IN THE HIGH COURT OF NEW ZEALAND
WHANGAREI REGISTRY

CIV-2016-488-000049
[2017] NZHC 764

UNDER	the Resource Management Act 1991
IN THE MATTER OF	an appeal under s 299 of the Act
BETWEEN	TURNERS & GROWERS HORTICULTURE LTD Appellant
AND	FAR NORTH DISTRICT COUNCIL First Respondent
	NORTHLAND WASTE LTD Second Respondent
	FEDERATED FARMERS OF NEW ZEALAND INC Third Respondent

Hearing:	1 December 2016
Appearances:	B S Carruthers and G A Willis for Appellant J S Baguley for First Respondent R B Brabant for Second Respondent R Gardiner for Third Respondent
Judgment:	24 April 2017

JUDGMENT OF GILBERT J

This judgment is delivered by me on 24 April 2017 at 4.30 pm pursuant to r 11.5 of the High Court Rules.

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Registrar / Deputy Registrar

Solicitors/Counsel:
Russell McVeagh, Auckland
Law North Limited, Kerikeri
R B Brabant, Barrister, Auckland
DRF Gardiner, Barrister, Auckland

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Introduction

[1] These are appeals on questions of law from a decision of the Environment Court arising out of a proposed plan change to the Far North District Plan.

[2] Turners & Growers Horticulture Ltd has operated an export fruit-processing facility in Kerikeri for many years. It has been concerned about the potential for incompatible non-rural industrial and commercial activities to co-locate in the Rural Production Zone in Northland since Northland Waste Ltd took steps to establish a waste transfer station on a site adjacent to its *Kerifresh* facility in 2011.

Plan Change 15

[3] The Far North District Plan is "effects-based" meaning that its provisions are directed at the environmental effects created by different land uses rather than the activities that generate these effects. Far North District Council came to recognise, however, that the Rural Environment provisions in the Plan are overly permissive and inadequate to address concerns arising out of incompatible land uses. Accordingly, it initiated a three-stage review of these provisions. The first stage in this process led to *Plan Change 15 – Rural Provisions*. This sought to address these issues principally through the introduction of a *Scale of Activities* rule which would limit permitted activities by reference to the number of persons involved in the activity per site or per hectare depending on the nature of the activity.

[4] Council also proposed a number of amendments to the existing Plan rules as part of Plan Change 15. One of these was a change to the *Keeping of Animals* rule, which would increase the boundary setback for factory farming and boarding kennels from 50 metres to 300 metres (except where the boundary adjoins a Residential, Coastal Residential or Russell Township Zone, where the minimum setback would remain 600 metres). The setback for catteries was to remain 50 metres.

[5] Plan Change 15 is particularly significant because it applies to a vast area. The area covered by the Far North District Plan is the second largest area covered by any territorial authority in New Zealand. The Rural Environment provisions dealt

with in Plan Change 15 will apply to the entire Rural Production Zone which comprises about 70 per cent of this area.

Turners & Growers' submission on Plan Change 15

[6] After Plan Change 15 was publicly notified in June 2013, Turners & Growers lodged a submission proposing the introduction of activity-based controls in the Rural Production Zone so that industrial or commercial activities, such as a waste transfer station, would be identified as discretionary or non-complying activities requiring consent. Alternatively, Turners & Growers sought various amendments to the existing rules, including a radical change to the *Keeping of Animals* rule by changing its name to *Potentially Incompatible Activities* and extending its scope from factory farming, boarding kennels and catteries to any non-rural industrial or commercial activity, including a waste transfer station.

Council decision

[7] Northland Waste and various other submitters opposed the changes sought by Turners & Growers to the *Keeping of Animals* rule and Council accepted the recommendation of the Independent Hearing Commissioners not to make them. The net result was to increase the setback only for boarding kennels from 50 metres to 300 metres (except where the boundary adjoins a Residential, Coastal Residential or Russell Township Zone, in which case the minimum setback remained 600 metres). In August 2014, Council confirmed changes to the *Keeping of Animals* rule from that appearing in the District Plan as shown below:

> **8.6.5.1.6 KEEPING OF ANIMALS**
>
> (a) Any building, compound or part of a site used for factory farming ~~or boarding kennels~~ or a cattery, shall be located no closer than 50m from any site boundary, except for a boundary which adjoins a Residential, Coastal Residential or Russell Township Zone, where the distance shall be a minimum of 600m.
>
> (b) Any building, compound or part of a site used for a boarding kennel shall be located no closer than 300 metres from any site boundary except for a boundary which adjoins a Residential, Coastal Residential or Russell Township Zone, where the distance shall be a minimum of 600m.

Turners & Growers' appeal to the Environment Court

[8] Turners & Growers appealed to the Environment Court against Council's decision to reject its proposed amendments to the *Keeping of Animals* rule. This was on the grounds that Council's decision would not achieve the purpose of the Resource Management Act 1991 (the Act), was contrary to Part 2 and other provisions of the Act, and was inconsistent with the purpose and principles of the Act. In particular, Turners & Growers contended that the District Plan does not contain appropriate mechanisms to avoid incompatible non-rural industrial and commercial activities from locating in the District's rural areas, is unable to protect lawfully established activities from adverse reverse-sensitivity effects that can result when non-rural industrial and commercial activities locate in the rural environment, and the rules do not give effect to, and will not achieve, the objective and policies of the Plan.

