and subdivision rule as a discretionary activity in the Rural Residential Zone.[62] The land use allows the activity.[63] The subdivision rules permit an application for consent to subdivide the relevantly zoned land for that purpose. The council can grant or decline that consent.

[62] The "cooperative living" provisions had no practical effect on the Awaroa RRC land. It did not change the prohibited status of subdivision in the RRC nor did it permit more dwellings on the Awaroa RRC land as was suggested by Ms Mackenzie in her written submissions. There were no changes to rr 16.3.8.6 and 16.3.8.7 of the Plan, which prohibits subdivision in the RRC. Those rules are not reproduced in PC60. Instead there is a blank space where the rule would be found on the Plan, and in that space the following words appear:

[unchanged text omitted]

Other dwellings

[63] The second main point in support of Mr Franks' submission on the ambit of PC60 was that it proposed changes to the rules and policies for certain structures allowed on properties throughout the Rural Zones, including RRC Awaroa land.

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59 At "Cooperative living" in ch 2.2.

60 These were introduced later: Tasman District Council *Decision Report 604 – Change 60: Co-operative Living*, above n 57, r 16.3.8.4B.

61 Tasman District Council *Plan Change 60*, above n 4, rr 16.3.5.4A and 16.3.6.4A.

62 The Decision Version of PC60 included the Council's recommended changes to the Plan following submissions: Tasman District Council *Decision Report 604 – Change 60: Co-operative Living*, above n 57, rr 16.3.8.4B and 17.8.2.6A.

63 Resource Management Act 1991, s 9.

[64] PC60 did propose some amendments relating to the rules headed "Build Construction or Alterations Rules in Rural Zones" as they relate to the maximum area of attached housekeeping units and the number of "sleepouts" permitted.[64] Sleepouts are detached buildings without facilities, limited to 36 m^2 and not located more than 20 metres from the dwelling.[65] PC60 proposed that the number of sleepouts be limited to two per dwelling.[66]

[65] These changes are minor adjustments to existing provisions and subject to land use conditions. These changes do not support the argument for the appellant.

Subdivision prohibition

[66] Mr Franks also said there was at least one type of subdivision already allowed on RRC land. He said subdivision was permitted to facilitate boundary adjustments.[67] This advanced a proposition that subdivision was a live issue in the RRC. This also supported his submission that it was incorrect to characterise subdivision as "prohibited" in that zone.

[67] In my view it does not lend support to Ms Mackenzie's arguments. Merely because realignments of boundaries requiring consequential lot adjustments are allowed in the RRC does not alter the fact that subdivision proper is prohibited in the RRC and that a review of rules on subdivision in the RRC was outside the ambit of PC60.[68]

Linkages between Plan Change 60 and the Submission

[68] I have dealt with the main specific examples that Mr Franks put forward at the hearing to show linkages between PC60 and the Submission.

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64 Tasman District Council *Plan Change 60*, above n 4, rr 17.8.3.1 and 17.8.3.1A.
65 At rr 17.8.3.1(c) and 17.8.3.1(d).
66 At rr 17.8.3.1(ba).
67 Tasman District Council *Tasman Resource Management Plan*, above n 2, r 16.3.8.6.
68 Rule 16.3.8.6 contemplates boundary adjustments which do not create additional lots upon which dwellings can be built and other restrictions as well as the requirement for resource consent. This was not the subject of proposed changes in PC60.

[69] Mr Franks in his oral submissions succinctly summed up what Ms Mackenzie was seeking in her Submission in relation to the Awaroa RRC land was: "the ability for the Council to broker and manage a more comprehensive change which would allow subdivision subject to detailed rules that would follow". He said this did not necessarily mean an immediate change to the prohibition on subdivision in the Awaroa RRC area, but the Council needed to hear alternative viewpoints on land use rather than being limited to the Council proposals. He said the exclusion of the Submission as it related to these viewpoints was wrong.

