

**BEFORE THE ENVIRONMENT COURT
AT AUCKLAND**



ENV-2013-AKL-000039

ENV-2013-AKL-000044

BETWEEN

G J & C F GUY ET ORS

Appellant (ENV-2013-AKL-000039)

AND

**PAIHIA HERITAGE PRECINCT SUPPORT
SOCIETY INC**

Appellant (ENV-2013-AKL-000044)

AND

FAR NORTH DISTRICT COUNCIL

Respondent

OPENING SUBMISSIONS FOR FAR NORTH DISTRICT COUNCIL


4 November 2013

Law North Limited
The Meridian
93 Kerikeri Road
Private Bag 1001
Kerikeri
09 407 7099
jsb@lawnorth.co.nz

OPENING SUBMISSIONS OF FAR NORTH DISTRICT COUNCIL

MAY IT PLEASE THE COURT:

Introduction

1. These are two appeals brought against a decision of the Far North District Council ("*Council*") on Plan Change 12 ("*PC 12*") introducing amended provisions to the Far North District Plan regarding a discrete number of properties (12 sites) on Marsden Road, Paihia. The name of the area which is the subject of the Plan Change is the "*Paihia Mission Heritage Area*" ("*PMHA*"). The PMHA is in the vicinity of the first church mission station established by Reverend Williams at Paihia in 1823. The mission was one of several church mission stations in the Bay of Islands which are of historical significance in the early European settlement in New Zealand.
2. The two appellant groups are:
 - a. The Paihia Heritage Precinct Support Society (which supports, in general terms, the intent of PC 12 and seeks to retain controls in the District Plan for the PMHA);
 - b. The landowners who are within the PMHA and who oppose PC 12 in its entirety. They seek commercial zoning for their properties without any overlay.
3. There are three s274 parties who have joined the appeals:
 - a. Mr Mandeno, a landowner, who opposes PC12;
 - b. The Paihia Haven of History, who oppose both of the appeals, stating in their s274 party notice that neither PC12 nor the commercial zoning are appropriate for the PMHA and seek a historically themed consolidated development;
 - c. The Focus Paihia Community Trust, which also opposes both appeals stating that neither PC 12 nor the commercial zoning represent the optimum solution.

4. From Council's perspective, the principal purpose of the Plan Change is to recognise and provide for the historic heritage (heritage items and their surrounds in the immediate locality) within the PMHA pursuant to s6(f) of the Resource Management Act 1991 ("Act"). It also has particular regard to the amenity of the subject area as required by ss7(c) and (f) of the Act. PC12 achieves these objectives in a way which is consistent with the overarching purpose of sustainable management under s5 of the Act by introducing controls which are measured and balanced and don't impose unreasonable restrictions on private property rights.
5. There is very little visible evidence of the first mission station remaining in the PMHA. Nonetheless, what remains is undisputedly "historic heritage" within the definition in the Act. I will come to examine these elements later in submission. For present purposes, I note that PC 12 seeks to protect those discrete elements and their immediate surrounds (which form part of the "historic heritage" within the definition in s2) from inappropriate use and development.
6. The provisions of PC12 are not intended to proscribe development in the area. The underlying commercial zoning of the properties remains. Rather, the provisions seek to encourage development in a way which is sensitive to the historic heritage in the immediate area, providing subtle distinctions from other areas in Paihia, drawing on the amenity values arising from the reserve behind the area and the character of the bay. The provisions intend to provide a visual context for an understanding of the historic heritage in the immediate locality.
7. The key ways the Plan Change seeks to achieve its intended outcomes is through the establishment of an overlay within which specific controls apply. The key controls relate to:
 - a. Setback;
 - b. Sunlight angle;
 - c. Building coverage; and
 - d. Visual amenity.

In other respects, the underlying elements of the generic Commercial zoning remain. For example, there are generous traffic intensity allowances, no scale of activities or hours of operation, all hallmarks of Commercial zoning. The tailored standards share some similarities with other Commercial subzones yet operate in combination to create a unique planning outcome for the PMHA.