[9] In its notice of appeal, Turners & Growers sought amendments to the *Keeping of Animals* rule, including changing its name to *Potentially Incompatible Activities* and extending its scope to any "non-rural industrial or commercial activity (such as a waste transfer station, factory or trade processing facility)" but proposed that these activities would be subject to a boundary setback of 100 metres (instead of 300 metres as earlier proposed). However, where the boundary adjoins a Residential, Coastal Residential or Russell Township Zone, the minimum setback would be 600 metres. Turners & Growers also sought such further or other relief as the Court considered appropriate to address the concerns raised.

[10] At the hearing of the appeal in the Environment Court, Turners & Growers sought modified relief by proposing the deletion of the *Keeping of Animals* rule altogether, amendments to *Rule 8.6.5.1.4 – Setback from Boundaries*, the insertion of a new rule, *Rule 8.6.5.1.12 – Outdoor Activities*, and the addition of assessment criteria. The detail of these newly proposed amendments were recorded in the Environment Court's decision as follows:[1]

> (a) <u>any building for a non-rural industrial or commercial activity that is proposed</u> to be erected within 100m of any site boundary (other than

[1] At [15].

a road frontage) to obtain resource consent as a restricted discretionary activity; and

(b) the insertion of a new rule 8.6.5.1.12 – Outdoor activities, to require any of the specified industrial or commercial activities undertaken outside consent as a restricted discretionary activity where it is proposed to undertake that activity within 30m of any site boundary (other than a road frontage).

Environment Court decision

[11] The Environment Court dismissed the appeal in a decision delivered on 17 March 2016.[2] The Court considered that it would be difficult to categorise non-rural commercial and non-rural industrial activities as would be required under Turners & Growers' proposed amendment:[3]

> We have a fundamental difficulty in trying to understand how such activity categorisation is going to be able to occur within the context of an effects-based plan that has virtually no method of dealing with the identification and compartmentalisation of activities.

[12] The Court concluded that fundamental changes to the Plan would be required to accommodate the proposed move to a more activities-based plan.[4] The Court was also not satisfied that the introduction of these arbitrary setbacks across such a significant land area was justified or appropriate:

> [87] … it is difficult to see how the significant increase in setbacks will achieve the purpose of the Act. There is no adverse effect that we are satisfied is going to be significantly addressed by the appellant's proposed provisions. Moreover, there appear to be adverse effects from the proposed method, including the fact that many of the sites within the district would require some form of resource consent. … We think the Council was rightly concerned about the addition of further regulatory, and potentially, development costs.
>
> [88] Although we acknowledge that the objectives and policies of the plan now provide for managing the adverse effects of incompatible activities, we are not satisfied that the Appellants' proposed standards are the most appropriate way to achieve these objectives or policies.
>
> [89] Furthermore, we cannot see how the proposed increased setbacks would assist the territorial authority to carry out its functions to achieve the purpose of the Act. …
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> …
>
> [91] What the evidence establishes to our satisfaction is that an increased setback across the district is not the only or the best method to achieve the

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2 *Horticulture New Zealand Limited & Anor v Far North District Council* [2016] NZEnvC 47.
3 At [56].
4 At [59].

> purpose of the Plan as it stands. We accept that more sophisticated and/or different approaches may yield the same or better results, although these are not clearly set out before us as options at this stage. …
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> …
>
> [93] Accordingly, though a setback provision might achieve the purposes of Part 2, and might achieve the objectives and policies of PC15, we consider it a particularly coarse measure to be adopted over an entire zone of this size when there is no clear purpose or outcome established.
>
> …
>
> [101] The Council has acknowledged that a change to the status quo is necessary by introducing PC15. Are the provisions of PC15 sufficient or is there still a significant risk if the setbacks sought are not introduced? We conclude that there is no more than poorly defined or inchoate risk. We conclude the risk of acting in such an arbitrary manner over such a large area of land is significant. Given our conclusion that the purpose of the constraint is ill defined, we would be imposing a significant burden on landowners to address far more localised issues around horticulture near Kerikeri. The lack of sufficient information about impacts beyond Kerikeri concerns us. Even in the immediate area the provisions seem to do little to address the risks of adverse effects on Turners & Growers or on the irrigated lands around Kerikeri. We conclude a more focussed approach needs to be taken on these issues in the next phase of the Plan review.
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> …
>
> [112] Further review of the Plan and the effect of the current provisions may support the need for further or targeted controls, but they are not appropriate at this stage. Much better analysis is required than that produced by any of the parties and their witnesses to justify the changes proposed by Horticulture NZ and Turners & Growers.

Turners & Growers' appeal to the High Court

[13] Turners & Growers appeals against the Environment Court's decision on two principal grounds.

[14] The first is whether the Environment Court erred in its evaluation of the Plan Change under s 32(3)(b) of the Act. That provision requires an evaluation of whether, having regard to their efficiency and effectiveness, the policies, rules or other methods are the most appropriate for achieving the objectives of the proposed plan. Turners & Growers contends that the Environment Court made the following errors in carrying out this evaluation:

(a) error 1 – the Court wrongly considered Part 2 and Council's functions under s 31 of the Act;

(b) error 2 – the Court failed to evaluate whether the Plan's methods would achieve the objectives and policies;

(c) error 3 – the Court's conclusion that it would be inefficient to impose the setbacks sought by Turners & Growers on the basis that restricted discretionary resource consent would inevitably be obtained for new activities that would breach those setbacks was not in accordance with the Act and was not open to it; and

(d) errors 4 and 5 – the Court wrongly focused on the effects of Northland Waste's activities on Turners & Growers' *Kerifresh* facility when considering the appropriateness of the proposed setbacks. In so doing, it failed to take into account a relevant consideration, namely the potential effects of other activities sought to be controlled by the setback across the entire Rural Production Zone (error 4) and it applied the wrong legal test (error 5). Turners & Growers argues that the correct question was whether the objectives and policies would be more appropriately achieved by introducing a zone-wide setback requirement.

