IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2017- 485-000627

IN THE MATTER OF	the Resource Management Act 1991 ("Act")
AND	
IN THE MATTER OF	an appeal against Environment Court decisions [2017] NZEnvC 31 (interim decision) and [2017] NZEnvC 100 (final decision) under section 299 of the Act
BETWEEN	**COASTAL RATEPAYERS UNITED INCORPORATED**
	Appellant
AND	**KAPITI COAST DISTRICT COUNCIL**
	Respondent

SUBMISSIONS ON BEHALF OF THE RESPONDENT

6 October 2017

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MAY IT PLEASE THE COURT:

Introduction

1. These proceedings concern an appeal against the following two Environment Court decisions:

   (a) *Coastal Ratepayers United Inc v Kapiti Coast District Council* [2017] NZEnvC 31 ("**interim decision**");[1] and

   (b) *Coastal Ratepayers United Inc v Kapiti Coast District Council* [2017] NZEnvC 100 ("**final decision**").[2]

2. The Environment Court decisions concerned an application by the Appellant for two declarations relating to the Respondent's (referred to in these submissions as the "**Council**") withdrawal of the coastal hazard provisions from the Kapiti Coast Proposed District Plan ("**PDP**").

3. The proceedings followed earlier declaratory proceedings lodged by the North Otaki Beach Residents Group ("**NOBRG**") seeking the same two declarations. The Appellant was a party to those proceedings. Those earlier proceedings were settled with NOBRG.

4. The Appellant sought the following two declarations from the Environment Court:

   *"**Declaration 1** The Council, having notified a full review of the District Plan, cannot change the ambit of that review under section 79 without first notifying the provisions which are no longer subject to the review, and/or notifying the existing provisions which it intends to remain 'operative' after the proposed plan is completed.*

   ***Declaration 2** In withdrawing the coastal hazard and other provisions under clause 8D of Schedule 1 of the RMA, the Council changed the meaning of the remainder of the PDP."*

5. The Council opposed the making of both declarations.

6. The Environment Court:

   (a) refused to make declaration 1 (in the interim decision); and

[1] At page 8 of the common bundle.
[2] At page 34 of the common bundle.

(b) granted declaration 2 in a more limited manner than had been sought by the Appellant (in the final decision).

7. The Council opposes this appeal and the relief sought by the Appellant.

BACKGROUND

8. The Environment Court's interim decision sets out the background to this appeal.

9. The background and context to these proceedings was provided to the Environment Court and is repeated here because it is important in terms of understanding the Council's approach. The affidavit of Ms Stevenson sets out in brief terms the background to these proceedings, and that background is summarised below:[3]

(a) the Council initiated its district plan review in September 2008, which included an extensive community consultation process and multi-staged series of discussion papers;

(b) the PDP was notified in November 2012 and 777 submissions were subsequently received. When the PDP was originally notified, significant concerns were raised by the community in relation to the coastal hazard provisions in the PDP;

(c) the Council subsequently commissioned two expert reports and, on the basis of recommendations in those expert reports, the Council withdrew the coastal hazard (and certain other) provisions from the PDP under clause 8D of Schedule 1 of the RMA on 2 October 2014;

(d) in making that decision, the Council's position was that while removal of the provisions and maps relating to coastal hazards would leave a gap in the PDP, those areas were still covered by underlying PDP zones and coastal hazards will continue to be addressed by the operative district plan ("**ODP**") while the coastal hazards review process progressed; and

(e) the hearings on the PDP commenced on 4 April 2016 in Paraparaumu. Since then, the Hearings Panel has heard from more than 200 submitters on 22 hearing days.

[3] Affidavit of Sarah Jane Stevenson dated 25 October 2016 at paragraphs 6 to 10 (page 160 of common bundle).

10. The hearings on the PDP were completed in April 2017. The Hearings Panel have prepared their recommendations reports on the PDP which are intended to be presented to Council on 9 November 2017 for a decision. It is anticipated that the Decisions version of the PDP will be publicly notified on 15 November 2017.

11. The Environment Court noted the Council's position in the interim decision as follows:[4]

> *"The Council's position is set out in its submissions by reference to the material contained in Ms Stevenson's affidavit in the following terms (footnotes omitted):*
>
> 6. *Ms Stevenson also explains in her affidavit the Council's intention, communicated consistently and clearly since July 2014, to undertake further coastal hazard work and, at the appropriate time, introduce a plan change to deal with those matters.*
>
> 7. *Ms Stevenson also identifies that there are, however, a number of other processes underway that have an influence on how and when it is appropriate to commence that coastal hazards process. These include:*
>
> …"

12. The processes referred to by Ms Stevenson are quoted in paragraph [7] of the Environment Court's interim decision. In summary, there are several important central and local government processes that are underway that are highly relevant to coastal hazards, and the Council cannot seek to resolve coastal hazard issues in isolation from or, in advance of, those other processes.

13. The Court further noted:[5]

> *"8. Finally, Ms Stevenson also noted:*
>
> (a) *the Council has already experienced the significant cost and difficulty associated with a small local authority seeking to undertake coastal hazard planning on its own, without support from regional or central government;*

[4] At [7] of the interim decision.
[5] At [7] of the interim decision.

(b) *as the Parliamentary Commissioner for the Environment has noted, climate change adaptation should not be progressed in haste. Dr Wright stated:*

> *"The Kapiti experience is instructive in a number of ways. Importantly, the process was hasty";*

(c) *the Council is committed to this process but as noted, the issue is not if, but when. It is a matter of timing and with so much uncertainty, it is prudent to wait; and*

(d) *for these reasons, over the next four years, Council intends to follow an Implementation Plan for engaging with the community via the Coastal Advisory Group, and establishing a Technical Advisory Group, to progress the review of the coastal hazards provisions."*

14. The Environment Court in the interim decision summarised the position of the Council as follows:[6]

> *"In short, the Council says that it continues to recognize the need for alteration of the existing coastal hazard provisions of the ODP. It has acknowledged that the replacement provisions initially contained in the PDP were not appropriate (consistent with the views of CRU) and has withdrawn them accordingly. The Council is committed to a process to identify appropriate coastal hazards provisions but it will be seen from para 8(d) of the Council's submissions cited above that this may take up to four years. The Council's position is that in the interim the existing coastal hazard provisions of the ODP will continue to apply and that there is no need for it to undertake any further review of the ODP or variation of the PDP to enable that to happen. It is that position which gives rise to the declarations sought by CRU."*

15. That remains the position of the Council. That is not to say that the Council is doing nothing. In addition to working through the final stages of the PDP process (which has taken significant Council and community resources), the Council is in the early stages of planning for the coastal hazards process.