8. There is one concept which is introduced which is unique to the PMHA and does not occur in any other Commercial subzone and that is the "Comprehensive Development rule". This is an innovative means of achieving development on a site or across several sites in a flexible, site-specific way with incentives to retain significant vegetation and streamline design in return for greater development potential elsewhere on the site. It was an idea first raised by Mr Scott on behalf of the landowners during consultation prior to the s32 report being finalised, based on his knowledge of another Commercial subzones in Russell at Orongo Bay. The idea was adopted for the PMHA to encourage design-led development.

9. I will examine the specific provisions of PC 12 later in submission.

Geographical Extent

10. The Paihia Mission Heritage Area extends over 12 sites from 36 Marsden Road to the Herald Supply ship launching site, and extending back to the scenic Reserve. A map of the proposed Area can be found at paragraphs 33-35 of Greg Wilson's evidence¹ or, at a larger scale at Annexure 1 of Stephen Brown's Evidence.²

11. The geographical extent of the PMHA is the same as that which was provided for in the Operative District Plan under the provisions of chapter 12.5B. I will now explore the origins of the operative chapter 12.5B. In doing so, I emphasise that the current decision on PC12 differs in several ways from chapter 12.5B and it is

¹ Vol 1 evidence bundle, tab 1, p8

² Vol 2 evidence bundle, tab 1, p48

the provisions of PC12 that we are here today to examine. Nonetheless, the history of the PMHA is important context.

Background to the PMHA

12. Back in 2000, the Paihia Heritage Precinct Support Society ("*Society*"), made a submission to the Proposed Far North District Plan ("*PDP*") seeking a *Heritage Precinct* to apply to all of the land fronting Marsden Road which lay between School Road and King's Road, as well as the Mary Williams house and gardens and the Village Green. The PDP had zoned this entire area Commercial without any notation or differentiation from other areas within Paihia. The Society's submission was disallowed by Council and the commercial zoning was confirmed. The Society appealed against that decision.
13. None of the landowners within the subject area, except 40 Marsden Road (the Bistro 40 site), either made submissions to the PDP or joined the Society's appeal. In this respect, it was unusual because the remainder of landowners in the commercial area of Paihia were actively involved in the District Plan appeal process. This is apparent from the many Commercial subzones (A1 to A5) which eventuated in the Paihia area. These subzones were the result of many hours of meetings, mediations and eventual resolution by consent between Council and the various landowners and community interest groups. Paihia was one of the more hotly contested urban areas of the Far North in respect of its commercial zoning provisions.
14. By contrast, the Society's appeal had no landowners involved, with the exception of Mr Rendell at the Bistro 40 site. Council was concerned about the absence of landowner participation and its elected members actively sought to gain the involvement of the landowners but none joined.

15. Mediation of the appeal occurred and an agreement was reached among the participating parties resulting in a consent order being issued by this Court.³ The relevant parts of the outcome as recorded in the consent order included:

- a. The creation of the "*Paihia Mission Heritage Area*" (map HA1) over a lesser geographical area than requested by the Society. The area extended from the Bistro 40 site to the Herald launching site and back towards the Scenic Reserve.
- b. Interim controls applied were added to the District Plan (this became chapter 12.5B as a result of final renumbering). The underlying zoning remained Commercial. It was not ascribed a site specific subzone within Commercial like the rest of Paihia but retained the generic Commercial zoning which applies elsewhere in the District.
- c. Site specific zoning was introduced for Bistro 40 site. (This became the Commercial A5 subzone).
- d. Certain errors regarding the location of the protected Norfolk pine were corrected.