[15] The second ground of appeal raised by Turners & Growers is whether the Court's conclusion, that the setbacks it sought were not the most appropriate method to achieve the objectives of the Plan as proposed to be amended, was open to it on the evidence.

[16] The respondents maintain that the Environment Court made no error of law in dismissing Turners & Growers' appeal.

Northland Waste's cross-appeal

[17] Northland Waste cross-appeals against the decision on grounds set out in an amended notice of appeal filed without objection during the course of the hearing in the High Court. In its amended notice of appeal, Northland Waste contends that the Environment Court would have had no jurisdiction to grant the relief sought by

Turners & Growers at the hearing because this went beyond the scope of the relief sought in its original submission to Council and was also beyond the scope of the relief sought in its notice of appeal to the Environment Court. In particular, Northland Waste argues that:

(a) Turners & Growers' notice of appeal to the Environment Court impermissibly sought amendments to *Rule 8.6.5.1.6 – Keeping of Animals* in materially different terms to those it proposed in its submission to Council on Plan Change 15; and

(b) the relief sought by Turners & Growers at the Environment Court hearing (deletion of proposed *Rule 8.6.5.1.6 – Keeping of Animals*; amendment to *Rule 8.6.5.1.4 – Setback from Boundaries*; the insertion of a new rule, *Rule 8.6.5.1.12 – Outdoor Activities*; and the addition of assessment criteria in Rules 8.6.5.3.4 and 8.6.5.3.8) was impermissible because these proposed changes were outside the scope of both its original submission and its notice of appeal.

[18] Council and Federated Farmers support Northland Waste's cross-appeal.

Approach on appeal

[19] Section 299 of the Act provides for appeals to the High Court from a decision of the Environment Court, but only on questions of law. To the extent that the appeal challenges factual findings, the appellant faces the very high hurdle of showing that there is no evidence to support the determination, in other words, the true and only reasonable conclusion contradicts the determination.[5]

[20] It is convenient to address Northland Waste's cross-appeal first because it raises a jurisdictional issue.

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5 *Edwards v Bairstow* [1956] AC 14 (HL) at 36, applied in *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721.

Northland Waste's appeal

[21] Although not raised even in the amended notice of appeal filed at the hearing, Northland Waste argued that Turners & Growers' original submission to Council proposing amendments to the *Keeping of Animals* rule was impermissible because, by proposing to change its name to *Potentially Incompatible Activities* and extend its scope to non-rural industrial or commercial activities (such as a waste transfer station, factory or trade processing facility), it went well beyond what could be regarded as a submission "on" Plan Change 15.

[22] The leading authority on whether a submission is "on" a Plan Change is the decision of William Young J in *Clearwater Resort Ltd v Christchurch City Council*.[6] Two aspects require consideration:[7]

> 1. A submission can only fairly be regarded as "on" a variation if it is addressed to the extent to which the variation changes the pre-existing status quo.
> 2. But 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, this is a powerful consideration against any argument that the submission is truly "on" the variation.

[23] This decision was endorsed by Kós J in *Palmerston North City Council v Motor Machinists Ltd* as remaining applicable following the amendments to the Act in 2009.[8] Kós J explained the significance of the two limbs of the *Clearwater* test:

> [75] Inherent in such sustainable management of natural and physical resources are two fundamentals.
>
> [76] The first is an appropriately thorough analysis of the effects of a proposed plan (whichever element within it is involved) or activity. In the context of a plan change, that is the s 32 evaluation and report: a comparative evaluation of efficiency, effectiveness and appropriateness of options. Persons affected, especially those "directly affected", by the proposed change are entitled to have resort to that report to see the justification offered for the change having regard to all feasible alternatives. Further variations advanced by way of submission, to be "on" the proposed change, should be adequately assessed already in that evaluation. If not, then they are unlikely to meet the first limb in *Clearwater*.

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6 *Clearwater Resort Ltd v Christchurch City Council* HC Christchurch AP34/02, 14 March 2003.
7 At [66].
8 *Palmerston North City Council v Motor Machinists Ltd* [2013] NZHC 1290, [2014] NZRMA 519.

> [77] The second is robust, notified and informed public participation in the evaluative and determinative process. As this Court said in *General Distributions Ltd v Waipa District Council*:
>
> > The promulgation of district plans and any changes to them is a participatory process. Ultimately plans express community consensus about land use planning and development in any given area.
>
> A core purpose of the statutory plan change process is to ensure that persons potentially affected, and in particular those "directly affected", by the proposed plan change are adequately informed of what is proposed. And that they may then elect to make a submission, under cls 6 and 8, thereby entitling them to participate in the hearing process. It would be a remarkable proposition that a plan change might so morph that a person not directly affected at one stage (so as not to have received notification initially under cl 5(1A)) might then find themselves directly affected but speechless at a later stage by dint of a third party submission not directly notified as it would have been had it been included in the original instrument. It is that unfairness that militates the second limb of the *Clearwater* test.
>
> …
>
> [80] For a submission to be on a plan change, therefore, it must address the proposed plan change itself. That is, to the alteration of the status quo brought about by that change. The first limb in *Clearwater* serves as a filter, based on direct connection between the submission and the degree of notified change proposed to the extant plan. It is the dominant consideration. It involves itself two aspects: the breadth of alteration to the status quo entailed in the proposed plan change, and whether the submission then addresses that alteration.
>
> [81] In other words, the submission must reasonably be said to fall within the ambit of the plan change. One way of analysing that is to ask whether the submission raises matters that should have been addressed in the s 32 evaluation and report. If so, the submission is unlikely to fall within the ambit of the plan change. Another is to ask whether the management regime in a district plan for a particular resource (such as a particular lot) 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.
> …
>
> [82] But that is subject then to the second limb of the *Clearwater* test: whether there is a real risk that persons directly or potentially directly affected by the additional changes proposed in the submission have been denied an effective response to those additional changes in the plan change process. As I have said already, the 2009 changes to sch 1, cl 8, do not avert that risk. While further submissions by such persons are permitted, no equivalent of cl 5(1A) requires their notification. To override the reasonable interests of people and communities by a submissional side-wind would not be robust, sustainable management of natural resources. …

