

**BEFORE THE ENVIRONMENT COURT**

Decision No. [2014] NZEnvC 129

**IN THE MATTER** of appeals under clause 14(1) of the  
Resource Management Act 1991 (**the  
Act**)

**BETWEEN** GUYCO HOLDINGS LIMITED & ORS  
(ENV-2013-AKL-000039)

**AND** PAIHIA HERITAGE PRECINCT  
SUPPORT SOCIETY  
(ENV-2013-AKL-000044)

Appellants

**AND** FAR NORTH DISTRICT COUNCIL

Respondent

Hearing at: Paihia, on 4-6 November 2013; further submissions received  
from the principal parties up to 25 November 2013.

Court: Principal Environment Judge LJ Newhook  
Environment Commissioner RM Dunlop  
Deputy Environment Commissioner D Kernohan

Appearances: JS Baguley for Far North District Council  
PT Cavanagh for Guyco Holdings Limited  
MJE Williams for Paihia Heritage Precinct Support Society  
G Williams for Focus Paihia Community Trust  
A Thomson for Paihia Haven of History Charitable Trust

Date of Decision: 13 June 2014



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## DECISION OF THE ENVIRONMENT COURT

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**A. The appeal of Guyco and associated parties is allowed to the extent that the provisions of Plan Change 12 are modified in the following ways:**

- i) Objective 12.5B.3.2 to be modified by deletion of the phrase “spacious surroundings”;**
- ii) The PMHA overlay to be deleted from Numbers 16, 18, 20 and 22 Marsden Road, Number 3 Kings Road, and the site of the plaque commemorating the launching of the supply ship “Herald”. This deletion will result in these pieces of land reverting to Commercial Zone.**

**B. The appeals are otherwise dismissed.**

**C. Costs reserved.**

## REASONS FOR DECISION

### Introduction

[1] This case concerns a plan change initiated by the Far North District Council, PC12, to augment heritage controls in its district plan over some 12 lots bordering Marsden Road, Paihia, and a sliver of an adjoining section with access off Kings Road. The area is part of the site of a mission established by the Church Missionary Society under the leadership of the Reverend Henry Williams in the 1820s. It is accepted by all parties that the site and the activities on it played a significant part in the history of New Zealand in the period of early contact between Māori and European, prior to the Treaty of Waitangi in 1840.

[2] The land contains a number of heritage elements relating to those early activities, although we were told that the mission, being of ‘low-church’ character, did



not seek to leave permanent visible reminders of its work for posterity. The heritage elements that do remain are scheduled in the District Plan, and comprise:

- the ruins of William Williams' (the brother of Henry Williams) house;
- Colenso printing workshop ruins;
- Church of St Pauls (dating to 1926) ; and its churchyard, graves, monuments and other markers which go back to the earliest period of the mission;
- a Norfolk pine;
- a plaque to commemorate the launching site of the supply ship, "Herald".<sup>1</sup>

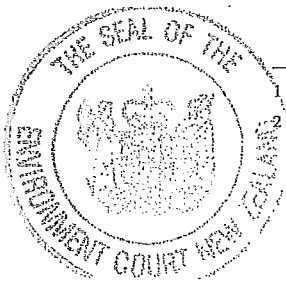
### **Recent planning history**

[3] In its decisions on the last District Plan Review issued in 2000, the Council zoned the land commercial. That decision was appealed by the Paihia Heritage Precinct Support Society, and by Consent Order dated 16 January 2006 the Council was directed to create over the subject land a Paihia Mission Heritage Area ("PMHA") which, while retaining an underlying commercial zoning, included restrictions on the extent of development considerably greater than those applying in the remainder of that zone.

[4] We note from the consent order that in the PMHA:

- (a) buildings visible from any public place require controlled activity consent;
- (b) buildings are required to be set back 20 metres from Marsden Road;
- (c) the building height limit overall is 8.5 metres, and to secure appropriate sunlight admission at any point the maximum height of a building may not exceed 2 metres plus the horizontal distance between the building and the site boundary.

In addition, a series of guidelines was to apply to all resource consent applications.<sup>2</sup>



GH Wilson, Evidence-in-chief, paragraph [39]  
Far North District Plan, chapter 12.5B, Rules 12.5B.6.1.2 – 4; Rule 12.5B.6.2.1

[5] The only landowner represented in the appeal that resulted in the consent order was Mr MC Rendell, the owner of 40 Marsden Road (the Bistro 40 site). He secured the exclusion of his land from the PMHA and specific site rules, and the imposition instead of some controls tailored to the particular site and buildings. Both the Council and the Court were aware of limited landowner participation in the process leading to restrictions on the use of other properties in the area covered by the PMHA, and the consent order accordingly contained the following paragraph:

The respondent has resolved to commence a Plan Change process by July 31<sup>st</sup> 2006 to look at the provision for historic heritage in Paihia more generally, giving consideration to all land between School Road and Kings Road, except for 40 Marsden Road. In the event that any party sought to include 40 Marsden Road in that plan change process, it is recorded that the appellants in these proceedings have recorded that they will not support that party.

[6] The Council undertook a consultation process (criticised by the Guyco appellants as inadequate), commissioned specialist reports, and eventually notified PC 12, the subject of these proceedings, in June 2012. A variety of submissions were received and a hearing was held before an independent commissioner in November 2012. The commissioner confirmed the Paihia Mission Heritage Area over the sites we have described, setting out its own statement of issues, objectives and policies, and rules. Key changes from the provisions introduced in 2006 were that the set-back from Marsden Road was reduced to 15 metres, and to the sunlight admission rule, which limited building height to 2m plus a recession plane of 45° on the boundaries adjoining Residential, Coastal Residential, Rural Living, Coastal Living or Conservation zones, or any site containing notable trees, historic buildings, or objects listed in Schedules 1D and 1E of the District Plan<sup>3</sup>. Further, a new rule would limit the proportion of the site that could be covered by buildings to 50% as a permitted activity, and there was provision for relaxation of some of these rules as a discretionary activity where a comprehensive development plan was produced.

### **The two appeals**

[7] The Paihia Heritage Precinct Support Society appealed the decision. It sought retention of the maximum height, sunlight and set-back from boundary rules that had been imposed by the 2006 consent order, and a reframing of the rules to

<sup>3</sup> Schedule 1D; Notable Trees and Schedule 1E: Historic Sites, Buildings and Objects





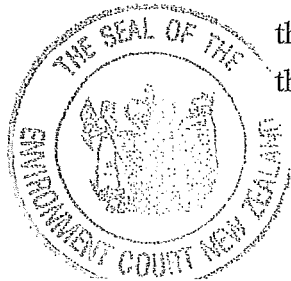
classify any new built development in the PMHA as a restricted discretionary activity. Nevertheless, the Society forthrightly recorded that had there been no other challenges to PC12, particularly by parties opposing the restrictions of the plan change, it would have been minded not to pursue its appeal.

[8] The society's position was that while there are few visible remnants of the period when the land was occupied by CMS, the unique combination of spatial, built, coastal landscape and amenity characteristics retained in the PMHA create a point of difference from the surrounding Commercial zone and assist visitors to the site to understand the importance both of the site itself in the early history of European settlement in New Zealand, and of the extant physical relics and memorials. This was also broadly the position of the Council. Both submitted that development within the PMHA should be such that the land remains distinguishable from the surrounding Commercial zone.

[9] Appellants Guyco Holdings Limited, GJ and CF Guy, TW Reed Estate, M & M Sinclair, W Park and Dalling Investments Limited opposed the plan change in its entirety but in terms which we considered required clarification. In their initial submission these parties had sought the withdrawal of PC12 and the removal of the existing controls on the PMHA contained in chapter 12.5B of the operative District Plan, in other words a reversion to the situation as it existed prior to the 2006 consent order. They were permitted during the course of the hearing to amend their relief to properly reflect that submission.