[6] At [7] of the interim decision.

DECLARATION 1

16. As noted above, declaration 1 as sought by the Appellant during the Environment Court proceedings was as follows:

> "***Declaration 1****: The Council, having notified a full review of the District Plan, cannot change the ambit of that review under section 79 without first notifying the provisions which are no longer subject to the review and/or notifying the existing provisions which it intends to remain 'operative' after the proposed plan is completed.*"

17. In its interim decision, the Environment Court refused to grant declaration 1. The Council respectfully submits that the Environment Court's decision was correct.

18. The Environment Court described the Appellant's case as follows:[7]

> *"[6] It will be seen that the heart of CRU's complaint summarized in the key background facts relates to the withdrawal of provisions of the PDP pertaining to coastal hazard lines, coastal hazard areas and the rules relevant to them (the coastal hazards provisions). CRU contends that the Council's intention that coastal hazards provisions of the ODP continue to remain in force pending identification of suitable replacement provisions can only be effected by undertaking a further review of the ODP pursuant to s 79 RMA and that the withdrawal of the coastal hazards provisions changed the meaning of the PDP to such an extent as to require a variation (or variations) of the PDP to be undertaken.*
>
> …
>
> *[13] The fundamental contention of CRU's case was that the answer to Question 1 is yes and that having determined as part of the PDP process that the coastal hazards provisions of the PDP were to be withdrawn then the Council was obliged to notify the provisions of the ODP which would remain in effect in the meantime as part of the review. Both the Council and amicus resisted that proposition.*"

19. The Environment Court considered the issue in some detail and set out its conclusions on declaration 1 as follows:[8]

[7] At [6] and [13] of the interim decision.
[8] At [30] – [31] of the interim decision.

"[30] *Considering specifically the provisions of s 73 and 43AA, I consider that the position is as follows:*

- *There is presently a district plan for the Kapiti District, namely the ODP;*
- *The ODP contains provisions in respect of a wide number of issues (including coastal hazards);*
- *The Council has reviewed the full ODP (including the coastal hazards provisions) and considered that it requires alteration;*
- *The alterations are contained in the PDP which is presently going through the plan change process contained in Schedule 1;*
- *When the change processes have been completed and the changes have been made operative in accordance with Schedule 14 they replace the provisions which they have "changed";*
- *Due to withdrawal of the coastal hazards provisions from the PDP, those provisions will require the undertaking of a further plan change to make the alterations which the Council has decided are required;*
- *Until such time as they are changed, the existing coastal hazards provisions are part of the ODP. They remain in force, not because the Council has determined that they should not be altered (it has in fact determined that they should be altered) but by operation of law until they are in turn changed by some future change or variation as is the Council's announced intention as a result of its review.*

[31] I suggest that the above outcome would reflect the common understanding of those who practice in the RMA area. It is a logical outcome. As Mr Slyfield submitted, the difficulty is not with that outcome 'but with the exercise of identifying in a certain and clear way which of the ODP provisions were (originally) proposed to be altered, and are now (as a result of the withdrawal) remaining unaltered, so as to continue to be operational. I concur with that submission."

20. That reflected the position advanced by the Council before the Environment Court, and again it is respectfully submitted that the Court's conclusions are correct. Further, as the Court noted, those conclusions reflect the common understanding of those who practice in the RMA area.

Structure of submissions

21. The structure of these submissions on declaration 1 is as follows:

(a) section 79 of the RMA;

(b) the Council is not required to notify the existing ODP provisions;

(c) the timing of the Schedule 1 process for the new coastal hazard provisions;

(d) the existing ODP provisions must remain in force; and

(e) the matter of ascertaining which ODP provisions remain in force.

Section 79 of the RMA

22. Section 79 of the RMA is the key statutory provision:

> ***79 Review of policy statements and plans***
>
> *(1) A local authority must commence a review of a provision of any of the following documents it has, if the provision has not been a subject of a proposed policy statement or plan, a review, or a change by the local authority during the previous 10 years:*
>
> *(a) a regional policy statement:*
>
> *(b) a regional plan:*
>
> *(c) a district plan.*
>
> *(2) If, after reviewing the provision, the local authority considers that it requires alteration, the local authority must, in the manner set out in Part 1 of Schedule 1 and this Part, propose to alter the provision.*
>
> *(3) If, after reviewing the provision, the local authority considers that it does not require alteration, the local authority must still publicly notify the provision—*

(a) as if it were a change; and

(b) in the manner set out in Part 1 of Schedule 1 and this Part.

(4) Without limiting subsection (1), a local authority may, at any time, commence a full review of any of the following documents it has:

(a) a regional policy statement:

(b) a regional plan:

(c) a district plan.

(5) In carrying out a review under subsection (4), the local authority must review all the sections of, and all the changes to, the policy statement or plan regardless of when the sections or changes became operative.

(6) If, after reviewing the statement or plan under subsection (4), the local authority considers that it requires alteration, the local authority must alter the statement or plan in the manner set out in Part 1 of Schedule 1 and this Part.

(7) If, after reviewing the statement or plan under subsection (4), the local authority considers that it does not require alteration, the local authority must still publicly notify the statement or plan—

(a) as if it were a proposed policy statement or plan; and

(b) in the manner set out in Part 1 of Schedule 1 and this Part.

(8) A provision of a policy statement or plan, or the policy statement or plan, as the case may be, does not cease to be operative because the provision, statement, or plan is due for review or is being reviewed under this section.