[24] Turners & Growers' submission to Council regarding setbacks appears to fail both limbs of the *Clearwater* test. The change to the relevant status quo concerning the *Keeping of Animals* rule proposed by Council in Plan Change 15 as publicly notified was to increase the normal setback for factory farming and boarding kennels

in the Rural Production Zone from 50 metres to 300 metres. This proposed change would affect only a limited class of person, those having an interest in factory farming or boarding kennels. Turners & Growers' submission involved a radical extension to the reach of this rule, as signalled by the proposed change to its heading from *Keeping of Animals* to *Potentially Incompatible Activities*.

[25] If Council had adopted these changes, anyone wishing to engage in non-rural industrial or commercial activities anywhere in this vast region would be directly affected. This could be a very large group. These parties could well have chosen not to make a submission on the Plan Change having concluded that it would not affect them. To adopt Kós J's expression, they may have been rendered "speechless" if they had learned that "by a submissional side-wind" the Plan Change had "so morph[ed]" that they were no longer able to locate any non-rural industrial or commercial activity within 300 metres of their site boundaries (and potentially up to 600 metres) as a result of changes to the *Keeping of Animals* rule having been made without notice to them and without giving them an opportunity to participate in the decision-making process.

[26] I therefore accept that there is force in Mr Brabant's submission that Turners & Growers' submission to Council regarding setbacks was not a submission "on" the Plan Change. However, this issue is not raised in Northland Waste's amended notice of appeal. There is some irony in Northland Waste asking this Court to determine an issue falling outside the scope of its notice of appeal in the context of its complaint that the Environment Court wrongly failed to determine the scope of Turners & Growers' appeal before it.

[27] The first issue raised in the amended notice of appeal is whether the relief sought by Turners & Growers in its notice of appeal to the Environment Court went beyond the scope of its submission on Plan Change 15. This is correct, but only in one respect. Whereas in its submission on Plan Change 15, Turners & Growers had sought a region-wide boundary setback for non-rural industrial or commercial activities of 300 metres, in its notice of appeal this was reduced to 100 metres except where the boundary adjoins a Residential, Coastal Residential or Russell Township Zone, in which case the proposed setback was increased to 600 metres. Only the

latter modification was outside the scope of the submission. The other changes to the rule proposed on appeal were the same as, or within, the scope of the changes proposed by Plan Change 15 or as sought in Turners & Growers' original submission on it.

[28] This minor departure in the relief sought in the notice of appeal from that sought in the submission could hardly be regarded as being fatal to the appeal in a jurisdictional sense. It could only be relevant to whether that aspect of the relief could properly be given. The Court did not need to examine the question of relief because it concluded that the appeal had to be dismissed on its merits in any event. The Court made no error of law in failing to address this question.

[29] Northland Waste next contends that the modified relief sought by Turners & Growers during the course of the hearing in the Environment Court could not be entertained because it went considerably beyond the scope of the relief sought in its notice of appeal. That may be so. However, whether or not the precise form of relief sought at the hearing came within the ambit of the notice of appeal would only become relevant if the Court concluded that the grounds of appeal advanced by Turners & Growers had been made out. It was not suggested that Turners & Growers did not have standing to appeal under s 14 of the Act. The Court was required to determine the appeal and, in doing so, it was entitled, if not obliged, to examine the merits of it. Only if the Court concluded that there was merit in the appeal, would it need to address what, if any, relief should be granted.

[30] In summary, while I accept the force of Mr Brabant's submission that the changes originally sought by Turners & Growers to the *Keeping of Animals* rule fell outside the scope of a proper submission "on" the Plan Change, this issue was not raised in the amended notice of appeal to this Court and accordingly it would be wrong to make any definitive finding concerning it. I reject Northland Waste's contention that the Environment Court erred in law by failing to address whether the scope of the relief sought by Turners & Growers on appeal, in the notice of appeal or in its evidence and submissions, was outside the scope of its original submission on Plan Change 15. The Environment Court did not have to determine this because it concluded that the appeal should be dismissed on its merits in any event.

[31] There is a further, more fundamental, difficulty with Northland Waste's cross-appeal. It succeeded in the Environment Court and does not seek to challenge the outcome of that decision in this appeal. It argues merely that the Environment Court ought to have taken a more direct route to the same result. This sort of criticism cannot found an appeal for reasons explained by the Supreme Court in *Arbuthnot v Chief Executive of the Department of Work and Income*:[9]

> It is fundamental that an appeal must be against the result to which a decision-maker has come, namely the order or declaration made or other relief given, not directly against the conclusions reached by the decision-maker which led to that result, although of course any flaws in those conclusions may provide the means of impeaching the result. A litigant cannot therefore, save perhaps in very exceptional circumstances, bring an appeal when they have been entirely successful and do not wish to alter the result. The successful litigant cannot seek to have the appeal body overturn unfavourable factual or legal conclusions made on the journey to that result which have had no significant impact on where the decision-maker ultimately arrived. In short, there is no right of appeal against the reasons for a judgment, only against the judgment itself.