[70] Most of Mr Franks oral submissions went to showing how the Submissions "touched" PC60. He said PC60 was very wide and had ramifications for specific sites so why could it not apply to Awaroa RRC. This was a submission in response to the EC Judge's reasoning that PC60 was "limited in scope". Mr Franks gave an example of a site-specific change relating to the Richmond East Development Area. The Council had control over whether to grant a resource consent for subdivision in that area because of "… the potential effects on the landscape values of the hill/backdrop to Richmond".[69] Mr Franks said if PC60 could put in site specific provisions for that land why not have the same controls for Awaroa RRC rather than a prohibition on subdivision.

[71] However, as the Council pointed out, that the provision relating to Richmond East Development Area was already in the existing plan and was not subject to any change proposed in PC60.[70] In addition, the Plan controlled the use of that area of land in a way which might be less restrictive than a prohibition on subdivision, but that was not a reason to review the prohibition on subdivision in RRC Awaroa land under the umbrella of PC60.

[72] In this vein Mr Franks also pointed to the change proposed for restricted discretionary subdivision in the Rural Residential Zone.[71] This proposed allowing the Council to refuse consent or impose conditions on consents given for restrictive

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69 Tasman District Council *Tasman Resource Management Plan*, above n 2, r 16.3.8.1(10).

70 This can be established by looking at Tasman District Council *Tasman Resource Management Plan*, above n 2. There is no information surrounding the rule that indicates it was proposed in PC60.

71 Tasman District Council *Plan Change 60*, above n 4, r 16.3.8.4A.

discretionary subdivision. Matters for which consent could be refused or conditions imposed included the effect of development on "… rural, landscape or coastal amenity values …".[72]

[73] This was said to illustrate the point that the Council was already dealing with coastal amenity in PC60 and changing subdivision rules, therefore, there was no reason why the Awaroa RRC land could not be dealt with in the same way. However, this point does not support an argument that the submission was "on PC60". It merely shows rather that the Council has different ways of managing different areas of land in the district. This is a matter of policy.

[74] The fact that the provision mentions "coastal amenity values" does not provide a material linkage between the Awaroa RRC land – merely because that land is also coastal.

[75] Mr Franks says that these illustrations show that the EC Judge took a "shortcut" through PC60. However, the examples given relate to the approach of the Council to different areas of land are matters of policy and are not required to be considered by the EC.

[76] Nor do references in the Submission to concepts such as "intensification", "low impact design", "sharing" and "visual impact" provide a sufficient connection between the Submission and PC60 to establish that it is "on" the Plan Change. They are merely a collection of words and concepts relevant to planning when divorced from the Submission. When in the context of the Submission those words all relate to the change being sought to the Awaroa RRC land to allow "… subdivision … and more dense settlement of the land".

[77] The Judge carefully reviewed the Submission. He referred to those parts of the Submission which related to the submitters' belief that the current restrictions on subdivision and occupancy are too inflexible and resulted in serious interference with

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[72] Rule 16.3.8.4A.

the proper development of the RRC Awaroa land.[73] He also specifically referred to the Submission seeking more dense settlement of the land.[74]

[78] Finally, in respect of the oral arguments as to the scope of PC60 I also note that, the Submission neither referred to nor sought specific relief in respect of the "cooperative living" provisions, nor the sleepout provisions which were dealt with in PC60.

[79] Ms Mackenzie has misunderstood the *Clearwater/Motor Machinists* first limb test. That a rule "touches" on a particular area of land is not enough.[75] It is about understanding the alteration to the status quo effected by the plan change.

[80] This general call for discussion of intensification of land use in the RRC Zone and consideration of innovative approaches to that does not provide the necessary linkages to make the submission "on" PC60. There are other steps Ms Mackenzie can take to precipitate the discussions she seeks which I refer to later in my judgment at [112].

Did the Judge err by misapplying or misinterpreting both limb one and limb two of the *Clearwater*/*Motor Machinists* test?