[10] There were three s274 parties to these appeals. One of them, Mr Mandeno, a landowner, opposed the plan change. The two others, the Paihia Haven of History and the Focus Paihia Community Trust took the position that neither PC 12 nor the Commercial zoning sought by Guyco and associated parties represented the best planning solution. They said they would have preferred a "mediated outcome".

[11] The positions of the two appellant groups and the respondent can be summarised as follows. The Council and the Paihia Heritage Precinct Support Society asserted that the restrictions imposed by the PMHA are the least that are necessary to protect its heritage resources. Guyco and associated parties submitted that the PMHA contains comparatively little in the way of heritage resources, and that those present are adequately protected by the provisions of Schedules 1D and 1E of the plan; further, any heritage benefits that might accrue from the restrictions imposed



by PC 12 must yield to the social and economic benefits that both the landowners and the Paihia community generally would gain from full development of the land as permitted by commercial zoning.

[12] More particularly, in a post hearing memorandum Guyco and associated parties:<sup>4</sup>

- (i) Continued to seek the withdrawal of PC 12 and the removal of Part 12.5B Paihia Mission Heritage Area from the operative Plan; and
- (iii) Sought the imposition of a Commercial sub-area A1 zone over the subject area to be depicted on Planning Map 91A; and
- (iv) Offered protection of the pohutukawa tree at 18 Marsden Road on the understanding that requested additions to Rule 7.7.5.3.4 at (v) below were achieved; and
- (v) The insertion of extra criteria in Rule 7.7.5.3.4 to encourage landscape enhancement and a better urban design outcome for future development. The suggested additional wording being:
  - (c) The extent to which buildings recognise and enhance the existing landscape and built elements, and the extent to which buildings address and activate the street frontage in a positive manner.
  - (d) In the case of properties in the Commercial A1 zone fronting Marsden Road (Between St Pauls Church and Kings Road) Paihia, the rule infringement may reduce the building setback to 0 metres provided any building erected within 6 metres of the front boundary does not exceed a maximum height of 5 metres.

[13] In the alternative, that the Guyco group would accept a comprehensive development plan (CDP) for the PMHA overlay area that was consistent with the Commercial A1 sub-zone and not weighted in favour of PC 12 provisions. These appellants said that they supported a CDP of the type attached to the evidence of Mr DJ Scott, their landscape witness, as Exhibit 3.1. If the Court were to favour a CDP approach, an opportunity was sought to make submissions on assessment criteria for



resource consent applications similar to those at (v) above, which were considered acceptable<sup>5</sup>.

[14] We attach as Appendix A, a copy of an exhibit of landscape witness for the council Mr SK Brown, which illustrates most of the features in the locality we have described, as well as some relative possible setbacks discussed in evidence.

### Legal matters

[15] The relevant law is that in effect when the plan change was notified. When changing its district plan, a territorial authority must do so in accordance with its functions under s31, the provisions of Part 2, and its duties under s32 of the Resource Management Act.<sup>6</sup> Relevantly to this case it must give effect to any New Zealand Coastal Policy Statement and any Regional Policy Statement.<sup>7</sup> Additionally, it must have regard to any proposed Regional Policy Statement,<sup>8</sup> and when making rules have regard to the actual or potential effect of activities on the environment, including in particular any adverse effect.<sup>9</sup>

[16] Relevant functions of the territorial authority under s31 are:<sup>10</sup>

- (b) The ... review of objectives, policies and methods to achieve integrated management of the effects of the use, development or protection of land and associated natural and physical resources of the district; and
- (c) The control of any actual or potential effects of the use, development or protection of land, including for the purposes of -

[17] Section 32 imposes on local authorities a duty to evaluate the extent to which each objective is the most appropriate way to achieve the purpose of the Act, and whether, having regard to efficiency and effectiveness, the policies, rules or other

<sup>5</sup> Op cit [14]ff

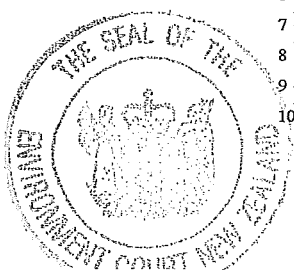
<sup>6</sup> Resource Management Act 1991 ("RMA") s74(1)

<sup>7</sup> RMA s75(3)

<sup>8</sup> s.74(2)(a)(i) April 2011 – December 2013

<sup>9</sup> RMA s76(3) October 2009 - September 2013

<sup>10</sup> RMA s31(1)(a) and (b)



methods are the most appropriate for achieving the objectives.<sup>11</sup> In a situation where there is no challenge to existing objectives and policies of a plan, there is a rebuttable presumption that they meet these requirements. While in this proceeding that situation applies to the majority of the objectives and policies of the District Plan, it does not apply either to the objectives and policies of PC 12 or to those in Chapter 12.5.B of the operative plan, since Guyco's case was that no special provision is necessary for the PMHA.

[18] We note that in this case no party denied that the settled objectives of the Far North District Plan were the most appropriate way to achieve the purpose of the Act. Nevertheless, having examined the provisions of the plan change against those objectives and policies, we shall, out of caution, also examine them against the provisions of Part 2 of the Act.

[19] We also note that the Environment Court in hearing an appeal must have regard to the decision that is the subject of that appeal.<sup>12</sup>

#### **The environment on which the provisions would take effect**

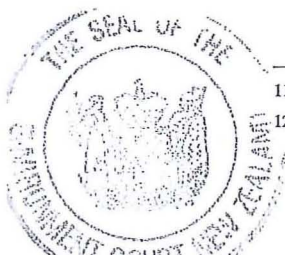
[20] The area which the Council proposes to identify as the PMHA occupies flat coastal land separated from the beachfront to the north-east by Marsden Road. It is bordered both to the east and west along Marsden Road by commercially zoned land. The area to the east of Kings Road is occupied by a cluster of shops and the Edgewater Palms apartments, while to the east of the site there are a number of other commercial properties. On the south-western boundary rise the bush-clad slopes of the Paihia Scenic Reserve.

[21] In the north-west of the PMHA is the site of St Pauls Church with its historic church-yard and beside it to the south east is a two-storeyed motel. The remainder of the area is occupied by residential-scale villa type buildings and bungalows set well back from the road. In addition to the scheduled Norfolk Pine, a mixture of native Pohutukawa and Norfolk pines together with open lawns soften the impact of built form. In its current state the land covered by the PMHA overlay has

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<sup>11</sup> RMA s32(3)

<sup>12</sup> RMA s290A





identifiable boundaries and is clearly distinguishable from bordering parts of the Commercial Zone<sup>13</sup>.

[22] As we have indicated the site contains very few physical remains above ground from the early period when it was most significant. St Pauls Church and its curtilage occupy at least a third of the site. There are also some limited remains indicating the outline of the house of William Williams and Colenso's printing workshop, in poor condition. The other scheduled items consist of markers of particular sites, including the scheduled Norfolk Pine which denotes the location of an original mission building. A response by the New Zealand Historic Places Trust to a proposal to create a Paihia Heritage Precinct succinctly states:

The built heritage within the heritage area is minimal.<sup>14</sup>

[23] However, that same response document indicates that the coastal terrace contains a significant amount of archaeological evidence. Further, it notes that in the absence of important individual buildings, the setting relative to the topography is the only reminder of the site's most significant period, and even this has been significantly altered over the past century and a half.<sup>15</sup>

[24] The landscape architects called by the parties, Mr Brown by the Council and Mr DJ Scott by Guyco and associated parties, agreed that the defining elements of the PMHA in landscape terms were:<sup>16</sup>

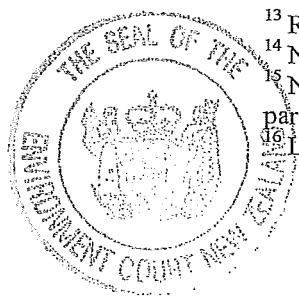
- dominant natural elements,
- beach and bay,
- vegetated backdrop and elevated topography,
- between these two elements... the coastal terrace which makes up the Paihia Mission Heritage Area,
- specimen trees adjacent to Marsden Road (pohutukawa, Norfolk pine, totara, and pepper tree).