(9) The obligations on a local authority under this section are in addition to its duty to monitor under section 35.

23. The Council's position as it relates to section 79 is as follows:

(a) the Council undertook a full review of its district plan;

(b) as a result of that review, the Council determined that the district plan required 'alteration' (to adopt the terminology of section 79);

(c) the Council had therefore complied with section 79 and completed the review process;

(d) in order to 'alter' the ODP, the Council prepared and notified, under Schedule 1 of the RMA, the PDP; and

(e) the fact that the Council subsequently withdrew part of the PDP under clause 8D of Schedule 1 does not derogate from the fact that the Council had undertaken and completed its review under section 79.

24. The Environment Court confirmed this position and found as follows:[9]

"[19]… In this instance, the Council determined in its full review that the ODP required alteration (including alteration of the coastal hazards provisions) and duly commenced a Schedule 1 process for the PDP accordingly."

…

"[21] The fact of the matter is that the Council has undertaken a full review of the ODP and has determined that its provisions (including those relating to coastal hazards) require alteration. It has not made a decision that the coastal hazards provisions of the ODP do not require alteration as suggested by CRU in question 1.

Mr Slyfield contended in his amicus submissions:

> *'Having reviewed the ODP provisions, and having found that the coastal hazard management provisions require alteration, Council could not notify the ODP provisions as provisions "not requiring alteration" (under ss 79(3) or (7). That is not the outcome of the review, and the review stands. It is not withdrawn.*

I concur with that statement. Having made its determination that the ODP requires alteration the Council has completed the review process."

[9] At [19] and [21] of the interim decision.

The Council is not required to notify the existing ODP coastal hazard provisions

25. It is respectfully submitted that the Environment Court was correct in deciding that the Council is not required to notify under Schedule 1 the existing ODP coastal hazard provisions.

26. The Council's position is that, having determined that the ODP coastal hazard provisions require alteration, section 79(6) (and not section 79(7)) applies:

> *"(6) If, after reviewing the statement or plan under subsection (4), the local authority considers that it requires alteration, the local authority must alter the statement or plan in the manner set out in Part 1 of Schedule 1 and this Part."*

27. On that basis the Council was not required to, and in fact was not able to, notify (in the formal Schedule 1 sense) the coastal hazard provisions in the ODP that would remain in effect. That is because:

    (a) the Council may only notify (under Schedule 1) the ODP provisions if it considers that they may remain without alteration (which was not the Council's decision); and

    (b) instead, the Council is required to notify (under Schedule 1) the new coastal hazard provisions, which is did initially through the PDP, prior to the withdrawal.

28. As noted further below in these submissions, the Council did give 'public notice' of the ODP provisions that it considers will remain in force. That was public notice in the information sense, not formal public notification under Schedule 1 of the RMA.

29. The Council fully accepts that if it had concluded that the coastal hazard provisions do "not require alteration", then under section 79(7) the Council would have to notify those existing ODP provisions through the Schedule 1 RMA process.

30. With respect, the Appellant is effectively asking the Court to impose a section 79(7) obligation on the Council, in circumstances where section 79(6) applies. The evidence before the Environment Court was that the Council clearly considers that the ODP coastal hazard provisions require

alteration, and that was accepted by the Court.[10] As noted by the Environment Court, the Council in fact made an attempt to alter those provisions, but did not do that properly, and on expert advice the Council withdrew those provisions from the PDP.

31. The Environment Court accepted that the Council had undertaken a full review under section 79(4)[11] and that having determined the ODP provisions required alteration (including the coastal hazard provisions) the Council commenced a Schedule 1 process for the PDP.[12]

32. The Environment Court found:[13]

> "*There is nothing in s 79 which requires a review to be given effect in a single Schedule 1 process."*

33. The Council accepts that the current ODP provisions are not fit for purpose. They need to be altered but, as Ms Stevenson pointed out in her affidavit provided to the Environment Court that needs to be done in a careful manner and in the context of the various central and local government policy initiatives that are currently underway.[14] The Environment Court agreed with that submission.[15]

34. It makes no sense for the Council to notify under Schedule 1 the current ODP provisions (and, as noted above, nor is the Council able to do that) as they are outdated, and it will be a waste of time and resources for both the Council and community to work through an expensive Schedule 1 process in relation to those provisions.

35. The High Court in *West Coast Regional Council v Royal Forest and Bird Protection Society of New Zealand* [16] stated that where a part of a plan is withdrawn, the impact would be temporary as the local authority would almost certainly have to consider a replacement which will give rise to public participation following notification of the new provisions. The Court noted:[17]

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[10] Affidavit of Sarah Jane Stevenson dated 25 October 2016 paragraphs 15-24 (pages 161-164 of the common bundle).
[11] At [18] of the interim decision.
[12] At [19] of the interim decision.
[13] At [20] of the interim decision.
[14] Affidavit of Sarah Jane Stevenson dated 25 October 2016 at paragraphs 15-24 (pages 161-164 of the common bundle).
[15] At [37] – [38] of the interim decision.
[16] [2007] NZRMA 32.
[17] *Ibid* at [35] (page 569 of the common bundle).

"We conclude that while public participation in the content of the plan is temporarily frustrated by a withdrawal of the whole or part of a plan, it is unlikely to be eliminated by that step. Indeed, in this case the notification of variation will ensure that there is an opportunity for public participation."

36. The Council acknowledges the utmost importance of public participation under the RMA. That principle must, however, be applied subject to the specific statutory provisions that do, or do not, provide for public participation at particular points in the RMA process. A generalised notion of public participation cannot override the text of the RMA which deals specifically with public participation. As noted earlier, the RMA requires public participation when the Council is progressing new coastal hazard provisions through the Schedule 1 process.

Timing of the Schedule 1 process for the new coastal hazard provisions

37. It is respectfully submitted that the Environment Court was correct in deciding that the Council must introduce the new coastal hazard provisions as promptly as is reasonable in the circumstances.[18]

38. The Council's position before the Environment Court and maintained in these proceedings is that the Council must notify new coastal hazard provisions as promptly as is reasonable in the circumstances in accordance with section 21 of the RMA:

*"**21 Avoiding unreasonable delay***

Every person who exercises or carries out functions, powers, or duties, or is required to do anything, under this Act for which no time limits are prescribed shall do so as promptly as is reasonable in the circumstances."