[81] The *Clearwater/Motor Machinist* test is in two parts that help to identify whether a submission is "on" a plan change in terms of cl 14(2)(a).[76] It is "on" a variation if it satisfies two limbs:[77]

(a) it addresses the extent to which the plan change will alter the status quo; and

(b) it would not cause the District Plan to be appreciably amended "…without the real opportunity for participation by those potentially affected…".[78]

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73 *Mackenzie v Tasman District Council,* above n 3, at [3] and [4].
74 At [4].
75 *Bluehaven Management Ltd v Rotorua District Council* [2016] NZEnvC 191 at [79].
76 Resource Management Act 1991, sch 1.
77 *Clearwater Resort Ltd v Christchurch City Council*, above n 13, at [66].
78 *Palmerston North City Council v Motor Machinists Ltd*, above n 14, at [55].

[82] Ms Mackenzie says the EC incorrectly applied limb one of the *Clearwater/Motor Machinists* test:

(a) Firstly, because the Judge applied limb one of the test too narrowly, and

(b) Secondly, as the Judge relied upon the s 32 evaluation report as the test.

[83] Ms Mackenzie also says the EC incorrectly applied limb two of the *Clearwater/Motor Machinists* test:

(a) Firstly, because the Judge applied limb two of the test too narrowly, and

(b) Secondly, the limb is "superfluous".

[84] I will address the arguments directed at each limb of the test in turn.

Limb one of the Clearwater/Motor Machinists test

[85] Kós J characterised the first limb of the *Clearwater* test as a "filter" which helped ensure there was a direct connection between the submission and the degree of alteration proposed in the notified plan change.[79] There are two parts to this first limb; first what is the breadth of the alteration to the status quo envisioned by the notified plan change, and secondly whether the submission addresses those alterations.[80]

[86] Kós J summarised the three possible approaches discussed by William Young J in *Clearwater*, as follows:[81]

> [49] William Young J noted that the question of whether a submission was "on" a variation posed a question of "apparently irreducible simplicity but which may not necessarily be easy to answer in a specific case".16 He identified three possible general approaches:
>
> (a) a literal approach, "in terms of which anything which is expressed in the variation is open for challenge";

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79 At [80] – [82].
80 At [80].
81 *Palmerston North City Council v Motor Machinists Ltd*, above n 14, at [49] and [50].

(b) an approach in which "on" is treated as meaning "in connection with"; and

(c) an approach "which focuses on the extent to which the variation alters the proposed plan".

[50] William Young J rejected the first two alternatives, and adopted the third.

(Footnotes omitted)

Was the first limb applied too narrowly?

[87] Mr Franks accepted that the *Clearwater/Motor Machinists* test was applicable to this case. However, he submitted it should have been more liberally interpreted in keeping with the EC decision in *Bluehaven Management Ltd v Rotorua District Council*.[82] In that case the EC adopted both limbs of the test but noted that other cases also assisted in the consideration of the scope. It said:[83]

> [27] Kós J then expanded on the *Clearwater* test by posing questions that may be asked to determine whether a submission can reasonably be said to fall within the ambit of a plan change:
>
> In terms of the first limb of the test:
>
> (i) Whether the submission raises matters that should have been addressed in the s 32 evaluation report? If so, the submission is unlikely to be within the ambit of the plan change.
>
> (ii) Whether the management regime in a plan for a particular resource is altered by the plan change? If not, then a submission seeking a new management regime for that resource is unlikely to be on the plan change.
>
> In terms of the second limb:
>
> (i) Whether there is a real risk that persons directly or potentially affected by the additional changes proposed in the submission have been denied an effective response to those in the plan change process? If so, then the process for further submissions under clause 8 of the Schedule 1 to the Act does not avert that risk.
>
> [28] All parties before us presented their cases based on this approach to the *Clearwater* test and we respectfully adopt it as the basis for this decision. However, we also note, in light of the submissions of Mr Muldowney for RDC and by reference to the survey in *Environmental Defence Society Inc & Ors v Otorohanga District Council*, that there are *other High Court authorities*

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82 *Bluehaven Management Ltd v Rotorua District Council,* above n 75.

83 At [27] – [28].

> *which are also pertinent to the question of scope which we consider must also be referred to.*
>
> (Emphasis added)

[88] The other authorities the Judge in *Bluehaven* referred to warned against an unduly narrow approach,[84] observing:[85]

> [32] In the end, the jurisdiction issue comes down to a question of degree and, perhaps, even of impression.