[32] For all of these reasons, Northland Waste's cross-appeal must be dismissed.

Turners & Growers' appeal

Ground 1 – Incorrect evaluation of Plan Change proposal under s 32 of the Act?

[33] As noted, Turners & Growers' appeal is brought on two principal grounds. The first of these is directed to the Court's evaluation of Plan Change 15 under s 32 of the Act. This relevantly provides:

> **32 Consideration of alternatives, benefits, and costs**
>
> (1) In achieving the purpose of this Act, before a proposed plan, proposed policy statement, change, or variation is publicly notified … an evaluation must be carried out by –
>
> …
>
> (c) the local authority, for a policy statement or a plan …
>
> …
>
> (3) An evaluation must examine –
>
> (a) the extent to which each objective is the most appropriate way to achieve the purpose of this Act; and

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[9] *Arbuthnot v Chief Executive of the Department of Work and Income* [2007] NZSC 55, [2008] 1 NZLR 13 at [25].

(b) whether, having regard to their efficiency and effectiveness, the policies, rules, or other methods are the most appropriate for achieving the objectives.

(3A) …

(4) For the purposes of the examinations referred to in subsections (3) and (3A), an evaluation must take into account –

(a) the benefits and costs of policies, rules, or other methods; and

(b) the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules, or other methods.

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

(6) The report must be available for public inspection at the same time as the document to which the report relates is publicly notified …

[34] Turners & Growers asserts that the Environment Court made five errors of law in evaluating the proposed plan change under s 32 of the Act. I now address these.

Error 1 – Did the Environment Court err in considering Part 2 and s 31 of the Act?

[35] Section 74(1) of the Act requires territorial authorities to prepare and change its district plan in accordance with various stipulated matters including its functions prescribed by s 31 of the Act and the purpose and principles set out in Part 2 of the Act. However, Turners & Growers submits that following the Supreme Court's decision in *Environment Defence Society Inc v The New Zealand King Salmon Co Ltd* a simpler approach to the assessment of plan changes is required.[10] It contends that unless the relevant plan is invalid, incomplete or uncertain, or a higher level document has been promulgated since the relevant plan was made operative, there is no justification for going beyond the settled objectives of the relevant plan. Because the proposed amendments to the objectives of the district plan were agreed to be the most appropriate way to achieve the purpose of the Act, Turners & Growers submits that the Court should not have considered Council's functions under s 31 or the purpose and principles under Part 2 of the Act. It simply needed to evaluate whether

[10] *Environment Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593.

the proposed methods were the most appropriate for achieving the objectives of the plan as proposed to be amended.

[36] On that basis, Turners & Growers submits that the Court fell into error by referring to the purpose of the Act in Part 2 and Council's functions under s 31 in the following paragraphs of its decision:

> [86] The Court also has a duty to consider s 32 in evaluat[ing] proposals before it. … In this case we are only dealing with a method (i.e. standards) … The joint witness statement and counsel agreed we can work on the basis that the objectives and policies generally are accepted and applicable. The question then is which standards are the most appropriate way to achieve the purpose of the Act. …
>
> [87] As we have already noted it is difficult to see how the significant increase in setbacks will achieve the purpose of the Act. …
>
> [89] Furthermore, we cannot see how the proposed increased setbacks would assist the territorial authority to carry out its functions to achieve the purpose of the Act. …

[37] I do not accept that the Environment Court erred by referring to the purpose of the Act or Council's functions under s 31 for the reasons set out below.

[38] First, the position now taken by Turners & Growers is completely at odds with the position it adopted in its appeal to the Environment Court. Turners & Growers contended in the Environment Court that Council's decision failed to achieve the purpose of the Act as set out in Part 2 and was not in accordance with its functions under s 31 of the Act. It now argues the complete opposite on appeal to this Court, contending that the Environment Court was wrong to have regard to Part 2 and s 31 of the Act.

[39] Turners & Growers' notice of appeal to the Environment Court relevantly reads:

> The reasons for this appeal are:
>
> (a) that the Council's Decision:
>
> (i) … will not achieve the purpose of the Resource Management Act 1991 ("Act");
>
> (ii) is contrary to Part 2 and other provisions of the Act;
>
> …
>
> (v) is otherwise contrary to the purposes and provisions of the Act …

> (vi) is inappropriate and inconsistent with the purpose and principles of the Act;
>
> …
>
> (viii) does not represent the most appropriate means of exercising the Respondent's functions, having regard to the efficiency and effectiveness of other available means and are therefore not appropriate in terms of s32 and other provisions of the Act.

[40] Having specifically complained that the Council's decision would not achieve the purpose and principles of the Act under Part 2 and was not in accordance with Council's functions under s 31 of the Act in its notice of appeal, Turners & Growers cannot criticise the Environment Court for addressing those matters in its decision.