<sup>13</sup> Refer Planning Maps 91A and HP 5 Planning Bundle

<sup>14</sup> NZ Historic Places Trust, Paihia Heritage Precinct proposals response documents, paragraph [7]

<sup>15</sup> New Zealand Historic Places Trust, Paihia Heritage Precinct proposals response documents, paragraphs [6] and [11]

<sup>16</sup> Landscape Architects Conference Statement, pages 1-2



[25] These witnesses further identified as key elements a modest residential scale of 1 or 2 storeys with limited site coverage, generous building setbacks and grassed front yards containing significant specimen trees; signs were limited and fences low. The overlay's focus on St Pauls together with its views both to the beachfront and to the Paihia Scenic Reserve are also key elements in its character.<sup>17</sup>

[26] Mr Brown noted that the spaciousness of the PMHA distinguishes it from the surrounding commercial area represented by the juxtaposition of the Edgewater Palms apartment complex, Super-Liquor outlet and café east of Kings Road, and the intensively developed commercial and visitor accommodation focussing on Marsden Road to the west of the Village Green, both with 6 metre setbacks from the road frontage.<sup>18</sup>

[27] Mr Scott, while of the view that the landscape and amenity qualities of the PMHA are appropriately described by the elements referred to in the joint witness statement, considered that these elements were not dependant on nor indicative of a 'heritage dominance' underpinning the landscape quality and amenity of the area, but simply represent the current situation resulting from previous development decisions of the various landowners.<sup>19</sup> That view could be thought to find some support in a paragraph written by Mr Brown.<sup>20</sup>

Although most of these remnants either post-date the Mission Station period – which ended in 1850 – or are considerably less than complete, nevertheless they add a veneer of historical context to this gateway area and augment its other amenity qualities.<sup>21</sup>

[28] We note particularly the use of the word 'veneer'.

[29] To be fair to Mr Brown, he expressed the opinion that heritage could not and should not be divorced from the wider amenity values of eastern Paihia, and that many of the elements that contribute to the visual character and appeal of the PMHA assist in maintaining both the presence of individual heritage sites and its overall historical ambience, even though what can be seen is the development pattern of a much later era of New Zealand history.

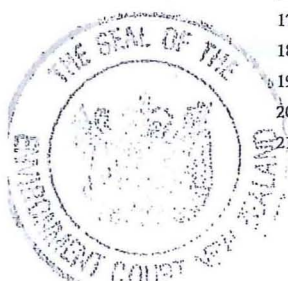
<sup>17</sup> Landscape Architects Conference Statement, page 2

<sup>18</sup> SK Brown, Evidence-in-chief, paragraphs [34]-[35]

<sup>19</sup> DJ Scott, Evidence-in-chief, paragraph [19]

<sup>20</sup> SK Brown, Evidence-in-chief, paragraph [35]

<sup>21</sup> SK Brown, Evidence-in-chief, paragraph [38]



## The effects of the various planning regimes proposed

### *Heritage and amenity effects*

[30] It is of course open to any or all of the landowners in the PMHA to allow their sites to remain in their present lightly-developed condition, whatever the District Plan permits. As Mr GH Wilson, the policy planner of the respondent council, told us, there was no take-up of the development opportunities offered by the reduction of the setback from Marsden Road to 9 metres in the 1992 Bay of Islands District Plan.<sup>22</sup> Guyco mounted its case on the basis that PC12 significantly reduces the development potential of the land, that the land concerned comprises key waterfront properties for commercial and tourist-related development, and an offer by Mr Guy to protect a notable tree on the site of 18 Marsden Road subject to a proviso that the area between the drip line of the tree and the front boundary of the property should be available for development.<sup>23</sup> For these reasons we have undertaken our assessment on the basis that over time the potential development opportunities provided by the plan, whatever we ultimately decide they should be, will be fully or close to fully utilised.

[31] Mr Scott conceded that, under the Commercial zoning proposed by Guyco and associated parties, many of the attributes which are key to the present character of the site would be lost. These include generous setbacks, grassed front yards, and limited site coverage. Equally we do not think the rhythm and separation of buildings would be maintained by simple separation of buildings at site boundaries. Mr Scott also acknowledged, in terms of the focus on St Pauls Church, that views of it from Marsden Road would be significantly diminished if the setback were reduced to 10m and a 30° recession plane imposed, and even more diminished if a development scenario with modified rules which he himself had proposed were adopted.<sup>24</sup> Mr Scott acknowledged that the sense of place and the character of the experience of a person in the vicinity of the William Williams house ruins would change completely under the commercial scenarios he put forward.<sup>25</sup>

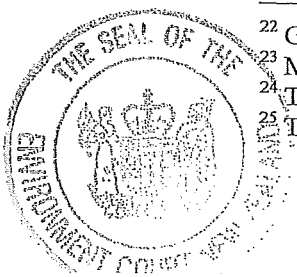
[32] However, any of the other planning regimes proposed would also bring change to the experience of anyone on or close to the site. Mr Brown told the Court

<sup>22</sup> GH Wilson, Evidence-in-chief, paragraph [45]

<sup>23</sup> Memorandum of counsel for Guyco Limited, 14 November 2013, paragraph [3], item 4

<sup>24</sup> Transcript, pages 297 – 300

<sup>25</sup> Transcript, page 301





that the 15m setback from Marsden Road, endorsed in the decisions version of the plan change, was likely to reduce both the green apron fronting Marsden Road, the visual presence of St Pauls Church and the Williams house/Colenso workshop site, and diminish the strength and continuity of the ridge/forest backdrop afforded by the Paihia Scenic Reserve.<sup>26</sup>

[33] Mr Brown also considered that revisions to the sunlight control rule, so that it no longer applied to boundaries with other commercial properties, would hasten the rejuvenation of the PMHA by facilitating the amalgamation of sites, enabling better inter-site integration, and making possible the provision of amenities such as underground parking which were likely to be too expensive for some of the narrow sites in the PMHA on their own. A consequence of this would be that some of the existing heritage character and amenity of the area would be subtly undermined by the modernisation and commercialisation thus promoted.<sup>27</sup> However Mr Brown also considered that the proposed rule would maintain visual access and permeability to the sites of individual heritage items.<sup>28</sup>

[34] Clearly, greater accessibility and openness would be promoted by the more stringent controls sought by the Paihia Heritage Precinct Support Society, although Mr Brown's appendix 2 indicates considerable areas that would be available for development, even under the setback rule favoured by the society. Against this, Mr Brown, who would favour a 20m setback in an ideal world, accepted that this would impose a very real restriction on the redevelopment of 18, 22, 24 and 30 Marsden Road because of their size and configuration<sup>29</sup>. But even under the scenario favoured by the Society, there would be change.

[35] In terms of the effects of these changes on the historic heritage of the site, the Court heard expert evidence from Dr BD Gilling, an historian called by Paihia Heritage Precinct Support Society. Dr Gilling was asked, what outside the area of the properties controlled by St Pauls parish and the society, provides memory to the site. He responded "*very little, if anything.*"<sup>30</sup> He had already accepted that there were no buildings extant in the PMHA that related to the era before 1850.<sup>31</sup> Dr Gilling's

<sup>26</sup> SK Brown, Evidence-in-chief, paragraph [52]

<sup>27</sup> SK Brown, Evidence-in-chief, paragraphs [60] and [63]

<sup>28</sup> SK Brown, Evidence-in-chief, paragraph [59]

<sup>29</sup> SK Brown, Evidence-in-chief, paragraph [55]

<sup>30</sup> Transcript, page 142

<sup>31</sup> Transcript page 141





concern was that the more the visual context of the mission site was impinged upon, the more remote from the experience of the time was the experience of the person on the spot.<sup>32</sup> In other words, there is little left, and the more intensive the development that occurs in future, the less that “little” becomes in the experience of the person viewing it.