[89] In *Bluehaven* the EC Judge concluded:[86]

> [37] In that context, we respectfully suggest that one might also ask, in the context of the first limb of the *Clearwater* test, whether the submission under consideration seeks to substantially alter or add to the relevant objective(s) of the plan change, or whether it only proposes an alternative policy or method to achieve any relevant objective in a way that is not radically different from what could be contemplated as resulting from the notified plan change. The principles established by the decisions of the High Court *discussed above would suggest that submissions seeking some major alteration to the objectives of a proposed plan change would likely not be "on" that proposal*, while alterations to policies and methods within the framework of the objectives may be within the scope of the proposal.
>
> (Emphasis added)

[90] The Judge said this might include an assessment of whether the evaluation report should have covered the issues raised in a submission.[87] He also noted that assessment should involve considerations of whether "there are statutory obligations national or regional policy provisions or other operative plan provisions which bear on the issue raised in the submission".[88]

[91] I now consider whether the EC incorrectly applied limb one of the test, when the Judge said:[89]

> …the submission does not address the extent to which PC60 alters the pre-existing status quo because the plan change does not seek to change the status quo, insofar as it relates to the prohibited status of subdivision of land in the RRC at Awaroa, at all …

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84 At [29] citing *Power v Whakatane District Council* CIV-2008-470-456, 30 October 2009.
85 At [32]
86 *Bluehaven Management Ltd v Rotorua District Council,* above n 75, at [37].
87 At [38].
88 At [38].
89 *Mackenzie v Tasman District Council*, above n 5, at [25].

[92] Mr Franks submitted Ms Mackenzie was seeking higher level changes rather than direct or zoning changes to the subdivision rules. However, that does not alter the fact that for all practical purposes those matters were what Ms Mackenzie's submission was on. What Mr Franks now says it sought is a review of the rules which would apply to the RRC. However this would ultimately lead to a relaxation of the rules on subdivision without proper consideration, evaluation or notification of the high level changes.

[93] Land subdivision is one of the most important tools a planner can use because it controls the division of ownership access rights and movement. It is the tool used to limit development in the RRC.[90] To change any high-level rules which would later flow into the detail of the subdivision rules would, in my view, require a clear proposal that was not contained in PC60.

[94] As the EC Judge noted, the uplifting of the subdivision prohibition could be done by a change of zoning or a change of rules relating to the RRC Awaroa land.[91] He noted that the merits of the Submission and the amendments it seeks to the subdivision rules in the RRC were not relevant to the legal issue of whether or not the Submission was within scope.[92]

[95] The EC's analysis and conclusion that the Submission was focussed on the prohibited status of subdivision in the RRC and the changes to the zone or zone rules is justified. That conclusion was reached following a reasoned consideration of the Submission and PC60. That conclusion will always be a question of degree and impression. The Judge applied his specialist expertise and experience to reach that conclusion on the evidence.

[96] Taking into account the additional considerations suggested in *Bluehaven*, the changes sought in the Submission:

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90 Subdivision is not limited to division of fee simple title but includes allocation of ownership and rights by way of modern forms of title which include unit title, cross lease, and company lease; See generally Caroline Miller and Lee Beattie *Planning Practice in New Zealand* (LexisNexis, Wellington, 2017) at ch 18.

91 *Mackenzie v Tasman District* Council, above n 5 at [4].

92 At [6].

(a) Were major alterations to the objectives of the proposed plan change. Consideration of the unique features of the area and the Awaroa RRC land did not feature in the objectives of PC60.

(b) Engaged other policy considerations relevant to the interpretation of land use and the relaxation of the prohibition on subdivision in the Awaroa RRC. These were not evaluated. The considerations included coastal environment and protection from inappropriate subdivision. Development of that land is a matter of national importance.[93]

[97] The EC Judge was well placed to undertake the *Clearwater*/*Motor Machinists* first limb assessment. The conclusion the Environment Court Judge reached that the Submission was not "on" PC60 was correct.