39. That submission is based on the following:

(a) while there is a statutory timeframe for the Council to undertake a review of the ODP provisions under section 79(1) (10 years), there is no statutory timeframe for the Council to notify replacement provisions under section 79(6) and Schedule 1;

[18] At [38] of the interim decision.

(b) consequently, the Council is not required to notify new coastal hazard provisions now through a variation to the PDP, nor through a plan change within any prescribed statutory timeframe;

(c) rather, the Council must do so as promptly as is reasonable in the circumstances in accordance with section 21 of the RMA;

(d) section 21 recognises that there are actions required under the RMA for which there are no prescribed timeframes, and refers to the concept of avoiding unreasonable delay;

(e) in her affidavit before the Environment Court, Ms Stevenson set out the proposed timeframe for the coastal hazard provisions; the need to not approach this process with undue haste; the various central and local government policy initiatives that are currently underway; and need for those initiatives to be resolved to inform the Council's approach to coastal hazard planning;[19] and

(f) those matters support the submission that the reasonableness of the timing must be assessed in the context of the individual circumstances.

40. It is submitted that while there is a timeframe for a review in section 79(1) of the RMA, the absence of a statutory timeframe for notifying a new plan or plan change resulting from that review is likely to be deliberate and is appropriate.

41. In some cases, the development of new planning provisions will be relatively straightforward and a Schedule 1 process may be able to be commenced relatively shortly after the conclusion of the review. That was so in the *West Coast Regional Council* case, where a variation on the wetland provisions was able to be prepared and notified in a few months.[20] In other cases, the development of new plan provisions will be far more complex, which for the reasons explained by Ms Stevenson, is the case here. For that reason, Parliament has not imposed a strict timeframe, but requires the Council to act as promptly as is reasonable in all of the circumstances.

[19] Affidavit of Sarah Jane Stevenson dated 25 October 2016 at paragraphs 15-24 (pages 161-164 of the common bundle).
[20] *West Coast Regional Council v Royal Forest and Bird Protection Society of New Zealand* [2007] NZRMA 32 at [34] (page 569 of the common bundle).

42. The Environment Court considered the Council's suggested 4 year time estimate for the plan change process necessary to alter the coastal hazard provisions in accordance with Schedule 1. The Court found there were no specified time periods in section 79 for doing so but that the Council was bound by section 21 to exercise its functions as promptly as is reasonable in the circumstances. The Court stated:[21]

> *"[36] A delay of some four years in commencing the required alteration by plan change might be regarded as pushing the extreme boundaries of promptness and CRU's concerns in that respect are understandable. The explanation for that time period was set out in Ms Stevenson's affidavit summarized in the Council's submissions. It must also be recognized that there will be a further period of time before any potentially controversial plan change process is completed.*
>
> *[37] Integral to determination of appropriate coastal hazards provisions is consideration of the effects of climate change, a matter to which the Council is required to have "particular regard" in exercising its functions under RMA. Aspects of the provisions as to coastal hazards which the Council sought to bring down in the PDP were found to be seriously deficient and the Council determined to withdraw those provisions and bring down more appropriate provisions. There has been and will continue to be a substantial community cost in that process which will be greatly exacerbated if the coastal hazards provisions are found wanting a second time. It must also be recognized that the decisions which the Council may ultimately make as to the appropriate coastal hazards provisions in its District Plan will likely have far reaching impacts on property owners affected by them.*
>
> *[38] Under those circumstances it is more important that the Council gets it right rather than gets it quick. Prima facie, I accept that the information provided in Ms Stevenson's affidavit together with the Council's submissions support the proposition that the likely time frame is reasonable in these particular circumstances, although I do not make any definitive finding in that regard and would require a good deal more information before doing so."*

43. The Council respectfully acknowledges and accepts those comments from the Environment Court in terms of timing. If in the future there is a concern

[21] At [36] – [38] of the interim decision.

that the Council is not acting as promptly as is reasonable in the circumstances in accordance with section 21, a declaration could be sought from the Environment Court to that effect. Importantly, that declaration has not been sought in this case and as noted above the Environment refused to make a definitive finding on the matter.

The existing ODP coastal hazard provisions must remain in force

44. The Environment Court, at paragraph 24 of the interim decision, sets out the Council's position on whether the existing coastal hazard provisions in the ODP would remain in force once the PDP became operative.

45. On that point, the Environment Court held:[22]

- *"Due to withdrawal of the coastal hazards provisions from the PDP, those provisions will require the undertaking of a further plan change to make the alterations which the Council has decided are required;*
- *Until such time as they are changed, the existing coastal hazards provisions are part of the ODP. They remain in force, not because the Council has determined that they should not be altered (it has in fact determined that they should be altered) but by operation of law until they are in turn changed by some future change or variation as is the Council's announced intention as a result of its review."*

(emphasis added)

46. It is respectfully submitted that the Environment Court was correct in deciding that the existing ODP coastal hazard provisions remain in force by operation of law until they are replaced through a plan change or variation.

47. The Environment Court stated in *Royal Forest and Bird v New Plymouth District Council*:[23]

> *"The provisions of RMA relating to plan reviews are notably brief and deficient of requirements for process and time limits. …"*

48. That brevity and deficiency is apparent in this case. Rather surprisingly, the RMA does not expressly state that when the provisions in a PDP become operative through the Schedule 1 process, the equivalent provisions in the ODP cease to have effect. The Environment Court acknowledged this

[22] At [30] of the interim decision.
[23] [2015] NZEnvC 219 at [122] (page 625 of the common bundle).

position stating that the answer to this issue is found by "*implication*" rather than a direct statement in the RMA.[24]

49. It is submitted that the reverse must also true - the provisions in an ODP must remain in force until they are lawfully amended or replaced through a Schedule 1 process.