[36] We acknowledge that conclusion. The question for us then becomes whether the preservation of a greater proportion of that “little” justifies the costs associated with it. That question becomes more significant in the light of the evidence of Professor SS Milne, professor of tourism at the Auckland University of Technology, who was called by the Paihia Heritage Precinct Society. When shown what development could occur under the rules of PC 12, he described the results as a number of heritage elements “pock-marked on a much larger area of development.” He considered it much more difficult for a visitor to get a sense of place with that kind of development.<sup>33</sup>

### *Economic effects of the various planning regimes*

[37] Part of Guyco’s case was that the Council had failed to bring to account the economic losses both to the landowners through lost development opportunity, and to the community in terms of reduced ability to provide more extensive tourist-related facilities in the PMHA. In cross-examination Mr Cavanagh was critical of the failure of the Council to provide specialist economic assessment to quantify these losses,<sup>34</sup> and Mr BW Putt, a town planner called by Guyco stated that there had been no assessment of the benefits and costs of the policies and methods proposed by PC 12 compared to the benefits and costs for the community at large from the operation over this land of unfettered commercial-zoned provisions.<sup>35</sup>

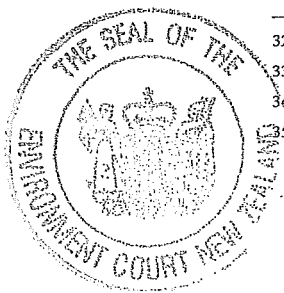
[38] No party has brought to this case such an analysis, though common sense tells us that the range of development opportunities available under the provisions of PC 12 would be somewhat less than if development were allowed in accordance with commercial zone rules. Guyco called evidence from Mr MC Rendell earlier mentioned, a Paihia real estate agent and owner of 40 Marsden Road (a property not

<sup>32</sup> Transcript page 146

<sup>33</sup> Transcript, page 206

<sup>34</sup> Guyco, opening submissions, paragraphs [83] and [89]

<sup>35</sup> BW Putt, Evidence-in-chief, paragraph [4.12]



subject to these proceedings). His evidence was that there is a shortage of commercial land in Paihia for future development of retail and tourist accommodation buildings. He noted in particular the lack of vacant retail space on the Paihia waterfront.<sup>36</sup>

[39] From his retail estate experience Mr Rendell had perceived a lack of good quality, high-end accommodation in Paihia. He considered that the appropriate place for provision of such accommodation was on the waterfront; in this context the land subject to PC 12 was important for the future development of tourist facilities in Paihia but would be seriously constrained by the restrictions the Plan Change involved.<sup>37</sup>

[40] Professor Milne considered the area of most demand was not necessarily for a large-scale five-star property, but rather for boutique style high-end accommodation of up to 20 rooms, creating a relatively exclusive sort of environment.<sup>38</sup> Mr Putt conceded under cross-examination that with the Plan Change as proposed by the Council, development of this sort could occur on the subject land.<sup>39</sup>

[41] In assessing the potential economic disadvantages of the proposed Plan Change, we also note Mr Rendell's evidence that in the case of an apartment building on land with the attributes of this site, seaward units would command the highest price as a general rule.<sup>40</sup> Mr Putt accepted that the extent of seaward frontage was going to remain the same, whatever the setback.<sup>41</sup>

[42] There was a certain inconsistency in the Guyco case. The proposition advanced in cross-examination that the land, even with the restrictions on use imposed by PC 12 faces considerable change, sits ill with the rather exaggerated claim in the appeal document and in the evidence of Mr Putt that the plan change provisions challenge the right of 'reasonable use' in terms of s85 of the Act.<sup>42</sup>

[43] In Mr Putt's estimation, admittedly on the basis of "*some fairly basic sort of planner's arithmetic*," the plan change will limit the floor area available for

<sup>36</sup> MC Rendell, Evidence-in-chief, paragraph [9]

<sup>37</sup> MC Rendell, Evidence-in-chief, paragraph [13]

<sup>38</sup> Transcript, page 198

<sup>39</sup> Transcript, page 337

<sup>40</sup> Transcript, page 288

<sup>41</sup> Transcript, page 339

<sup>42</sup> BW Putt, Evidence-in-chief, paragraph [4.25]



commercial use in the PMHA to a third of what would otherwise exist<sup>43</sup>, and in doing so limit the range of uses available to landowners in the area. However, the evidence is that a number of potentially the most profitable development options remain, including at least one identified by an expert in tourism as badly needed in the wider district. It is likely that the landowners will not receive as high a return from their land as they would if only Commercial zoning applied, although there is no evidence on which we can estimate the extent of that loss. It is also likely that the land would service fewer visitors, and so the input from it into the wider community would be reduced, again by an unquantifiable amount.

[44] Against those losses, we must set any gain from increased “heritage tourism” which could result from the enhanced protection to the heritage of the site afforded by the proposed plan change. Professor Milne drew attention to a strong seasonal bias in visitor arrivals, with the bulk of visitors coming to Northland in the summer months. To increase the attraction of the area to visitors, it should add to what he described as the “standard list of sea-based activities, landscape and nature”.<sup>44</sup> He considered that a more diversified tourism offering, including better use of the region’s heritage resources, had the potential to extend the ‘shoulder-season’ on either side of the summer peak.<sup>45</sup>

[45] Professor Milne also referred to research by the Travel Industry Association of America which showed that, on average, visitors to historic sites stayed longer in destinations and spent more money than other kinds of tourist. That tendency has been confirmed by recent research by the New Zealand Tourism Research Institute in both New Zealand regions and the South Pacific.<sup>46</sup>

[46] It was Professor Milne’s evidence that Northland as a whole with its range of heritage experiences and sites was well placed to meet the growing demand for authentic tourist experiences. Paihia, however, did not presently have much to offer within that heritage mix. Professor Milne wrote that the proposed Paihia Mission Historic Area constituted such an offering with the potential to stimulate tourist demand.<sup>47</sup>

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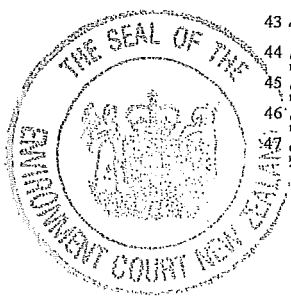
<sup>43</sup> TOP p 353

<sup>44</sup> SS Milne, Evidence-in-chief, paragraph [3.10]

<sup>45</sup> SS Milne, Evidence-in-chief, paragraph [3.11]

<sup>46</sup> SS Milne, Evidence-in-chief, paragraph [6.1]

<sup>47</sup> SS Milne, Evidence-in-chief, paragraph [4.10]



[47] We have one reservation about Professor Milne's evidence on the PMHA. It appears to us to have been based on the assumption that the area would remain rather as it is now.<sup>48</sup>

Paihia's proposed Mission Heritage Area is an area of enormous local and national historic significance both to Māori and Pakeha. Grassed areas and mature trees contribute to the area's character. The combination of resources found in the area is ideally suited to precinct-type heritage protection and development.

[48] We have already noted his view that if the area were developed to the full extent allowed by PC 12, the visitor would find it much more difficult to get a sense of place.

[49] We summarise our findings on the effects of the various planning regimes proposed, in the following way. The PMHA covers a site where important events in the early period of European colonisation occurred. It contains few remnants of that era, but the open, low-density development that has occurred so far still enables the visitor to get a sense of place and the context of the remaining structures of the period. That would change completely if a Commercial zone enabled by the rules favoured by Guyco was imposed on the site. However, PC 12 in its present form would reduce the range and flexibility of commercial activities on the site and would reduce, to an extent we are unable to quantify with precision, the level of contribution the site would make to the provision of tourist-related facilities in the area. The extent to which this reduction will be offset by the effect of visitors exploring the site's historic heritage features also remains uncertain, but it is likely to be less to the extent that development in accordance with PC 12 would reduce the ability of people to interpret the area and its history.