16. The consent order also recorded that Council "*has resolved to commence a Plan Change process by 31 July 2006 to look at the provision for historic heritage in Paihia more generally, giving consideration to all of the land between School Road and Kings Road, except for 40 Marsden Road.*"⁴

17. The principal motivation behind Council's resolution to commence a Plan Change process and for the interim nature of the controls was a concern that, with the exception of the Bistro 40 site, none of the other affected landowners had participated in the appeal. They were of course entitled to participate in the publicly notified proposed District Plan process, but none had done so. Council wanted to ensure that the landowners participated in any final outcome over these titles affected by the overlay.

³ Volume 1 evidence bundle, tab 1, p31

⁴ Volume 1 evidence, tab 1 pp32-33

18. Shortly afterwards, in September 2006, Council commenced its consultation with key stakeholders. I will now turn to detail the consultation process which occurred over several years leading to the notification of PC12. A timeline of the key steps occurs in Mr Wilson's primary evidence (appended to the s32 report): refer Volume 1 evidence, tab 1 p117.

Consultation process

19. Council's reporting planner, Mr Greg Wilson, will give evidence that following the issue of the consent order, Council set about consulting with key stakeholder groups including affected landowners and the property owners representative group, the Marsden Road Property Owners' Association, the Paihia Heritage Precinct Support Society, the New Zealand Historic Places Trust, the Paihia Haven of History Charitable Trust and tangata whenua.⁵

20. A series of meetings were held to discuss the PMHA and other land in the vicinity. Consultation continued throughout 2006-2009. At the end of this first lengthy consultation period a report was prepared outlining all of the feedback received. This is appended to Mr Wilson's primary brief of evidence at pp 64-83.⁶

21. The range of outcomes identified through the consultation extended from Commercial Zoning to Residential Zoning to Discretionary Activity status for all properties and removal of heritage provisions all together.

22. Following the first period of consultation, Council commissioned several expert reports which looked at the alternatives for the PMHA. These were:

- a. A landscape report by Brown NZ Limited which looked at the alternatives. This report is appended to Mr Brown's evidence.⁷ The scope of Mr Brown's inquiries is detailed in his evidence at paragraph 13.⁸

⁵ Vol 1 evidence: tab 1, pp2-5 and exhibit GHW-4, pp 64-83; tab 2 pp6-7

⁶ Vol 1 evidence: tab 1, pp 64-83

⁷ Vol 2 evidence: tab 1, pp32

⁸ Ibid, p4

- b. A review of the options for heritage management in Paihia by Barnes & Associates Limited ("*Barnes*") architectural planners, annexed to Mr Wilson's evidence.⁹
- c. The New Zealand Historic Places Trust was also invited to submit its position, which it did by a Response Document appended to Mr Wilson's evidence.¹⁰ I submit that a careful reading of the position of the NZHPT contained within that paper is pragmatic striking a balance between recognising the heritage elements which exist in the PMHA but not imposing unduly burdensome controls on the otherwise commercial potential of the sites.

23. Following receipt and distribution of these reports (April 2011), a further round of consultation occurred where stakeholders were asked to give feedback on the reports. Again, responses were received from Council from the divergent, at times polarised, viewpoints of the affected persons, including the landowners. This is the first time that Mr Putt became involved on behalf of the landowners and explains why he is apparently unaware of the previous 5 years of consultation.¹¹ The landowners collectively urged Council to give more regard to the economic potential for development of their land through various responses over the next few months. This resulted in amendments to the policy framework including the introduction of a specific objective which focussed on economic development and the removal of a controlled activity status for buildings, together with other recommended changes in the eventual finalised s32 report and notified Plan Change.¹²

24. I submit that the consultation process embarked on and completed over some six years was thorough, measured and objective. It was entirely appropriate given the importance of the outcomes to all of the parties involved. A further record of

⁹ Vol 1, tab 1, pp35-44

¹⁰ Vol 1: tab 1, pp45-63

¹¹ Refer Putt para 3.3, vol 3 evidence tab 1, p12; see Mr Wilson's response para 18 vol 1, tab 2, p8

¹² Refer para 5 Wilson additional rebuttal vol 1 evidence, tab 3, p2.

consultation was made in the s32 report prepared to support the Plan Change, the details of which I will turn to shortly.¹³

Statutory basis for the Plan Change

25. Mr Wilson, Council's planning witness sets out in his evidence the statutory provisions and policy framework which have guided and continue to guide Council through the Plan Change process.¹⁴ I will not repeat all of those provisions here but focus instead on the ones which I apprehend are at issue among the parties.