Section 32 Evaluation Report

[98] The other matter referred to in the Notice of Appeal under this ground relates to the s 32 evaluation report. Kós J in *Motor Machinists* suggested it is useful to analyse the contents of the s 32 evaluation report and compare the contents of the submission to the contents of the report.[94] The second method was to:[95]

> … ask whether the management regime in a district plan for a particular resource… is altered by the plan change. If it is not then a submission seeking a new management regime for that resource is unlikely to be "on" the plan change.

[99] Mr Franks says the evaluation report should not govern the ambit of submissions on the plan change and the EC was in error in using the s 32 evaluation report to define the ambit of PC60 for the purposes of deciding whether the submission was "on" it.

[100] In applying the *Clearwater* test, the Judge expressly recognised that the s 32 evaluation was not a test in its own right, but rather a means of analysing the status quo at issue. He noted there may be other means, but found s 32 evaluation report of

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93 Resource Management Act 1991, s 6(a).
94 *Palmerston North City Council v Motor Machinists Ltd*, above n 14, at [12].
95 At [81].

particular relevance in addressing the first limb of the *Clearwater/Motor Machinists* test.[96] The Judge was alive to and expressly noted the concern that a rigid application of the legal tests might give local authorities the opportunity to stifle debate through a narrow s 32 report.[97]

[101] While the Judge did consider the evaluation report it is apparent he did so in conjunction with consideration of the Plan and PC60.[98] The Judge nevertheless concluded that the submission was not "on" PC60 because the plan changes were not directly applicable to the RRC Awaroa land. He said:[99]

> [29] PC60 was the outcome of a plan review process which the Council initially commenced in 2004 and then recommenced in about 2012. The review was for a limited purpose, namely to more effectively achieve the current objectives of the District Plan as they provide for:
>
> - protection of the productive capacity of land, especially land with high productive value;
> - flexible use of land (for rural living and rural business opportunities) while retaining the productive capacity of land;
> - maintaining rural character and amenity values while providing for resource use and development.
>
> [30] Neither the review nor PC60 which emerged from it, were undertaken for the purpose of considering subdivision opportunities in the Rural Residential Closed Zone at Awaroa. I consider that the Council was entitled to propose general changes to its District Plan seeking to protect productive land whilst providing flexibility in rural living and business opportunities, without opening debate on the appropriate zoning and subdivision provisions for a specific area of land which has been zoned to protect the Coast and its special landscape features.
>
> (Footnotes omitted)

[102] The s 32 evaluation report was an accurate evaluation of the proposed changes in PC60. Mr Franks takes issue with the fact it excluded options for the intensification or better use of RRC Awaroa land. However, as PC60 was not dealing with the RRC Awaroa land in any specific sense the evaluation report did not need to canvas the

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96 *Mackenzie v Tasman District Council*, above n 5, at [13].
97 At [56].
98 At [19], [21] and [22].
99 At [29] and [30].

alternatives relating to that resource which was in a separate zone than the zones targeted by PC60. That the RRC is a separate zone is not now contested.

[103] In essence, the Environment Court Judge concluded that the management regime for Awaroa RRC land was not altered by the proposals in PC60 and that Ms Mackenzie's Submission was seeking a new management regime for that resource. This consideration is the second method suggested by Kós J to assist the analysis.

[104] I am of the view that the Judge correctly applied the *Clearwater*[100] test as formulated in *Motor Machinists*.[101] Ms Mackenzie is essentially arguing that the Judge did not apply her preferred legal test, rather than alleging the Judge made an error of law. It is perhaps obvious that I believe no error of law was made in this regard.

The second limb of the Clearwater/Motor Machinists test

[105] The second limb of the test is focussed on fairness of process and ensuring those potentially affected are both notified and have the opportunity to have their say. It would be a powerful consideration against finding that the Submission was truly "on" the variation if the effect of regarding a submission as "on" a variation would be to permit a planning instrument to be appreciably amended without real opportunity for participation by those potentially affected.[102]

[106] The Council indicated it would be looking at some zoning changes at a later date. If there were to be relevant changes proposed to the Awaroa RRC zone, they would be dealt with squarely at that time. Through that process, all landowners and other interested parties would be alerted to the proposals and have the opportunity to make submissions. This is in line with the progressive and orderly resolution of issues associated with the development of proposed plans contemplated by the Act. If the changes sought in the Submission were effected in PC60, it would be out of left field to those who read PC60.