[50] We now explore the range of effects in the context of the Far North District Plan.

### ***The Far North District Plan***

[51] Tourism and the development of resources to support it, and the preservation of heritage, are both significant themes in the district plan. Ideally, the two go hand in hand. The introduction to the plan includes a statement of strategic direction which

<sup>48</sup> SS Milne, Evidence-in-chief, paragraph [5.4]





recognises tourism as one of the three major industries of the district, and attaches importance to development that will improve employment levels.<sup>49</sup> But that same statement of strategic direction recognises that history and geography of the area are the main focus of tourism;<sup>50</sup> in consequence the protection and maintenance of the heritage values of the Far North is part of the district's strategic direction.<sup>51</sup> Importantly, such protection and maintenance is to be in a manner that enables sustainable development, and enablement of the use of resources is to ensure adverse effects on the environment are minimised.<sup>52</sup>

[52] These themes find expression in the objectives and policies of the plan which, as we shall see neither sanction development which fails to control appropriately effects on the environment, including heritage resources, nor assert the primacy of heritage over all other considerations.

[53] In its chapter on the urban environment, the plan notes that the various urban areas within the district have distinct and often unique amenity values. It outlines the approach of the plan as protecting amenity by establishing separate zones for housing, industry, and commerce, and establishing appropriate thresholds.<sup>53</sup> One of the outcomes anticipated by this approach is that urban areas will be sustainably developed while preserving the distinctive character and amenity of each area.<sup>54</sup>

[54] There are objectives of ensuring that urban activities do not cause adverse effects on the district's natural and physical resources,<sup>55</sup> and of avoiding, remedying or mitigating the adverse effects of activities on the amenity values of existing urban environments.<sup>56</sup> A further objective is that where the potential effects of urban activities will not impact adversely on the character and amenities of these areas, they be enabled.<sup>57</sup>

<sup>49</sup> Far North District Plan ("FNDP") 1.3.1

<sup>50</sup> FNDP 1.3.3

<sup>51</sup> FNDP 1.3.5

<sup>52</sup> FNDP 1.3.9

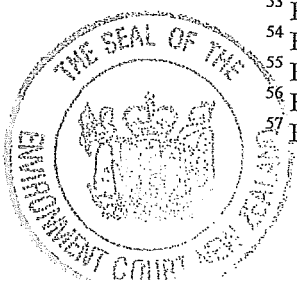
<sup>53</sup> FNDP, chapter 7 context

<sup>54</sup> FNDP, 7.2.1

<sup>55</sup> FNDP, Objective 7.3.1

<sup>56</sup> FNDP, Objective 7.3.3

<sup>57</sup> FNDP, Objective 7.3.4



[55] Relevant policies which flow from these objectives are that the amenity values of existing and newly developed areas be maintained or enhanced,<sup>58</sup> that new urban development avoid (amongst other things) adversely affecting heritage resources<sup>59</sup> and that urban areas with distinctive characteristics be managed to maintain or enhance the amenity derived from those characteristics.<sup>60</sup>

[56] The plan contains a subsection dealing specifically with Commercial zones. It contains amongst other matters an objective and four policies which are described as supplementing those in the more generic section in the urban environment chapter. The objective is for commercial areas accommodating a wide range of activities that avoid, remedy or mitigate adverse effects on other activities in the Commercial zone and on the natural and physical resources of the district.<sup>61</sup> Relevant policies are to limit the range of activities within the Commercial zone only by the need for the effects generated by a particular activity to be consistent with other activities in the zone<sup>62</sup> and for standards to be applied to protect visual and environmental amenity within the Commercial zone, and the amenity of adjacent areas.<sup>63</sup>

[57] A section of the natural and physical resources section of the plan deals with heritage. The expected outcome of its provisions include recognition and retention of the heritage values of identified historic buildings, objects or features, and improved knowledge and understanding of heritage resources.<sup>64</sup> There are objectives to:

- (a) protect and retain the heritage values of resources, including those of an archaeological, architectural, cultural, historic, scientific and technological nature (Objective 12.5.3.1);
- (b) conserve the historic and amenity values of settlements with significant historic character (Objective 12.5.3.4);
- (c) ensure that land use management practices avoid adverse effects on heritage values and resources (Objective 12.5.3.7).

<sup>58</sup> FNCP, Policy 7.4.5(c)

<sup>59</sup> FNDP, Policy 7.4.5(c)

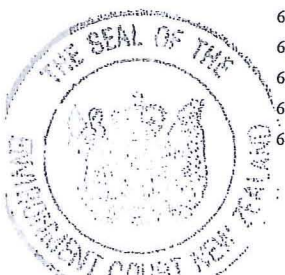
<sup>60</sup> FNDP, Policy 7.4.7

<sup>61</sup> FNDP, Objective 7.7.3.1

<sup>62</sup> FNDP, Policy 7.7.4.2

<sup>63</sup> FNDP, Policy 7.7.4.3

<sup>64</sup> FNDP, 12.5.2.1



[58] Significantly, one of the implementing policies is that a heritage resource be recognised as a complete entity whose surrounds or setting may have an important relationship with the values of the resource. (FNDP 12.5.4.1) By way of explanation the policy outlines instances where the setting is important – though the explanation is included in the policy itself. There are also policies that where areas have significant historic character, their heritage values are not compromised by inappropriate activities (12.5.4.8), and that settlements that contain a high degree of heritage value be protected from subdivision, use or development that would adversely affect those values and their landscape setting (12.5.4.11).

[59] In interpreting these policies we note that in giving context to the heritage provisions, the plan states:<sup>65</sup>

For the purposes of the plan, heritage resources include:

- Notable Trees;
- Historic Sites, Buildings and Objects;
- ...
- Heritage precincts.

[60] A similar non-exclusive definition is found in the definitions section of the plan.<sup>66</sup> We have considered whether the word ‘site’ in this section of the plan is used in the way the term is defined in the definitions section of the plan, that is, “*an area of land comprised of one allotment on an approved survey plan of subdivision or two or more contiguous allotments held... in such a way that the allotments cannot be dealt with separately without the prior consent of the Council...*”<sup>67</sup> That strict definition is not entirely compatible with a policy:<sup>68</sup>

...that landowners shall be encouraged to protect and enhance heritage sites on their land.

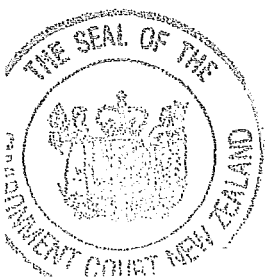
[61] We conclude that the word site in the context of the heritage provisions of the plan may need to be interpreted in the more general sense of a piece of land where something is or is intended to be located. In any event the term “heritage precincts” has the connotation of a wider geographic area than the definition of “site” captures.

<sup>65</sup> FNDP, Chapter 12.5 - Context

<sup>66</sup> FNDP, Chapter 3, page 8

<sup>67</sup> Chapter 3, page 15

<sup>68</sup> FNDP, Policy 12.5.4.10

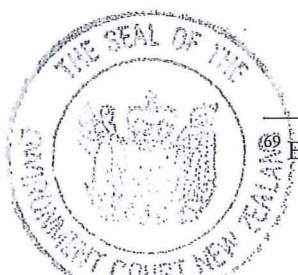




[62] We find that the heritage objectives and policies do not readily lend themselves to the approach suggested by Guyco through the evidence of Mr Putt that their emphasis is on the built physical environment and the values of settlements with significant historic character.<sup>69</sup> The policies, as we have indicated, look to avoid compromising the heritage values of areas with significant historic character and to recognise heritage resources as a complete entity whose surrounds and setting may relate significantly to the resources' value. Such considerations are likely to assume even greater importance where the only true reminder of the most significant period in the history of the PMHA is the relationship of its albeit modified setting and its topography.