Section 5

26. The principal provisions are contained in Part 2 of the Act and, in particular, s5 which sets out the overarching purpose of sustainable management of natural and physical resources which is then given direction by ss6-8.

27. Section 5 states:

- (1) The purpose of this Act is to promote the sustainable management of natural and physical resources.*
- (2) In this Act, sustainable management means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while—*
 - (a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and*
 - (b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and*
 - (c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.*

28. Section 5 requires an overall broad judgment of whether a proposal will promote the sustainable management of natural and physical resources. This recognises that the Act has single purpose in 5(1) and the overall broad judgment must allow

¹³ Refer s32 report, vol 1 evidence, tab 1 pp84-184, at p90-91

¹⁴ Vol 1 evidence, tab 1 paras 56-71

for comparisons of conflicting considerations, and considerations of their relative significance in the final outcome.¹⁵

29. It is anticipated that the appellant landowners will urge the Court to focus on the economic element of s5. While it is accepted that the Act enables landowners to provide for their own economic wellbeing, the concept of sustainable management takes priority over private property rights¹⁶ – the Act is not meant to “enable” landowners only. The use of the phrase “people and communities” shows that the management of the resource for the wider community must also be considered.¹⁷ The considerations of the wider community are integrated into the decision making process by the other provisions of Part 2. That said, the important economic considerations sit alongside the other aspects of s5 and have formed an integral part of the balancing exercise by Council in its s32 analysis with extensive consultation on these aspects.

Section 6(f)

30. In relation to s6 Council must recognise and provide for various matters of national importance in exercising its functions under the Act. The key provision for this Plan Change is s6(f) which elevates *“the protection of historic heritage from inappropriate subdivision, use and development”* to a matter of national importance.

31. The definition of *“historic heritage”* as set out at s2:

“(a) means those natural and physical resources that contribute to an understanding and appreciation of New Zealand’s history and cultures, deriving from any of the following qualities:

- (i) Archaeological;*
- (ii) Architectural;*
- (iii) Cultural;*

¹⁵ *New Zealand Rail v Marlborough District Council* [1994] NZRMA 70.

¹⁶ *Falkner v Gisborne District Council* [1995] 3 NZLR 622 at 633; *NZ Suncern Construction Ltd v Auckland City Council* [1996] NZRMA 411 at 423 – 425.

¹⁷ *Blakeley Pacific Ltd v Western Bay of Plenty District Council* [2011] NZEnvC 354 at [189] – [192].

- (iv) *Historic;*
- (v) *Scientific;*
- (vi) *Technological; and*
- (b) *includes–*
 - (i) *historic sites, structures, places and areas; and*
 - (ii) *archaeological sites;*
 - (iii) *sites of significance to Maori, including waahi tapu; and*
 - (iv) *surroundings associated with natural and physical resources.”*

32. The specific heritage resources in the PMHA are set out at paras 38-39 of Mr Wilson’s evidence.¹⁸ They are the mission cemetery surrounding St Paul’s Church, the foundations of a stone dwelling built and occupied by Reverend Henry Williams and the surviving archaeological record which is below ground. There are also specific scheduled heritage resources which have protection in the District Plan, namely¹⁹:

Heritage Resource	District Plan	Historic Register	Other
William Williams House Kume Marsden Road, Paeroa Lot 3 DP 10201 - Bk IV Sawakahi SD	Entered into Appendix 1E – Schedule of Historic Sites Buildings and Objects	Item 403 – Category 2	
Colonial Farming William Williams Marsden Road, Paeroa Lot 3 DP 10201 - Bk IV Sawakahi SD	Entered into Appendix 1E – Schedule of Historic Sites Buildings and Objects	Item 404 - Category 2	
Church of St Paul 20 Marsden Road, Paeroa Road Bk 1 DP 10201	Entered into Appendix 1E – Schedule of Historic Sites Buildings and Objects	Item 3824 – Category 1 – includes Churchyard and graves monuments and markers	
Henry Williams Memorial 20 Marsden Road, Paeroa Lot 3 Bk 1 DP 10201	Entered into Appendix 1E – Schedule of Historic	Item 3836 – Category 2	

¹⁸ Vol 1 evidence, tab 1, p9

¹⁹ Table taken from Wilson’s evidence at para 39, volume 1 tab 1 p9

	Sites Buildings and Objects		
Norfolk Pine Williams Historic Reserve Marsden Road Pāhara Lot 3 DP 2818/1 Blk IV Kawakawa SD	Entered into Appendix 1D – Schedule of Notable Trees (Item 123)		Site is managed by Council under the provisions of the Reserves Act as an Historic Reserve
Remains to commemorate the site of the launch of the Taranaki Supply Ship Marsden Road Pāhara Lot 1 DP 2818/1 Blk IV			Site is owned by the Waitangi National Trust Board and is part of the asset base held and managed by the Trust.

33. There are also a number of significant trees, including several pohutukawa which are not protected under the District Plan and the scheduled Norfolk Pine which is protected²⁰.

34. I do not understand that the *existence* of these heritage elements is an issue to be determined by this Court. For instance, the landscape witnesses have agreed on the heritage elements present in the PMHA: refer joint landscape caucus statement para 1.

35. The key issue for this Court is whether the proposed Plan Change is the appropriate way to discharge the duty which arises under s6(f) to protect the “historic heritage”, as it is defined in the Act, from inappropriate development.

36. Pursuant to s2, the definition of “*historic heritage*” includes not only “*sites*”, but “*places*” and “*areas*” and “*surroundings*”. Not every historic site, structure, place or surrounding will meet the threshold test of being ‘historic heritage’. It is only those sites, structures, places, surroundings “*which contribute to an understanding and appreciation of New Zealand's history and cultures*”.

²⁰ Wilson para 37, p9 volume 1 tab 1

37. In *Maniototo Environmental Society Inc v Central Otago DC*,²¹ the Court inferred that the concept of historic heritage also included the context of a site, structure, place or area. In that case the Court held that a road over a ridge in Otago was historic heritage. The proposal would not affect the road, but was inappropriate from a heritage point of view because there would be effects on the heritage surroundings about the road.

38. Once “historic heritage” is identified, the protection of it from inappropriate use is a matter of national importance under s6(f).

39. In this case the experts have agreed that the PMHA contains “historic heritage”. It is Council’s position that as a result of this agreement it is beyond question that protection of this “historic heritage” from inappropriate use is a matter of national importance.²²

40. I apprehend through a review of the evidence proffered by the landowners that an argument will be raised that Council is seeking to create a “cultural heritage landscape” in an area which does not possess the necessary attributes to be one.²³ Reference is made within that evidence to the case of *Gavin Wallace Ltd & others v Auckland Council* [2012] NZ EnvC 120.

41. Council’s response is that it is not seeking to establish or protect a “cultural heritage landscape” and accordingly there is no reason to engage in an investigation as to whether the PMHA is a “cultural heritage landscape”. This is supported by Mr Brown as expert landscape witness.²⁴

42. Council does not suggest that the concept of a “cultural heritage landscape” arises or that it even has to be acknowledged to exist within the Act. The concept has

²¹ ENVC CHCH C103/09, 28 November 2009, overturned on appeal but this point and analysis not in issue on appeal, see *Meridian Energy Ltd v Central Otago District Council* [2011] 1 NZLR 482.