50. There are indications in the RMA that support that principle, including:

(a) section 79(8) which states:

> *"A provision of a policy statement or plan, or the policy statement or plan, as the case may be, does not cease to be operative because the provision, statement, or plan is due for review or is being reviewed under this section."*
>
> (emphasis added)

(b) section 86F which states:

> *"**When rules in proposed plans must be treated as operative***
>
> *A rule in a proposed plan must be treated as operative (and any previous rule as inoperative) if the time for making submissions or lodging appeals on the rule has expired and, in relation to the rule,—*
>
> *(a) no submissions in opposition have been made or appeals have been lodged; or*
>
> *(b) all submissions in opposition and appeals have been determined; or*
>
> *(c) all submissions in opposition have been withdrawn and all appeals withdrawn or dismissed.*
>
> (emphasis added)

51. In its interim decision the Environment Court referred to sections 73, 79(8) and 43AA.[25] The Environment Court relied on these provisions to support the conclusions that:

[24] At [26] of the interim decision.
[25] At [27] – [29] of the interim decision.

(a) when the provisions in a PDP become operative under the Schedule 1 process, the equivalent provisions in the operative district plan which have been 'changed' cease to have effect; and

(b) until such time, those provisions in the ODP remain in force.[26]

52. As was submitted by the Council at the Environment Court hearing, it cannot have been Parliament's intention that, in this scenario, all provisions in an ODP would be rendered inoperative on the coming into force of what would only be a partial new plan (such as the PDP). In other words, it cannot have been the intention to create a 'regulatory gap', merely because the process commenced with a full review and full proposed plan, but transitioned to a partial proposed plan as a result of the withdrawal of a part of the PDP.

53. If that were the position, then a local authority could effectively withdraw large parts of a PDP and subsequently render large parts of an ODP inoperative, without replacement provisions for those ODP provisions having worked through the Schedule 1 process. That position does not accord with the purpose, scheme or wording of the RMA. There is no mechanism in the RMA for a provision in an ODP to be removed except through a Schedule 1 process.

Ascertaining which ODP provisions survive

54. The Appellant places some emphasis on the difficulties of identifying which ODP coastal hazard provisions remain in force.

55. This difficulty is acknowledged by the Environment Court:[27]

> *"I suggest that the above outcome would reflect the common understanding of those who practice in the RMA area. It is a logical outcome. As Mr Slyfield submitted, the difficulty is not with that outcome 'but with the exercise of identifying in a certain and clear way which of the ODP provisions were (originally) proposed to be altered, and are now (as a result of the withdrawal) remaining unaltered, so as to continue to be operational. I concur with that submission."*

56. The Environment Court recognises in that paragraph that there may be challenges in identifying what ODP provisions remain in force. That does

[26] At [30] of the interim decision.
[27] At [31] of the interim decision.

not, however, alter the position that those provisions do remain in force until they are replaced through a Schedule 1 process.

57. In order to address that uncertainty, the Council gave public notice (for information purposes rather than under Schedule 1) of the provisions that it considers will continue in force once the PDP was made operative. The Environment Court noted:[28]

> *"…Notwithstanding that it was not required to do so, on 26 October 2016 the Council gave public notice identifying the provisions of the ODP which it considered would remain in force as a consequence of the withdrawal of the coastal hazards provisions."*

58. The Environment Court also referred to the situation with the Christchurch Replacement District Plan. As Ms Stevenson identified,[29] the Canterbury Earthquake (Christchurch Replacement District Plan) Order 2014 (clause 5A):[30]

    (a) provides for the withdrawal of the coastal hazard provisions from the proposed plan (clause 5A(1));

    (b) provides for the identification of the existing district plan provisions that will continue to apply following that withdrawal of the coastal hazard provisions (clause 5A(2)(b));

    (c) requires the council to *"give public notice of the fact that the existing coastal hazard provisions will continue to apply and identifying those existing coastal hazard provisions"* (clause 5A(2)(c)); and

    (d) requires the Council commence, under section 79 and Schedule 1 of the RMA, a review of the existing coastal hazard provisions (clause 5A(2)(d)).

59. The Christchurch situation is not relied upon as authority or justification for the Council's approach or position on declaration 1. Rather, the Council's position is based on the scheme and interpretation of the RMA outlined above. As Ms Stevenson notes, the Council has taken some 'guidance' from the Christchurch approach. To that extent the Christchurch situation is a useful analogy.

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[28] At [33] of the interim decision.
[29] Affidavit of Sarah Jane Stevenson dated 25 October 2016 at paragraphs 27-28 (pages 164-165 of the common bundle).
[30] At page 627 of the common bundle.

60. The issues raised by the Appellant do not detract from the proposition that, despite the modifications to the RMA in the Christchurch context, that Order reinforces the principle that existing ODP provisions remain in force following a withdrawal process.

Conclusion on declaration one

61. It is for those reasons that it is respectfully submitted that the Environment Court's decision is correct in declining to make declaration 1 and finding that:

    (a) the coastal hazard provisions of the ODP continue in force once the PDP becomes operative;

    (b) the Council is not able or required to notify under Schedule 1 the ODP provisions now;

    (c) rather, the Council is required to notify the new coastal hazard provisions in accordance with section 79(6) and Schedule 1 of the RMA; and

    (d) the Council is required to notify those new coastal hazard provisions as promptly as is reasonable in the circumstances under section 21.

62. For those reasons it is respectfully submitted that this Court should uphold the decision of the Environment Court on declaration 1.

DECLARATION TWO

63. Declaration 2 as sought in the Environment Court is as follows:

> ***Declaration 2****: In withdrawing the coastal hazard and other provisions under clause 8D of Schedule 1 of the RMA, the Council changed the meaning of the remainder of the PDP.*

64. The Appellant's position in the Environment Court on Declaration 2 was (in summary): [31]

> *"When a Council proposes to withdraw provisions from a PDP then it can only do so by notifying a variation to the PDP, if the proposed withdrawals will change the meaning or effect of the remaining provisions."*

[31] Appellant's submissions filed in proceedings ENV-2016-WLG-000028, dated 18 November 2016, paragraph 2 (page 207 of the common bundle).