[63] Turning to the relevant urban environment and commercial objectives and policies it is fair to say that there is an emphasis on enabling activities. That is found in an objective for urban environments and perhaps even more so in the policy for the Commercial zone to restrict the range of activities only (our emphasis) to the extent necessary for the effects to be consistent with other activities in the zone. But alongside that emphasis there is also strong emphasis on avoiding adverse effects and on maintaining the amenity value of existing urban environments. Further, in commercial areas the environment objectives and policies which look to those outcomes are given effect to by a policy of applying standards to protect visual and environmental amenity within the zone and neighbouring zones.

[64] There appear to be two factors involved here. A reluctance to limit the range of activities is accompanied by a concern about scale of effects – which are to be controlled by standards. We did not understand any party to be contesting the proposition that commercial activities should be allowed to establish on the land or to be seeking limits on their range. What we understood to be at issue is the appropriate standards to apply, particularly on the extent and character of the built form that houses the activity. In that respect the plan acknowledges in general terms that different standards need to apply to different areas, if the amenity and character of each area is to be preserved (to use the phrase in Urban Environment Objective 7.3.1). After all, the plan applies within Paihia five different Commercial sub-zones. Nothing in the structure of the plan sets itself against applying the sort of rules the Council proposes for the PMHA overlay, should the evidence support it.



<sup>69</sup> BW Putt, Evidence-in-chief, paragraphs [2.9]. [2.10]



[65] We admit to some difficulty in terms of how to apply policies which look to avoid adverse effects on the amenity values of existing urban environments, and the amenity values derived from the distinctive character of urban environments. It is clear that the district plan envisages that the activity taking place on the PMHA land will change. Not only would the change to commercial activity increase considerably the “busy-ness” of the area, it would permit a considerable change to the balance of built form to open space even under the most restricted set of rules which are before us. Nonetheless we do not think the objective and policy couched in these terms envisage, to use Mr Scott’s phrase “*that the sense of place and character will completely change.*”<sup>70</sup> It is difficult to see how a planning regime indistinguishable from that imposed upon the surrounding area will maintain or enhance the amenity derived from the distinctive characteristics of the PMHA.

#### Other statutory documents

[66] Mr Putt described the Northland Regional Policy Statement (“RPS”) as giving general encouragement and direction to achieve protection of historic heritage, but also looking to the use of physical resources to provide a basis for the regional economy through tourism.<sup>71</sup> These are the concerns mirrored in the District Plan – and in this case they pull in different directions. The only specific provision from the Statement cited in evidence<sup>72</sup> was an objective to preserve and, where possible, enhance the cultural, historic and amenity values of heritage features. What outcome gives effect to the RPS turns on the extent to which the site, as potentially developed in accordance with PC 12, is either itself a heritage feature or lends amenity to the particular physical remnants of an earlier era found on the site.

[67] A number of policies in the proposed Regional Policy Statement emphasise the context of historic heritage resources. Mr Wilson referred to a policy that requires historic heritage, features and resources to be identified, taking into account among other characteristics context and identity,<sup>73</sup> and also a policy that development should be designed in a way which (among other things) maintains and enhances the sense of



<sup>70</sup> Transcript, page 301

<sup>71</sup> B.W Putt, Evidence-in-chief, paragraph [4.2]

<sup>72</sup> GH Wilson at paragraph [74] citing an objective in s24.3 of the RPS

<sup>73</sup> Northland proposed Regional Policy Statement (“PRPS”), Policies 4.6.3, 5.1.1

place and character of the surrounding environment.<sup>74</sup> In reaching our final conclusion we have kept these policies of the PRPS in mind.

[68] Mr Wilson also referred us to Policy 17 of the NZ Coastal Policy Statement, which sets out a number of ways in which historic heritage in the Coastal Environment is to be protected, including the management of historic sites.<sup>75</sup> We note that is as distinct from provision for historic landscapes, which we do not regard as brought into play in this case. We note that an objective of the policy statement is to enable people and communities to provide for their well-being through subdivision use and development, recognising that some uses and development which depend on the use of natural and physical resources in the coastal environment are important to the social, economic and cultural well-being of communities.<sup>76</sup>

[69] Overall, we do not consider that the higher order policy documents require a response different from that envisaged by the district plan.

## *Part 2*

[70] In considering Part 2 matters, we consider that the following provisions are significant.<sup>77</sup>

Under s7 the requirement to have particular regard to:

- ...(b) the efficient use and development of natural and physical resources;
- (c) the maintenance and enhancement of amenity values;
- ...(f) the maintenance and enhancement of the quality of the environment;
- (g) any finite characteristics of natural and physical resources;

Under s6 the requirement to recognise and provide for:

- (a) the preservation of the natural character of the coastal environment;
- ...(f) the protection of historic heritage from inappropriate subdivision, use and development.

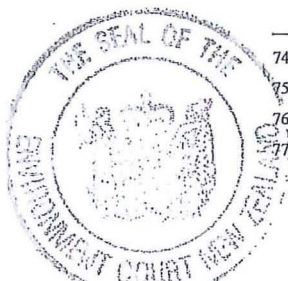
[71] None of these s7 matters are of themselves definitive in this case. The historic heritage of the site, such as it is, is a finite resource, but so is coastal land in

<sup>74</sup> PRPS Policy 5.1.1

<sup>75</sup> NZCPS Policy 17

<sup>76</sup> NZCPS Objective 6

<sup>77</sup> RMA, 1991, ss6 and 7



Paihia suitable for the development of additional tourist facilities. It might on the one hand be inefficient to preclude maximum use of the resource in an industry whose development is significant for Northland, but on the other it might be inefficient to diminish the value of a resource which would encourage people to spend time in Paihia exploring its heritage.

[72] The evidence is that the character of the PMHA from which it derives its present amenity could be completely changed if the Guyco case was successful, but it could also be substantially changed if the possibilities offered for development by PC 12 were implemented. Amenity values are defined in the Act as “...*those natural or physical qualities and characteristics of an area which contribute to people’s appreciation of its pleasantness, aesthetic coherence and cultural and recreational attributes*. We imagine that even if it is seen as an enclosure, views into St Pauls Church and cemetery which Mr Brown thinks would remain with a 15m setback on adjacent land, together with open space on Marsden Road,<sup>78</sup> would add to the pleasantness of people’s experience of the area from that road, but we wonder whether heritage items ‘pock-marked’ over a wider area of development would greatly assist appreciation of the aesthetic coherence or cultural attributes of the area. In other words, the gain for amenity values secured by PC 12 is tangible but limited’ particularly at the north western end of the PMHA.

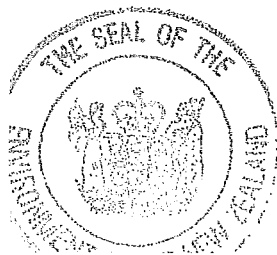
[73] Turning to the need to recognise and provide for the protection of historic heritage from inappropriate subdivision, use and development, we note the definition of historic heritage<sup>79</sup> means those natural and physical resources that contribute to an understanding and appreciation of New Zealand’s history and culture, deriving from any of the following qualities:

- (i) archaeological
- (ii) architectural
- (iii) cultural
- (iv) historic
- (v) scientific
- (vi) technological; and

(b) Includes -

<sup>78</sup> SK Brown, Evidence-in-chief, paragraph[51]

<sup>79</sup> RMA 1991, s2



- (i) historic sites, structures, places and areas; and
- (ii) archaeological sites; and
- (iii) sites of significance to Māori including waahi tapu; and
- (iv) surroundings associated with the natural and physical resources.