²² As an aside, the history of the Paihia settlement as central to the contact period of New Zealand history should by any analysis elevate the area as being of “sufficient substance” to warrant protection.

²³ See, for example, Mr Putt’s evidence, vol 3, tab 6 paras 12 and 18

²⁴ Refer, for example to Mr Brown’s additional rebuttal volume 3 tab 3 pp7-9, especially paras 27-28

been used to attempt to protect large landscapes (some over 200 hectares) which contain a number of *different sites* of historic heritage. The goal is to provide a type of “blanket protection” over the entire landscape by declaring the *entire* landscape to be historic heritage, and as a result to trigger the protection of s6 for the *entire* landscape. That is not the case here – we are dealing with a small number of commercially zoned Paihia sites in part of a bay which has already been acknowledged to contain “historic heritage”. Section 6(f) is already engaged and the question becomes simply now to recognise and protect this area from inappropriate use.

43. Council is not seeking to veto development or unreasonably constrain its commercial nature. The sites retain underlying commercial zoning. What is expected, however, is that any development will be sensitive to the historic heritage and distinctive amenity of the PMHA rather than inappropriate.

44. I submit that the approach taken by Council in this measured response to the PMHA is entirely consistent with the outcome intended in the *Gavin Wallace* case:

“The strong directions contained in Section 6 relating to Maori and historic heritage are not a total veto on development, they are directions to decision makers to recognise and provide for protection from inappropriate development. We are satisfied on the evidence before us that the most appropriate way of achieving the statutory directions is to provide for a mechanism that allows sensitive development, while at the same time safeguarding and protecting the special characteristics of this land.”

45. I submit that the same outcome exists in the Plan Change decision of Council here.

Section 7(c) and (f)

46. Also relevant to this Plan Change are s7(c) and (f) which require particular regard to be had to:

“(c) The maintenance and enhancement of amenity values;” and

“(f) The maintenance and enhancement of the quality of the environment.”

47. A precautionary approach is required when considering these matters.

48. Mr Brown will give evidence of the existing amenity of the PMHA on behalf of Council. The amenity aspects were investigated in preparation of his 2011 report and are also contained within that document. Mr Brown acknowledges that the physical remains and visual imprint of the historic site are less emphatic than in other areas of the Far North but nonetheless considers there is a sufficient nexus between the heritage elements and the amenity of the PMHA to warrant some degree of protection.

49. There is a level of consensus between the two landscape expert witnesses as contained in the joint witness statement regarding the current amenity of the PMHA and I understand this is an issue which is resolved.²⁵

50. However, it remains an issue for this Court as to whether the outcomes produced by the proposed Plan Change are necessary or appropriate to maintain that agreed level of amenity.²⁶ This is a secondary issue to the questions which arise in s6(f).

Section 32

51. Pursuant to s32, Council is required to consider all of the alternatives and conduct a cost/benefit analysis of each of the options.

52. In this case, Council commissioned an independent consultant to prepare a draft s32 report (Campbell Brown) in October 2011. Once a draft had been prepared, Council reviewed it and circulated to interested parties in November 2011. Further consultation occurred with affected parties and landowner groups emphasised that they required more consultation because of the economic effect on their properties. Another year of consultation occurred during which these issues were ventilated in detail. The outcome of the further consultation and

²⁵ Refer joint witness statement paras 1 and 3.

²⁶ Refer joint expert witness statement

Council's suggested amendments were fed into the report before it was finalised in October 2012.²⁷

53. In this case, the s32 analysis²⁸ prepared by Council considered four scenarios:

- a. Removal of the heritage controls;
- b. Non-regulatory methods;
- c. Retaining the interim provisions contained in chapter 12.5B of the operative District Plan; and,
- d. Incorporating changes to the District Plan.²⁹

54. Council expressly recognised that the s32 obligations to evaluate were continuing ones and carried on past notification (refer para 4.1 of the s32 report).