[41] Second, it is clear from reading the Environment Court's decision overall that it followed the approach now urged by Turners & Growers. It approached its analysis on the basis that the critical enquiry was whether the methods proposed by Turners & Growers were the most appropriate way of achieving the objectives of the Plan as proposed to be amended. As Turners & Growers accepts, this is evident from the following two passages of the decision:

> [88] Although we acknowledge that the objectives and policies of the plan now provide for managing the adverse effects of incompatible activities, we are not satisfied that the Appellants' proposed standards are the most appropriate way to achieve those objectives or policies.
>
> [93] Accordingly, though a setback provision might achieve … the objectives and policies of PC15, we consider it a particularly coarse measure to be adopted over an entire zone of this size when there is no clear purpose or outcome established.

[42] As Mr Brabant points out, there can be no doubt that the Court understood that the essence of the appeal involved consideration of the most appropriate method to implement the new policies of the proposed plan. This is clear from the Court's observations in the following paragraphs:

> [39] It was common ground that the objectives and policies of the Plan, in the form now modified by PC15, were agreed. …
>
> [51] New Policies 8.6.4.7 – .9 and more particularly the appropriate method to implement them are at the nub of the appeals.

[43] Third, I do not accept the submission that the Court was wrong to consider the purpose and principles in Part 2 and Council's functions under s 31 when

evaluating the proposed rules. Section 74 specifically requires a territorial authority to change its district plan in accordance with its functions under s 31 and the provisions of Part 2 (ss 5 to 8). The Supreme Court did not suggest in *New Zealand King Salmon* that those making decisions under the Act should disregard these mandatory provisions. On the contrary, the Court stated "the obligation of those who perform functions under the RMA to comply with the statutory objective is clear".[11] The Court explained that "[s]ection 5 is a carefully formulated statement of principle intended to guide those who make decisions under the RMA. It is given further elaboration by the remaining sections in Part 2, ss 6, 7 and 8".[12]

[44] The issue in *New Zealand King Salmon* concerned the nature of that obligation in the particular circumstances of that case where a higher order planning document, the New Zealand Coastal Policy Statement (NZCPS), required a lower order decision-maker, a Board of Inquiry, to avoid adverse effects of activities on areas of outstanding natural character such as those the subject of the private plan change application it was tasked to consider. The Court concluded that this was a mandatory requirement that had to be given effect to, as required by the Act, when considering the plan change. Consequently, the Board of Inquiry was wrong to disregard this requirement by resorting to Part 2 of the Act and treating it as no more than a relevant consideration. The Court explained:

> [85] First, while we acknowledge that a regional council is directed by s 66(1) to prepare any regional plan "in accordance with" (among other things) Part 2, it is also directed by s 67(3) to "give effect to" the NZCPS. As we have said, the purpose of the NZCPS is to state policies in order to achieve the RMA's purpose in relation to New Zealand's coastal environment. That is, the NZCPS gives substance to Part 2's provisions in relation to the coastal environment. In principle, by giving effect to the NZCPS, a regional council is necessarily acting "in accordance with" Part 2 and there is no need to refer back to the part when determining a plan change. There are several caveats to this, however, which we will mention shortly.

[45] The Supreme Court identified three situations where resort to Part 2 might be required in interpreting the policies of a higher order planning document such as NZCPS. These were if there was an allegation of invalidity, incomplete coverage or uncertainty of meaning. Absent any such allegation, the Court strongly rejected "the

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11 At [21].
12 At [25].

notion that decision-makers are entitled to decline to implement aspects of the NZCPS if they consider that appropriate in the circumstances".[13]

[46] It will be obvious that the circumstances of the present case are far-removed from those under consideration in *New Zealand King Salmon*. There is no relevant constraint in a higher order planning document to which Council is required to give effect. The suggestion that Council and the Environment Court were wrong to have regard to Part 2 and s 31 when considering the proposed plan change is directly contrary to s 74 of the Act, which requires this. The Supreme Court did not suggest that Part 2 would be an irrelevant consideration in a case such as the present where decision-makers have choice. On the contrary, the Court said this:[14]

> Reflecting the open-textured nature of Part 2, Parliament has provided for a hierarchy of planning documents the purpose of which is to flesh out the principles in s 5 and the remainder of Part 2 in a manner that is increasingly detailed both as to content and location. It is these documents that provide the basis for decision-making, even though Part 2 remains relevant.
>
> (Emphasis added).

[47] The objectives and policies in the plan as proposed to be amended for the Rural Production Zone are expressed at a comparatively high level of abstraction. For example, one of the objectives is to "avoid, remedy or mitigate the actual and potential conflicts between new land use activities and existing lawfully established activities (reverse sensitivity) within the Rural Production Zone and on land use activities in neighbouring zones". One of the policies to achieve that objective is "[t]hat a wide range of activities be allowed in the Rural Production Zone, subject to the need to ensure that any adverse effects on the environment including any reverse sensitivity effects, resulting from these activities are avoided, remedied or mitigated and are not to the detriment of rural productivity". These objectives and policies leave considerable room for choice as to the methods or rules most appropriate to achieve them. It is an extraordinary proposition to suggest that Council, and the Environment Court on appeal, should disregard the purpose and principles of the Act when considering that choice. I reject this proposition.

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13 At [90].
14 At [151].

[48] Finally, Turners & Growers' complaint reduces to one of semantics in the present case in any event. It is difficult to see how the outcome would have been any different if the Court had referred consistently in its decision to the achievement of the objectives and policies of the plan and not to the purpose of the Act as well. The objectives, and the policies to implement them, were not in issue. It was assumed that these appropriately met the purpose of the Act. It follows that when considering the appropriateness of the particular methods or rules for implementing the policies, the Court was inevitably considering whether those methods or rules would (thereby) meet the purpose of the Act. This explains why the Court used "the purpose of the Act" and "objectives and policies" interchangeably, as demonstrated by the following two passages already quoted:[15]

> "… we can work on the basis that the objectives and policies generally are accepted and applicable. The question then is which standards are the most appropriate way to achieve the purpose of the Act.
>
> "… we are not satisfied that the Appellants' proposed standards are the most appropriate way to achieve those objectives or policies."
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> (Emphasis added).