[74] The PMHA clearly comes within this definition. It is an area where important events in New Zealand history occurred including prior to the signing of the Treaty of Waitangi in 1840. But apart from the already protected items the most significant features are the topography and the setting. We understand the concern of Dr Gilling that the greater the extent of development that takes place on the land the further removed will be the experience of the person standing on the land from experience of the mission station in the second quarter of the 19<sup>th</sup> century. That tells against Guyco's position. But the significance that this has in the final outcome is tempered by the comment in the New Zealand Historic Places Trust response document that the setting relative to the topography has been significantly altered over the last century and a half, and the fact that it will be further modified if development occurs to the extent contemplated by PC 12. Under any scenario the experience of the person on site will be remote from the experience of people in the 19<sup>th</sup> century.

[75] On balance the relevant matters in ss6 and 7 tell, but not strongly, against development of the site under Commercial zone rules, undifferentiated from the commercial areas adjacent to the PMHA. But there remains a real question of the extent to which the gains in amenity values, and the protection of historic heritage to be derived from PC 12, are counterbalanced by a reduction in the ability of the landowners and the community to provide for their economic well-being. The extent of this reduction was not quantified, and in these circumstances we have had some difficulty in determining how best the conflicting matters which bear on our decision are to be incorporated into it. Our broad conclusion is that, while there are benefits from distinguishing the PMHA from the surrounding areas, these benefits justify a somewhat lesser distinction than that proposed in PC 12.

***Section 290A: The decision under appeal***

[76] In a finely balanced case, the Environment Court does not lightly set aside or modify a first instance decision. But the Court has the benefit of cross-examination, which is not available to the Council when it makes its decision. In this case cross-examination revealed interesting responses to the effects of Plan Change 12





and the changed environment it would permit. For that reason a somewhat different response to the issues may be justified.

***Section 32: The most appropriate planning provisions for the site***

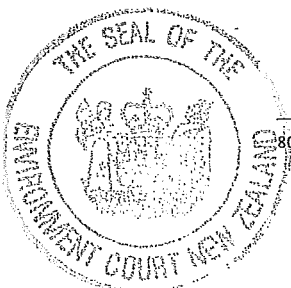
[77] Under s32 we are required to consider the extent to which each objective is the most appropriate way to achieve the purpose of the Act, and whether having regard to their efficiency and effectiveness the policies and methods are the most effective for achieving the purpose of the objectives. The arguments in this case were directed to the general issue of whether any special provision for the PMHA is warranted at all. Having determined that the purpose of the Act and the objectives and policies not under challenge of the plan would not be served by treating the area as simply another part of the Commercial zone of Paihia, we have considered the proposed objectives for the area, though we record comparatively little guidance on this was received from the parties on specific wording. However, given that the extent of development permitted under all the planning regimes promoted by the various parties, we consider that the words “spacious surroundings” in the PC 12 Decisions Version do not sit well in Objective 12.5B.3.2, and should be deleted.

[78] Despite the finding that those words should be deleted from the objective, we hold that the policies giving effect to them can remain unchanged. However, we consider a somewhat less restrictive approach to method to be appropriate, particularly on the sites where heritage resources are less evident or significant. In order to analyse the competing regimes asserted by the parties we now describe the Decisions Version PMHA and the Commercial zone development controls more fully than previously<sup>80</sup>.

**Paihia Mission Heritage Area Overlay Controls**

[79] The Overlay’s permitted activity development controls include the following significant provisions:

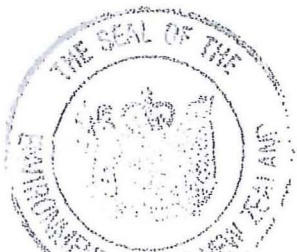
- (a) 8.5m maximum Height complemented by a recession plane commencing at a point 3.5 metres above ground and 15 m in from the road boundary rising to 8.5 metres at 20m from the road (Rule 12.5B.6.1.1).



- (b) A Sunlight control that no building may penetrate a 45 degree recession plane commencing 2m above a site boundary adjoining land (relevantly) zoned Conservation [being the Paihia Scenic Reserve] or a site containing a notable tree, historic buildings or objects listed in the Plan (Rules 12.5B.6.1.2(a) and (b)).
- (c) A Setback from Boundaries control that buildings be a minimum 15m from the road; buildings on sites with a road frontage less than 25m to be set back a minimum 3m from any one side boundary; and buildings on sites with a road frontage greater than 25m to be set back a minimum of 3m from both side boundaries (Rule 12.5B.6.1.3).
- (d) A Visual Amenity control that outdoor areas used, amongst other things, for parking and outdoor storage associated with non-residential activities, be 15m from the road boundary; at least 50% of the area 15m back from the road boundary to be landscaped predominantly in lawn or specimen trees; fencing on the road boundary and first 10m of side boundaries to not exceed 1m height (Rule 12.5B.6.1.4).
- (e) A Building Coverage control limits the maximum net ground floor area of all buildings on a site to no more than 50% of the gross site area (Rule 12.5B.6.1.5)

[80] The Decisions Version deleted the controlled activity provisions and established restricted discretionary controls for each of the five preceding matters with council's discretion restricted in each case to specified matters (Rule 12.5B.6.2). It suffices to note that the RDA provisions allow for a degree of relaxation in the permitted activity measures, with the following being especially apposite:

- (a) the maximum height recession plane commencing 10m from the road frontage;
- (b) the sunlight recession plane commencing at a point 3m high on a site boundary;
- (c) building setbacks from boundaries reducing to 1.3m;



- (d) building coverage not to exceed 60% of gross site area.

[81] Significantly, the Decisions Version also amended the notified discretionary activity provisions by allowing for Comprehensive Development Plans where new development would not comply with the rules for permitted or restricted discretionary activities. An application was authorised for new development on single or multiple sites. The rule specified information to be provided and set out four broad matters to which the consent authority is to have regard. There was no express reference to the Plan's general historic heritage or the PMHA objectives and policies, although these could be expected to be considered under s.104 in the normal way (Rule 12.5B.6.3).

### **Commercial Zone and Commercial A1 sub-zone Controls**

[82] The Commercial A1 sub-zone controls which the Guyco appellants sought and Mr Putt supported, are fewer, different from and generally more enabling of built development than the PMHA provisions. (We will have more to say about assertions by the Guyco parties that there is some point of difference between Commercial Zone provisions *simpliciter* and Commercial A1 sub-zone provisions). Although the maximum permitted height for commercial is the same, the Sunlight control does not apply to land zoned Commercial (Rules 7.7.5.1.2, .2.1 and 7.7.5.3). The Visual Amenity Rule 7.7.5.1.3 requires 50% of a 3m strip parallel to the road frontage to be landscaped but there is no requirement for a minimum depth of front yard to be kept free of parking or outdoor storage (beyond screening). The minimum permitted building setback from a road boundary is 6m (Rule 7.7.5.1.4(b)(i)). Notably, commercial has no permitted maximum building coverage control.

[83] There is provision in Commercial in Paihia on a restricted discretionary activity application, to increase building height to 10m, with the discretion to consider adverse effects on heritage values restricted to proposals within or adjacent to an Heritage Precinct. Of some significance, the PMHA is an "Area" not a "Precinct". In other respects the council's discretion is restricted to the separation distance between buildings, landscaping and screening (Rule 7.7.5.3.1(b)(ii)). By Rule 7.7.5.3.3 the Visual Amenity matters over which council has restricted its discretion are only tangentially concerned with historic heritage (visual effects, landscaping). In Rule 7.7.5.3.4, the "setback from boundaries assessment criteria" are largely irrelevant, although the Guyco appellants would add the degree to which "buildings recognise and enhance the existing landscape and built elements" and



“activate the street frontage”. Significantly, the those appellants also seek to reduce the road frontage building setback to zero provided buildings erected in the first 6m of the site do not exceed a height of 5m.