65. The Council opposed the making of declaration 2. The Council's position on declaration 2 was as follows (in summary):[32]

(a) the act of withdrawing the proposed coastal hazard provisions from the PDP inevitably had an impact (or flow-on effect) on those parts of the PDP that remain;

(b) however, an assessment of the significance of those flow-on effects is essential to determine whether the withdrawals needed to be dealt with by way of variation under Schedule 1. That significance assessment is supported by the High Court's decision in *West Coast Regional Council*; and

(c) the expert planning evidence (from three expert planners) provided by the Council concluded that any flow-on effects from the withdrawal of the nine identified provisions on the balance of the plan are minor and are not of such significance that the withdrawals should have been dealt with by a variation.

66. In the interim decision the Environment Court set out the issues with declaration 2 as follows:[33]

> *"[42] Declaration 2 raises the issue of the consequences of the Council having withdrawn the coastal hazards provisions from the PDP. The issues raised by CRU under this head revolved around the observation made in the High Court decision West Coast Regional Council v Royal Forest and Bird Protection Society of New Zealand [2007] NZRMA 32 (the West Coast decision) that although part of a proposed plan may be withdrawn, such a withdrawal may not operate as "a variation by the backdoor".[10] CRU contended that in some instances withdrawal of the coastal hazards provisions has had the effect of changing the meaning of the remainder of the plan to such an extent that a variation of the PDP was required.*
>
> *[46] The heart of CRU's case revolves around question 3 as to whether or not various provisions in the PDP identified by CRU had been "altered" by the partial withdrawal of the coastal hazard provisions in the sense excluded by the West Coast decision."*

[32] Council's submissions filed in proceedings ENV-2016-WLG-000028, dated 18 November 2016, paragraphs 51-96 (pages 251- 260 of the common bundle).
[33] At [42] and [46] of the interim decision.

67. In its final decision the Environment Court granted declaration 2 in an amended and refined form as follows:[34]

> *"In withdrawing the coastal hazard provisions under Clause 8D of Schedule 1 of the RMA, the Council changed the meaning of provisions 2, 4, 5, 6, 7 and 9 identified in the Interim Decision in these proceedings."*

68. The key difference between the declaration as sought and the declaration granted is that the latter identifies the specific provisions that had suffered from a "change in meaning", whereas the declaration as sought applied to a far broader and unspecified set of provisions.

69. With respect, it is difficult to understand what the Appellant is asking this Court to do in relation to declaration 2. This Court cannot be expected to make the broader declaration sought by the Appellant (applying to all of the withdrawn provisions as opposed to the nine identified provisions) as there is not the information or analysis before the Court (nor was there before the Environment Court) to make that broader declaration.

70. Further, the Appellant now appears to be asserting that the *West Coast Regional Council* decision should not be applied to the facts of this case, whereas the fundamental basis of the Appellant's case in the Environment Court was that the *West Coast Regional Council* was an authoritative statement of the law and should be applied. The Council's position is that the *West Coast Regional Council* is applicable to this context, subject to the comments made below.

Structure of submissions

71. The structure of these submissions on declaration 2 is as follows:

    (a) the Council's position on declaration 2;

    (b) the Appellant's case was confined to nine provisions; and

    (c) the need for an expert assessment of significance.

[34] At [13] of the final decision.

The Council's position on declaration 2

72. The Council opposed the making of declaration 2 in the Environment Court.

73. As explained further below:

(a) it was critical for the Council that the Appellant was clear on which specific provisions it alleged had been unlawfully withdrawn. This was particularly important given the PDP hearings process that was running alongside these proceedings;

(b) following a direction from the Environment Court, the Appellant clarified that its case related to nine discrete provisions withdrawn from the PDP;

(c) the Council filed detailed expert planning evidence assessing the withdrawal of each of those nine provisions, and whether they had resulted in a 'change of meaning'. The experts concluded that the answer to that question was 'no';

(d) the Environment Court did not accept that 'significance' approach, and rather found that six of the nine provisions appeared to have been unlawfully withdrawn;

(e) the Environment Court provided an opportunity for the parties to explore solutions to the unlawful withdrawals, short of requiring a variation which would put the ratepayers of the Kapiti Coast to significant further expense of undertaking a variation to the PDP (which itself would have to run through the Schedule 1 process); and

(f) the Council decided that the most effective way forward was to accept the Court's findings on the six provisions, and to formally withdraw those provisions from the PDP, which it did.

74. The Council's position on declaration 2 is as follows:

(a) this appeal on declaration 2 is opposed;

(b) the Council has accepted the Court's findings on the six provisions;

(c) the Council has withdrawn those six provisions, which has remedied the issues with the withdrawals;

(d) the Council submitted to the Environment Court that, in that context, the making of the declaration would be futile. The Court did not accept that position and made the declaration, albeit in a modified form; and

(e) the Council accepts and has not challenged the making of that declaration. Rather, it has taken a pragmatic approach and has withdrawn the six offending provisions.

The Appellant's case was confined to nine provisions

75. As noted above, it was critical for the Council that the Appellant was clear on which specific provisions it alleged had been unlawfully withdrawn. This was particularly important given the PDP hearings process that was running at that time and the need to understand the implications of the proceedings for the PDP, which involved extensive time, resources and commitment from the Council and the communities of the Kapiti Coast.

76. With respect, it is submitted that the Appellant conducted its case in a manner that lacked specificity and focus, requiring the Environment Court on more than one occasion to raise with the Appellant the fact that the nature of the Appellant's case was not clear.

77. During the pre-hearing conference on 15 August 2016, Counsel for the Council submitted, and the Environment Court confirmed, that the Court and the Council were entitled to understand the nature and scope of the case to be answered in respect of declaration 2.