55. The s32 analysis carried out by Council determined that the preferred approach was modification to the District Plan rules to implement a suite of rules which manage form and visual amenity thereby enabling commercial development whilst protecting the amenity and heritage values which exist in the PMHA. The recommendations also addressed the potential to amalgamate titles and develop the area through the comprehensive development rules.

56. In forming this view, the s32 report expressly considered the extent to which restrictions can be imposed on property rights pursuant to s85 of the Resource Management Act 1991 ("Act").³⁰ "Reasonable use" under s85 is not to be confused with "commercial viability" although Council also considered "commercial viability" of the outcomes by analysing the outcome relative to other commercially zoned land in the district.³¹ The landowner appellants criticise the s32 report because it didn't contain an expert economic report. However, this does not mean that economic concerns of the landowners were not considered – they made submissions on this issue during consultation and the policy framework was

²⁷ Refer timeline annexed to s32 report (volume 1 tab 1 p117)

²⁸ Vol 1 evidence: tab 1 pp84-184

²⁹ Refer Appendix 1 s32 report tab 1 vol 1 evidence p110 and section 8 of the report pp99-100 bundle

³⁰ Refer para 11 s32 report, vol 1 bundle, tab 1, p102

³¹ Refer para 11.2 s32 report, ibid

modified as a result. The landowners do not bring any evidence to this court to demonstrate additional economic considerations beyond those which were considered by Council during the consultation and Plan Change process.

57. The conclusions of the s32 report are set out at para 13 (pp107-108 of tab 1, vol 1). These formed the basis for the notified Plan Change.

Notification of the Plan Change and Decision

58. Plan Change 12 was notified on 28 June 2012. Council received 42 submissions and no further submissions seeking wide relief ranging from complete opposition to the proposals, to conditional acceptance and seeking to retain the Operative Plan version. A hearing was held before independent Commissioner Childs who released his recommendations in December 2012.³² Council approved the decision at its January 2013 meeting.

Key elements of the Plan Change

59. The key platforms of the Plan Change are:

- a. New objectives and policies (12.5B.3 and 12.5B.4) that allow the use of the land for commercial activities to the extent possible in the zoning while retaining the heritage values associated with the PMHA;
- b. New rules that allow building as a permitted activity in accordance with development controls including a maximum building height of 8.5m (12.5B.6.1.1), compliance with a sunlight recession plane for sites adjoining the conservation zone and a scheduled heritage item (12.5B.6.1.2), a 15m setback from Marsden Road and a minimum setback for one side boundary (bearing in mind that these are narrow sites) (12.5B.6.1.3);
- c. Visual amenity controls on outdoor areas such as parking and storage on Marsden Road frontage (12.5B.6.1.4);

³² Refer GHW-6, vol 1 bundle, tab 1, p186

- d. Provision for a Comprehensive Development Plan to be applied as a Discretionary Activity where there are two or more contiguous sites with a minimum size of 2000m² (12.5B.6.3.1). This rule is designed to allow flexibility in design for larger proposals.

60. There are no changes to the traffic intensity or scale of activities allowances for the PMHA so the current commercial zoning allowances apply. This means generous traffic allowances and an absence of scale of activities control.

Refer decisions version of Chapter 12.5B for the detailed changes: handed up separately-Attachment 2 to the decision at Volume 1 tab 1 p186 (should be inserted into the bundle after p249).

Position of the landowners

61. The landowner appellants in their evidence seek the retention of Commercial Zoning with no overlay or specific rules applying to the PMHA. Both expert witnesses called by the landowners, Messrs Putt and Scott suggest that Commercial A1 zoning should apply, rather than the current underlying Commercial zoning.³³ There is no difference in Commercial A1 from the generic commercial zone as that zone applies in the PMHA.