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100 *Clearwater Resort Ltd v Christchurch City Council,* above n 13.
101 *Palmerston North City Council v Motor Machinists Ltd,* above n 14.
102 At [55].

[107] It is not only landowners who would likely be interested in putting in a submission on changes to the RRC Awaroa land. Given its special characteristics appropriate consultation would be necessary with other parties, and proper consideration and evaluation of the proposals undertaken. In *Clearwater* William Young J said that "…a submission proposing something completely novel…" was a strong factor against finding the submission to be on the variation.[103] This would be the case when dealing with proposals for intensification of Awaroa RRC land use. Such changes must be notified clearly. Kós J said covering proposals for significant changes to the management regime of a resource:[104]

> [79] … That requires, in my view, a very careful approach to be taken to the extent to which a submission may be said to satisfy both limbs 1 and 2 of the Clearwater test. Those limbs properly reflect the limitations of procedural notification and substantive analysis required by s 5, but only thinly spread in clause 8. Permitting the public to enlarge significantly the subject matter and resources to be addressed through the Schedule 1 plan change process beyond the original ambit of the notified proposal is not an efficient way of delivering plan changes. It transfers the cost of assessing the merits of the new zoning of private land back to the community, particularly where shortcutting results in bad decision making.

[108] The proposals made in Ms Mackenzie's Submission were unlikely to attract a response via submissions from landowners and other interested parties who had alternate views on the matters raised. This was recognised within Ms Mackenzie's Submission, which noted:

> G … Indeed in the absence of considered change the natural response to increased visitor pressure could be a more intrusive emphasis on the private nature of current land occupancy. Sensible changes would enable the Council to work with owners on mutually satisfactory changes to manage and respond to that access need. *Changes in the Plan could be important to reducing the cost of withstanding possible challenges from the kind of objectors who tend to resist automatically any changes to any status quo.*
>
> (Emphasis added)

[109] Ms Mackenzie said that most of the people who would be affected landowners were aware of the submission and longstanding desire of Ms Mackenzie to obtain an easing of the restrictions on the development of their land. Mr Franks said that as most

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103 *Clearwater Resort Ltd v Christchurch City Council,* above n 13, at [89].
104 *Palmerston North City Council v Motor Machinists Ltd,* above n 14 at [79].

of the landowners would have supported the Council allowing increased density and flexibility in the land use as sought, the second limb of *Clearwater* was not relevant.

[110] In making his argument that Ms Mackenzie's Submission was known to all relevant land owners, Mr Franks said:

> 57. The Decision erred in failing to recognise that persons who might be affected by the Submission's purposes were likely to be aware of them and had a chance to submit on the issues.

[111] There was no evidence in support of this point. Nor would it have been appropriate for me to allow new evidence on this point. In any event the evidence relates to matters of fact and it is not for determination here. In addition, Ms Mackenzie's Submission itself suggests at [G] that there are landowners who may not be aware of the Submission or who would not agree with the views and proposals made in it.

[112] Ms Mackenzie is not precluded from adopting one of three options to pursue the changes and discussions that she is seeking concerning subdivision and a change of rules in the Awaroa RRC. Kós J set those options out in *Motor Machinists* as follows:[105]

> [78] Where a land owner is dissatisfied with a regime governing their land, they have three principal choices. First, they may seek a resource consent for business activity on the site regardless of existing zoning. Such application will be accompanied by an assessment of environment effects and directly affected parties should be notified. Secondly, they may seek to persuade their council to promulgate a plan change. Thirdly, they may themselves seek a private plan change under Schedule 1, Part 2. Each of the second and third options requires a s 32 analysis. Directly affected parties will then be notified of the application for a plan change. All three options provide procedural safeguards for directly affected people in the form of notification, and a substantive assessment of the effects or merits of the proposal.