78. As a result, the Court directed that Counsel for the Appellant itemise the alleged instances of unlawful withdrawals of PDP provisions. In the Minute dated 15 August 2016, the Environment Court directed as follows:[35]

> *"Mr Mitchell is directed to itemise the instances where it is alleged that there have been substantive variations (in the Schedule 1 sense of that term) of the remaining provisions of the proposed plan brought about by withdrawal of the coastal hazard provisions. …"*

79. The Appellant was given a period of four weeks to provide this analysis. In the Memorandum of Counsel for the Appellant dated 12 September 2016,[36] nine such instances were identified. There was no detailed expert planning

[35] At [4] of the Minute of the Court dated 15 August 2016. This Minute will be provided in the supplementary common bundle.
[36] This Memorandum dated 12 September 2016 will be provided in the supplementary common bundle.

evidence or analysis provided in relation to the nine alleged unlawful withdrawals.

80. In that Memorandum the Appellant also made the comment that the nine provisions were examples only. This was of concern to the Council as it needed to understand the precise scope of the case it was required to answer.

81. In a Memorandum of Counsel for the Council dated 16 September 2016,[37] it was requested that the Court:

(a) confirms that the scope of declaration 2 is limited to the nine provisions instances identified by the Appellant; and

(b) sets a timetable for the Council to prepare expert planning evidence to address these nine provisions.

82. The Environment Court confirmed in the Minute dated 22 September 2016[38] that the Council was to be given time to prepare expert affidavit evidence, and that the affidavit evidence was to address the nine provisions identified in the Appellant's Memorandum.

83. On 23 September 2016 the Appellant emailed a letter to the Environment Court Registrar alleging that the Court's approach to the applications is "*creating a number of problems which are severely prejudicial to CRU*."[39] These matters included the Court's direction for the Appellant "*to file further particulars, on the potential consequences of the Court making the declarations sought in the applications"*. The Appellant also contended that it was "*premature for the Court to make orders as to evidence before the Council defined its position on the law".*

84. In the Minute dated 29 September 2016, the Environment Court noted:[40]

> *"I am also concerned as to the Appellant's comments regarding delay. It was not possible for the Court (nor I think, the Council) to glean the precise nature of the Appellant's case from the material filed with the application. It was for that reason that further details were sought and a process directing the Council to provide a response has appropriately been directed."*

[37] At page 301 of the common bundle.
[38] At page 304 of the common bundle.
[39] At page 2 of the letter (page 307 of common bundle).
[40] At [7] of the Minute of the Court dated 29 September 2016 (page 312 of the common bundle).

85. The information above confirms that by September 2016, the case for the Appellant had been narrowed to the nine provisions identified in the 12 September 2016 Memorandum. The scope was then reflected in the expert evidence filed by the Council (which dealt with each of the nine provisions in detail) and in the conduct of the Environment Court hearing.

86. It is submitted that the Environment Court and the Council were entitled to understand the nature of the case to be answered, and the Appellant cannot seriously challenge the Environment Court for making those directions to bring focus and specificity to the Appellant's case. The Court gave the Appellant four weeks to identify the offending provisions, and the Appellant identified nine provisions. It is respectfully submitted that this Court on appeal should not be expected to expand the scope of the declarations beyond the nine provisions considered by the Environment Court.

87. The Environment Court stated in its final decision:[41]

> *"As I understand it, the Council accepts the Court's tentative finding in that regard and has sought to remedy the shortcomings in its process by undertaking a withdrawal of further provisions from the PDP. I make two observations in that regard:*
>
> *• CRU did not claim to have identified every alteration to the PDP which might have been improperly brought about as a result of the Council's initial withdrawal of the coastal hazards provisions. It was not its function to do so. It may or may not be the case that further provisions of the PDP, similarly affected, emerge in future;*
>
> *• It is not the Court's function as part of these proceedings to determine whether or not the withdrawal of further provisions of the PDP has achieved the Council's objective of remedying its failure to deal with provisions 2, 4, 5, 6, 7 and 9 by way of variation. CRU offered no comment in that regard but submitted that "the Court should not endorse or require specific actions - and apart from any jurisdictional constraints, it simply does not have adequate information to do so".5 I concur with that statement."*

88. The Council does not contest that statement from the Court. The Council understands the effect of the statement to be as follows:

[41] At [10] of the final decision.

(a) the Council has accepted the tentative finding in relation to the six provisions;

(b) the Council has sought to remedy that by withdrawing the six provisions;

(c) it could be that there are other provisions that were similarly affected, but those provisions are not within the scope of these declaratory proceedings; and

(d) it was not for the Court to decide whether the Council's most recent withdrawals were lawful – that too is outside the scope of these declaratory proceedings.

89. In summary, it is respectfully submitted that:

(a) the Environment Court appropriately required the Appellant to identify the specific provisions in question;

(b) the Appellant identified nine provisions, and the Court identified issues with six of those;

(c) the Appellant cannot suggest that the scope of this case now be expanded beyond those nine provisions (and there is not sufficient information before this Court to support such an expansion); and

(d) the statement by the Court in paragraph [10] does not mean that the scope of the proceedings is to be expanded beyond the nine provisions.

The need for an expert assessment of significance?

90. As noted above, the Council has accepted the Environment Court's findings on the six provisions, and responded by withdrawing those provisions from the PDP under clause 8D of Schedule 1.

91. Without detracting from that position, the Council maintains the view that in order to assess whether a withdrawal is within the limits of clause 8D, expert planning evidence is required. That is because those assessments are nuanced and require assessment by expert planners. The same could be said of the test identified above by the Court, which is whether anything "new" has been introduced into the plan. Ultimately, given the inevitability of some change following a withdrawal, there must be a threshold of

acceptability of change. It is submitted that a significance threshold is required and that requires expert assessment.

92. The Appellant did not file expert planning evidence to analyse the effect of the withdrawal of each of the nine provisions, but rather relied on legal analysis and submission and more generalised planning evidence.