Error 2 – Did the Environment Court err in failing to evaluate whether the methods achieve the objectives of the Plan as proposed to be amended by Plan Change 15?

[49] Turners & Growers makes the following submission:

> Put simply, the Court failed to turn its mind to whether the rules put forward by Council would achieve the policy intent of PC15.

[50] The Court recorded that the *Scale of Activities* provision was the most significant change to the relevant methods in Plan Change 15 to address the potential reverse-sensitivity effects.[16] There was no challenge to this provision which could only be justified if it was an efficient and effective way of contributing to the achievement of the objectives of the proposed plan. The Court was therefore not required to reconsider whether the *Scale of Activities* provision put forward by Council was appropriate as an efficient and effective way of achieving the policy intent of Plan Change 15. Nevertheless, the Court did turn its mind to this issue,

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15 At [86] and [88].
16 At [13].

observing that "the methods adopted currently are the most appropriate at this time to achieve the purpose of the Act and the objectives and policies of the Plan".[17]

[51] Turners & Growers' submission pre-supposes that the objectives and policies of the plan as proposed to be amended are cast in absolute terms with "bottom-line" environmental outcomes stipulated and that these must be achieved by the methods or rules. However, that is not the case. The objectives and policies do not stipulate that reverse-sensitivity effects may not occur; rather, they state that these should be "avoided, remedied or mitigated".

[52] The issue before the Court was whether the further measures proposed by Turners & Growers should also be introduced. The Court appropriately focused its attention on this issue and made no error of law in doing so.

Error 3 – Did the Environment Court err by determining that it would be inefficient to impose the setbacks sought by Turners & Growers on the basis that restricted discretionary resource consent would inevitably be obtained for new activities that would breach those setbacks?

[53] Turners & Growers submits that the Court made an error law in the following passage of its decision:

> [95] Costs and benefits can also be seen in terms of their efficiency and effectiveness. We have concluded that it is highly inefficient to impose a blanket control in circumstances where the outcome is inevitably going to be to grant a dispensation from the standard, but at cost to the Council and parties and with unclear objectives from doing so.

[54] Turners & Growers submits that this statement is wrong because it is not inevitable that restricted discretionary applications will always be granted. However, in my view, this submission is based on a misreading of the paragraph. The Court was not suggesting that consents would be granted in every case, no matter what the circumstances. The Court was simply recognising that significant costs and inefficiencies would result from the requirement for such applications with little corresponding benefit given the likelihood that they would be routinely granted, though not necessarily always.

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[17] At [111].

[55] It is clear that the Court's observation in [95] is drawn from the evidence of one of the expert witnesses, Mr Hodgson, to the effect that "all applications for consent to dispense with setback standards of various dimensions that he has lodged for applicants in other areas have been successful and he anticipated the same would occur here". The Court referred to this evidence at [90]. Ms Carruthers accepts that many applications for restricted discretionary resource consent are in fact granted.

[56] In my view, there is nothing in this point. The Court made no error of law in this paragraph of its decision.

Errors 4 and 5 – Did the Environment Court err by focusing on the effects of Northland Waste's activities when considering the appropriateness of the proposed setbacks?

[57] Turners & Growers submits that the Environment Court erred by taking into account the potential effects of Northland Waste's activities on Turners & Growers' *Kerifresh* facility. Turners & Growers claims that this was only referred to during the hearing of the appeal as an example to provide context but the specific issues arising out of that example were not substantively addressed in the evidence. Turners & Growers contends that the Court was therefore wrong to make any findings in relation to this site-specific example, let alone to rely on these as being determinative in dismissing the appeal relating to zone-wide setbacks.

[58] As noted, Turners & Growers categorises the error in two ways. First, it contends that the Court failed to take into account a relevant consideration, namely the potential effects of other activities in the zone sought to be controlled by the proposed setback (error 4). Second, it contends that the Court applied the wrong legal test (error 5). It argues that the correct question was whether the objectives and policies would be more appropriately achieved by introducing a zone-wide setback requirement.

[59] I do not accept that the Court made these errors. The Court did not reject Turners & Growers' proposal for a zone-wide setback restriction merely because reverse-sensitivity issues had not been adequately demonstrated at the *Kerifresh* facility as a result of Northland Waste's activities. It is clear that the Court did not

approach the matter as if it was a site-specific rule, but considered the implications of it applying across the entire zone. The Court commenced its analysis of whether such a zone-wide restriction would be appropriate and workable by noting the difficulty of determining which activities in the area would be caught by the "non-rural industrial and commercial" test in the setback rule proposed by Turners & Growers. The Court stated:

> [55] As we drove through the area, we noticed the enormous diversity of activities conducted within the RPZ [and Rural Living Zone] that seemed to encompass almost the full range of human activity. We note, for example, pottery and art studios that seemed to be low scale yet would appear to fit the general meaning of a non-rural commercial or industrial activity. Yet, more troublesome are those in the grey area such as building manufacturers, i.e. Versatile Garages and others; tank manufacturers; depots for raw materials such as metal and the like; and contractors' depots, all of which arguably have a functional need to be located in the rural area or primarily supply that sector.
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> [56] … We have a fundamental difficulty in trying to understand how such activity categorisation is going to be able to occur within the context of an effects-based plan that has virtually no method of dealing with the identification and compartmentalisation of activities.
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> …
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> [59] … If this plan is to move to a more activities-based plan, some relatively fundamental changes in the Plan structure would need to take place.