[113] I conclude that the EC Judge was correct in his finding that the Submission did not meet the requirements of limb 2 of the *Clearwater/Motor Machinists* test.

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[105] *Palmerston North City Council v Motor Machinists Ltd,* above n 14, at [78].

Policy issues

[114] Ms Mackenzie's Submissions on the appeal were largely concerned with issues of policy. The specific matters raised by Mr Franks as providing linkages to PC60 overlooked by the Judge, do not in my view advance his argument that the Submission was on PC60. The Submitters disagree as a matter of policy on the approach of the Council to the use of the Awaroa RRC land, and seek the ability to use the land more flexibly and intensively. PC60 was not the vehicle for enabling those policy issues to be advanced.

[115] I have not addressed in detail every illustration raised in Mr Franks oral argument. Many were directed toward the policy of the Council in the manner it has restricted development of the RRC Awaroa land and comparison with the use of other land in the area. For instance, Mr Franks said there is already residential zoned land in Awaroa and this land his similar attributes to the Awaroa RRC land. However, this does not open the gate to consideration of the limitations and subdivision prohibition on Awaroa RRC land in PC60.

[116] As I noted above, the Judge made some minor errors of detail. These were largely due to the way the draftsman of the Plan created the RRC with reference to the definition of the Rural Residential Zone in chapter 2 of the Plan.[106] These minor errors do not detract from the fact that the Submission was not on PC60.[107] The errors are immaterial.

[117] The Judge made no material errors in his judgment. He was very well placed by virtue of his special expertise and experience to make his assessment. His judgment is to be given deference in that regard. He was entitled to conclude Ms Mackenzie's submission was not "on" PC60.

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[106] Tasman District Council *Tasman Resource Management Plan* (2 December 2016), above n 2, at ch 2.

[107] See above at [28]. There also appears to have been some confusion about the maps the Judge was referring to – see *Mackenzie v Tasman District Council,* above n 5, at [19] – [21].

Further evidence

[118] Mr Franks sought to introduce further evidence in support of Ms Mackenzie's appeal. The evidence largely related to the history of the discussions between some of the landowners and the Council concerning the use of the Awaroa RRC land. These were matters not appropriate to be dealt with here. Further evidence in an appeal is rarely admitted. As Doogue J said in *Television New Zealand Limited v Southland Fuel Injection Limited,* the Court on appeal should only consider the matter on the evidence which was before the lower court.[108] This was adopted in *Zimmerman v Director of Proceedings*.[109] Therefore, the application to admit further evidence is denied.

Conclusion

[119] The questions of law as posed in the Notice of Appeal are answered as follows:

(a) **Question (1)**: Did the EC misdirect itself in its interpretation and application of cl 14 of Sch 1 of the Act? In particular, did it apply legal tests from case law additional to, or in elaboration of, the requirements of cl 14 so as to contradict the express provisions for rights of appeal?

Answer: No.

(b) **Question (2)**: Did the Judge err by misapplying or misinterpreting both limb 1 and limb 2 of the tests set out in in *Clearwater* and *Motor Machinists* in assessing whether a submission was "on" a plan change.

Answer: The Judge did not err as described.

(c) **Question (3):** Did the EC misdirect itself in treating the land area in the Rural Residential Zone under the "Closed" overlay as a separate zone, and in effect treating it as if it was deemed to be excluded from the Rural Residential Zone in relation to relevant proposals of PC60?

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[108] *Television New Zealand Limited v Southland Fuel Injection Limited* AP298/94, 16 March 1998 at 6.

[109] *Zimmerman v Director of Proceedings* HC WN CIV-2006-485-761, 29 May 2007.

Answer: This question was abandoned at the hearing.

[120] The appeal is dismissed.

Costs

[121] There appears to be no reason that costs should not follow the event in the usual manner. If the parties are unable to reach agreement on this issue they should file submissions on costs as follows:

(a) The Council will file submissions on or before seven days from the date of the delivery of this judgment.

(b) Ms Mackenzie will file submissions in reply on or before seven days from the date of the respondent's submissions.

(c) The Council will file submissions in response (if any) on or before a further three days.

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Grice J

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