62. The generic Commercial zone in Paihia in this area which currently applies has the following permitted standards³⁴:

- a. 6m setback from road boundary (7.7.5.1.4(b)(vi));
- b. Visual amenity requirements for some screening and landscaping (7.7.5.1.3);
- c. 8.5m height limit (7.7.5.1.1(b)(iii));
- d. no sunlight controls which would apply (7.7.5.1.2);
- e. no control on impermeable surfaces (100% site coverage is permitted);
- f. no scale of activities rule;

³³ See, for example: Putt para 17: Volume 3 evidence tab 6 and Scott para 6: Volume 3, tab 7

³⁴ Refer vol 1 evidence tab 1 p254 et seq

- g. generous traffic intensity allowances (200 daily one way movements permitted and 500 controlled).

These coincide with the controls for Commercial A1.

63. Refer Wilson's primary evidence paras 94-96 for a comparison of these Commercial Zones.³⁵

64. Additionally to these Commercial Zone rules, the District wide provisions which would apply in the absence of an overlay are also relevant. These are set out at paragraph 97 of Mr Wilson's primary evidence.³⁶ They require parking areas to be paved (15.1.6.1.1). In this locality, without specific visual amenity controls, the result could be carparking areas fronting Marsden Road with no landscape requirements. Additionally, access carriageways are to be 3m for one-way and 6m for two-way. The adverse effects created by these outcomes cannot be controlled in the absence of the overlay area.

65. The expert witnesses called by the landowners, Messrs Putt and Scott, acknowledge the historic heritage within the PMHA and its amenity values but say the Proposed Plan Change is not necessary to discharge the duties under s6(f), 7(a) and (c). They seek to persuade the Court that Commercial Zone A1 is all that is necessary to encourage a design-led approach resulting in sensitive development in the area. I submit that there is nothing in Commercial A1 which operates to protect the historic heritage within the PMHA from inappropriate development or which encourages a design-led approach.

66. On Council's analysis of the options in its s32 report and its evidence for the hearing and this appeal, Commercial zoning (either in its current form or A1) alone would not produce these outcomes. Rather, in the opinion of Council's expert witnesses, there is clear potential for building dominance adversely affecting views to and from the heritage items, the natural character and point of difference of

³⁵ Volume 1 evidence tab 1, pp22-23

³⁶ Volume 1 tab 1 page 23

this area from the rest of Paihia and diminish the potential to understand and appreciate the heritage resources in the vicinity. These adverse effects would be even greater if multiple sites were used for a single development proposal.

67. The landowner witnesses place heavy reliance on the large trees in the PMHA as a means of retaining character and influencing the nature of the development which can occur around them. However, with the exception of the scheduled Norfolk pine, none of the other trees are protected in the District Plan and are not directly protected under the Plan Change. The landowners have not offered to protect the trees. In the proposed Plan Change, Council's comprehensive development plan rule has vegetation protection as a criteria for consideration as part of a more intensive development elsewhere on the site. This provides an incentive for retention of the existing mature trees.

68. I submit that the landowners' plea to retain commercial zoning (either the generic one or A1) fails to meet the statutory tests under ss5, 6(f) and 7(c) and (f) for this area.

Position of PHPSS

69. The Paihia Heritage Precinct Support Society appellant broadly supports the Council's Plan Change although it seeks a greater setback of 20m for the properties rather than the 15m in Council's decision. They also initially sought a broader geographical area but have since resiled from that position.

Conclusion

70. In conclusion, I submit that the decision of Council on Plan Change 12 is a considered and measured response to the complex planning issues which arise in relation to this discrete area within this bay. It appropriately recognises the significant historic heritage and amenity within the confines of the PMHA, thereby discharging the duties arising under ss6(f), 7(c) and (f). It imposes a level of control

which is not intrusive to the extent that it unreasonably impacts on the affected landowners. In doing so, it gives effect to the overriding purpose within s5 of the Act.

Dated 4 November 2013



J S Baguley
Counsel for Far North District
Council