[60] It appears that the only specific evidence on reverse-sensitivity problems arising out of incompatible activities in the zone concerned the potential adverse effects of Northland Waste's activities on Turners & Growers' *Kerifresh* facility. In these circumstances, the Court can hardly be criticised for referring only to this evidence. In any event, the Court looked at the issue much more broadly noting:

> [77] PC15 does not address what it is about non-rural commercial or industrial activities that create concern. Although incompatible activity is cited, the concern appears to be about adverse effects of new non-rural activities on existing farming or forestry activities. These effects seem to resolve to odour, dust and noise. …
>
> [92] We were in even more doubt in the case of Turners & Growers as to what particular issue it was concerned about. If it was odour there was no compelling evidence before us, or any other basis, on which we could conclude than an extra 20 metres or even 100 metres separation would make any significant difference to odour effects. Moreover, we find it curious that Turners & Growers would be suggesting a 30m setback for outdoor activities and 100m for building when it was acknowledged that activities within buildings (including those producing odour) are less likely to have an

> adverse impact. In any event, the Council has changed its District Plan, making air discharge the sole domain of the Regional Council.

[61] In summary, the Court did take into account the potential effects of other activities in the zone sought to be controlled by the proposed setback rule to the extent that this was covered in the evidence before it. That disposes of error 4.

[62] The Court also considered whether the objectives and policies would be more appropriately achieved by introducing a zone-wide setback requirement, concluding:

> [93] Accordingly, though a setback provision might achieve the purposes of Part 2, and might achieve the objectives and policies of Plan Change 15, we consider it a particularly coarse measure to be adopted over an entire zone of this size when there is no clear purpose or outcome established.

This disposes of error 5.

[63] I now turn to Turners & Growers' second principal ground of appeal.

Ground 2 – Was the Court's conclusion, that the setbacks sought by Turners & Growers were not the most appropriate method to achieve the objectives of the District Plan, open to it on the evidence?

[64] Turners & Growers contends that the only evidence before the Court as to whether the proposed setbacks were the most appropriate way of achieving the objectives and policies of the Plan was the evidence of its expert planning witness, Brian Putt. In his written statement of evidence prepared for the hearing in the Environment Court and dated 30 October 2015, Mr Putt stated:

> The key point of analysis under s32 is for the rule amendments proposed by the Appellant to be evaluated under the criteria of s32(1)(b). In respect of the first test, and given the effects-based structure of the Plan, it is difficult to identify any alternative reasonable practical options for achieving the amended objectives which relates to the management of incompatible land uses and the potential for reverse sensitivities. The practical option chosen has been to identify the non-rural industrial or commercial activities as a generic group which, through some manufacturing process, have the ability to create significant adverse effects. The method chosen has been to use a separation distance between the activity and the site boundary. In an effects-based environment this is a simple method that does not rely on a technical process analysis. In my opinion this is the most appropriate way of achieving the relevant objectives.

[65] Even if this had been the sole evidence on this issue, the Environment Court, as a specialist body, would not have been obliged to accept it uncritically.

[66] Moreover, Mr Putt's evidence was not the only evidence available to the Court to enable it to carry out its assessment. For example, Gregory Wilson, a senior policy planner employed by Far North District Council, explained at some length why the setbacks proposed by Turners & Growers would be problematic and undesirable. Mr Wilson observed in his initial brief of evidence dated 29 September 2015:

> [54] Council considered the relief sought resulted in an overcorrection, and would capture unanticipated activities not considered to be problematic. The application of a provision controlling generic commercial and industrial activities is considered problematic in the context of the Far North District Plan. A broad spectrum of activities would be unintentionally captured under the banner of these activity classes.
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> [55] For example, the application of a 3000m "yard" style rule having universal control on industrial and commercial uses would capture a variety of activities that are important contributors to the Northland economy and that may offer little or no implications for land use incompatibility. This includes, but is not limited to:
>
> - home business and home occupations; and,
> - small retail (such as farm gate sales).
>
> [56] Exempting such activities from a new rule is considered to lie outside of the scope of the Proposed Plan Change as these activities are not currently defined in the District Plan. Also, industrial and commercial activities contained within a building are in many ways likely to have similar effects to farming activities contained within a building. The outdoor components of these activities may offer the more immediate land use incompatibility issues.
>
> [57] The spatial separation of 300m is also considered to be an excessive approach. Even the utilisation of a 50m threshold would result in 41% of sites in the Rural Production Zone not being able to undertake permitted activities. The mechanism is considered to not be proportionate to the issue, and also does [not] take into account further management techniques available through future review processes such as zoning review.

[67] Mr Wilson directly responded to Mr Putt's evidence in his written rebuttal dated 18 December 2015 in which he confirmed his view that the mechanisms proposed by Turners & Growers were not appropriate for use as a District-wide provision. The witnesses were also cross-examined on this evidence.

[68] For these reasons, I reject Turners & Growers' submission that the only conclusion available to the Court was to accept Mr Putt's evidence. That is plainly not so.

Result

[69] Turners & Growers' appeal is dismissed.

[70] Northland Waste's cross-appeal is dismissed.

[71] The respondents have succeeded overall and are entitled to costs calculated on a category 2, band B basis.

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M A Gilbert J