93. In contrast, the Council filed three expert planning briefs as follows:

(a) Affidavit of Emily Jane Inglis Thomson - a planner with formal planning qualifications; 12 years of planning experience at the Council; and a full member of the New Zealand Planning Institute;[42]

(b) Affidavit of Bryce Michael Tom Julyan - a planner with formal planning qualifications; over 30 years of planning experience; the Chair of the New Zealand Planning Institute; and the Vice President (Australasia-Pacific) of the Commonwealth Association of Planners;[43] and

(c) Affidavit of Sarah Jane Stevenson - a planner with formal planning qualifications; 18 years of planning experience; and a full member of the New Zealand Planning Institute.[44]

94. Ms Thomson and Mr Julyan (the latter in a peer review role) both undertook a detailed assessment of the nine provisions identified by the Appellant. This assessment included a consideration of whether the withdrawn provisions identified by the Appellant were of such significance that they should have been dealt with by way of variation under Schedule 1. In all nine cases, both Ms Thomson and Mr Julyan concluded that was not the case.

95. Ms Stevenson's evidence focussed primarily on the background to and current status of the PDP process, but she also provided an opinion as an expert planner that agreed with the conclusions reached by Ms Thomson in relation to the nine provisions.[45]

96. Nonetheless, despite that view, the Council has accepted declaration 2 as made by the Court and has taken a pragmatic approach to remedying the situation.

[42] At page 168 of the common bundle.
[43] At page 194 of the common bundle.
[44] At page 158 of the common bundle.
[45] Affidavit of Sarah Jane Stevenson dated 25 October 2016 at paragraph 30 (page 165 of the common bundle)..

Conclusion on declaration 2

97. For those reasons it is respectfully submitted that this Court should uphold the decision of the Environment Court on declaration 2.

RELIEF SOUGHT

98. The Council opposes the relief sought through this appeal.

99. In terms of the alternative relief sought in final paragraph of the Notice of Appeal (an order requiring the Council to introduce a variation to the PDP), it is respectfully submitted that it would be entirely inappropriate for the Court to provide that relief. Further, the Appellant did not seek enforcement orders in the Environment Court, which would have been necessary for the Court to make such an order.

100. Similar relief was sought in the earlier NOBRG proceedings, but the declarations were refined by agreement to remove that relief on the basis (at least in the Council's view) that the Environment Court would not have jurisdiction to grant such an order in declaratory proceedings.

101. In advancing that position the Council relied on Environment Court authority. In *Awatea Residents' Association Inc v Christchurch City Council*[46] declarations were sought from the Environment Court that the Council had a duty to introduce a variation to its proposed district plan, as a result of a statement in its plan that such a variation would be introduced. The Court commented:[47]

> *"[13]… Plans frequently contain provisions indicating an intention for council to undertake a certain course of action.*
>
> *[18]…It is difficult to say in this situation that the Council has failed in any legal duty by not introducing the variation. …*
>
> *[19] In our view no issues of interpretation arise in this particular case. There is a clear statement of intention to introduce the variation and clear evidence that this has not been undertaken. The point, in our view, is more fundamental. The wording does not, even on its face, give rise to any legally enforceable duty on the part of the Council. If it gives rise to a legitimate expectation on the part of the residents, then that is a matter that is not justiciable before this Court.*

[46] ENC Christchurch C078/06, 14 June 2006 (page 579 of the common bundle).
[47] At [13], [18], [19] and [23] (pages 583, 585-586 of the common bundle).

[23] Accordingly neither of the grounds are made out for a declaration. This Court must now consider whether, under section 313, it should issue any declaration as sought or as modified or refuse to issue a declaration. In the circumstances, we cannot see any useful purpose in issuing any form of declaration. Even if there had been a breach of duty, it is difficult to see a basis upon which a declaration as sought could have been issued. Quite simply, any decision to issue a variation would still be subject to the exercise of discretion by Council and it would not be appropriate for this Court to supplant the exercise of that discretion."

(emphasis added)

102. Further, in *Royal Forest and Bird v New Plymouth District Council*[48] the Environment Court stated:[49]

[120] Although it is reasonable to expect that in undertaking its evaluation the Council would have regard to any findings which we might make in these proceedings, we do not consider that it is possible for us to fetter the Council's considerations in doing so. The evaluation to be made under s 32 and the form of any plan change which emerges from that evaluation is a matter which is within the functions of the Council and not one which is open to the Court to direct or usurp. Ultimately the Court's functions in the plan change process arise under the appeal processes available under RMA and the provisions of s 293 rather than at the front end of the process.

[122] … We consider that our enforcement powers under s 314(1)(b)(i) would extend to ordering a Council to undertake a review pursuant to s 79 if it had failed to do so, but we do not consider that it is open to us to prescribe the form of that review. Again we consider that the Court's power to address issues arising out of a review arise under the appeal processes in Schedule 1 in respect of any changes to the District Plan which the Council decides to make or not to make.

[123] Even if we were wrong in our assessment as to whether or not we can be as directive as Forest and Bird wish as to the plan change or review processes, we do not consider that we should make

[48] [2015] NZEnvC 219 (page 595 of the common bundle).
[49] *Ibid* at [120], [122] and [123] (pages 625-626 of the common bundle). It is noted that these comments were made in relation to the applications for enforcement orders that followed the declarations sought from the Court.

enforcement orders as sought. A number of the parties to the proceedings before us contended that the District Plan review process is the appropriate vehicle for consideration of the issues which Forest and Bird has put before the Court and we consider that there is merit to that proposition.

(emphasis added)

103. In summary, it is respectfully submitted that this Court should not make a declaration requiring a variation to the current PDP to be introduced.

104. The Council accepts that it has a legal duty to undertake a review under section 79, and it has done so. Beyond that, the form of any 'alteration' (for example, a variation or plan change) is a matter of discretion for the Council, and the Environment Court has refused to make declarations or enforcement orders requiring a local authority to introduce a variation, in part because the Court did not consider that it has the jurisdiction to do so.

105. As noted above, if the Council fails to deal with the matter within a reasonable timeframe as contemplated by section 21, a declaration could be sought on that basis at the time.

OVERALL CONCLUSION

106. For the reasons outlined above, it is respectfully submitted that the Court:

(a) should uphold the Environment Court's decision on both declarations;

(b) should not order a variation to the PDP; and

(c) should dismiss the appeal.

All of which is respectfully submitted.

DATED at Wellington this 6th day of October 2017

Paul Beverley/Victoria Brunton
Counsel for the Respondent