### **Discussion and Findings**

[84] Having considered the extensive evidence earlier traversed and related submissions, and been materially assisted by our site visit, we have concluded that the key matters requiring management to implement relevant objectives and policies and adverse effects on the environment are:

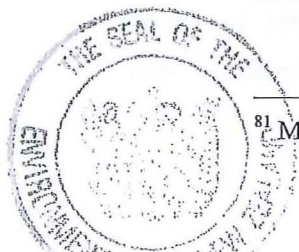
(a) The extent to which built development recognises and provides for the protection of the historic heritage resources present at 28 and 36 Marsden Road (the Trust land containing Williams’ stone dwelling ruins and St Paul’s church) and scheduled Norfolk Island pine on the Williams Historic Reserve managed by the Council<sup>81</sup>. We find that the critical neighbouring sites are 24, 26, 30 and 32 to 34 Marsden Road, because numbers 26, 30 and 32 to 34 directly adjoin scheduled sites, and number 24 is separated from the Trust land by the pan-handle access to Number 26 and adjoins the scheduled tree on Council reserve.

(b) The extent of any setback on the Marsden Road frontage to preserve views into and from St Pauls and an appreciation of its historic heritage resources.

[85] When evaluating the competing outcomes contended for, it is necessary that we consider not only what the permitted activity controls for the PMHA and Commercial zone would enable, but also their respective restricted discretionary and discretionary activity provisions, as there is a high probability land owners will use the latter to optimise development returns.

[86] Building mass, dominance and the location of development on adjoining sites will determine the extent to which persons at 28 and 36 Marsden Road appreciate the sites’ historic heritage and amenity values. Our understanding of these matters was materially assisted by the multi-discipline evidence received, including supporting graphics and in particular Exhibits 1A and 1B. In these respects we find that:

<sup>81</sup> Ms Baguley, Opening Submissions for the Council [32]





- (a) The 2 storeys enabled by the 8.5m maximum restricted discretionary activity height under PC 12 is likely to be more compatible and respectful of heritage and amenity values than the 3 storeys enabled by the corresponding Commercial restricted discretionary activity provision. 8.5 metres provides the opportunity for building bulk to be better mitigated by boundary planting and to reduce the potential for over-viewing.
- (b) The PMHA sunlight (permitted and restricted discretionary) rules apply to sites containing scheduled historic buildings and objects and would require development to be set back from the boundaries of Numbers 28 and 36 to varying degrees, with one assessment criterion specifically addressing heritage effects and another with “visual domination, overshadowing, [and] loss of privacy”. The Commercial zone has no corresponding control.
- (c) Under the PMHA permitted and restricted activity rules, development at No’s 34 and 26 Marsden Road would be set back from side boundaries by the minimum distances given above. Again, Commercial has no corresponding control. There are also significant differences in the minimum setbacks required from the Marsden Road frontage under the competing “regimes”. For the PMHA the 15m and 10m minima for permitted and restricted discretionary activities respectively, would have the positive effect of helping maintain sight lines to and from the St Pauls Church site. Under the commercial zonings zone the corresponding permitted activity control is 6m with an unlimited diminution capable of being considered as a restricted discretionary activity under Rule 7.6.5.3.3. As noted above, neither of the two restricted discretionary activity assessment criteria in the operative commercial provisions are concerned with historic heritage or related amenity considerations. The two additional assessment matters sought to be added by the appellants would not redress this. They are concerned with how development activates and addresses the road frontage, factors that are likely to support development close to the street akin to that illustrated in Exhibits 5 and 6. They would also enable development up to 5m high on the Road frontage, including for example, at Number 34. We find provisions of this type would have the effect of closing in the St Paul’s site, thus detracting from the public’s appreciation of its historic heritage values.

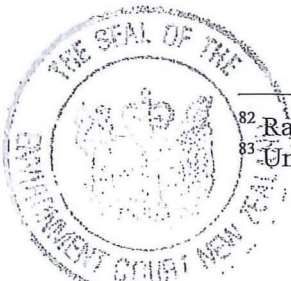


- (d) The PMHA provisions enable parking and outdoor storage, for example within the 15m Visual Amenity setback from Marsden Road, to be considered as a restricted discretionary activity. Effects on heritage items and notable trees, the extent to which vegetation and lawns are retained, and the scale of perimeter fencing, are amongst the matters over which there is discretion. We are not confident that the corresponding Commercial Zone (or Commercial A1 sub-zone) provisions either separately or in junction with the Setback from Boundaries controls (operative and proposed) would be the most appropriate way of dealing with these matters in order to maintain sight lines into and from St Paul's and a level of amenity commensurate with the appreciation of its heritage values<sup>82</sup>.
- (e) The PMHA maximum Building Coverage controls, be they for permitted activities or on a restricted discretionary application, provide a further and fundamental point of difference with the commercial provisions. The absence of an commercial limit on building coverage as a proportion of gross site area creates the potential for adverse visual dominance and over-viewing effects, subject only to the mitigation of applicable bulk and location controls. By comparison, the limit on built development that applies under the PMHA (50 – 60%)<sup>83</sup> is more conducive to creating a respectful relationship between neighbouring development and the Trust land/St Pauls heritage resource be it in respect of a 2 storey permitted activity with ground level parking or a 2 storey development with a half level basement parking rising to the full 8.5m limit.

[87] The preceding analysis has led us to the conclusion that the PMHA provisions generally afford a better and more appropriate set of controls for implementing the confirmed objectives and policies. However, as previously indicated, we consider that the effects to be managed are those potentially associated with development at 24, 26, and 30 to 34 Marsden Road. These sites together with the Trust land (No 28) and St Pauls Church (No 36) should remain subject to PC 12 and the PMHA overlay.

<sup>82</sup> Rational Transport v NZTA [2012] NZRMA 298 [45]

<sup>83</sup> Unless some greater area is consented on a discretionary activity or other consent.



[88] We are not persuaded, however, that the overlay should apply to the full area covered by the Decisions Version. That is, we have concluded that 16 to 22 Marsden Road and the sliver of 3 Kings Road behind the “Herald” plaque site are sufficiently distant from the historic heritage resources around St Pauls and the Trust land and are sufficiently devoid of historic heritage values, as not to warrant management for the purposes of s.6(f) RMA. The “Herald” plaque site is itself so small and so removed from sites where the overlay will remain, that it is pointless to keep it there either. The PMHA overlay is to be removed from all these sites.

[89] There is a further aspect to the “Herald” site. We have specifically considered likely effects of development on or around the site containing the plaque. The plaque is on a small site owned by the Waitangi National Trust that fronts Marsden Road at the south eastern end of the subject land. It is primarily viewed and experienced from the Road. We have concluded that this experience would not be materially affected by the likely proximity or scale of development on adjacent sites, or even on the small site itself<sup>84</sup>; and certainly not to an extent warranting controls additional to those in the operative Commercial zone.

[90] This is a different result from the Consent Order issued in January 2006 and reflects, firstly, the more in-depth submissions and evidence provided to the Court from a wider range of interests and, secondly, the respondent’s commitment at that time to initiate a Plan Change expressly concerning historic heritage in this part of Paihia.

[91] The appellants’ offer of scheduling the pohutukawa tree at No 18 Marsden Road as part of the relief sought does not afford sufficient benefit to influence the outcome<sup>85</sup>. The tree presently affords a degree of amenity to the waterfront and could potentially enhance future development especially if integrated appropriately with new buildings and open space. These however are matters for the owner and council, possibly at a future date. The appellants led evidence from Mr Scott (his Exhibit 3.1) on the opportunity he saw for the PMHA open space and heritage resources to be protected in “a spatial arrangement” based on “*potential Commercial sub-zone A1 building footprint[s]*”<sup>86</sup> with inter-connecting pedestrian linkages, and

<sup>84</sup> To the NW the plaque site is adjoined by two pan-handled access ways and to the SE by a site outside the PMHA.

<sup>85</sup> Cavanagh Memorandum of Counsel, 14 November 2013 p 7

<sup>86</sup> Scott Rebuttal [36]ff





“recommendations” to reject the PC 12 sunlight and setback rules (including Mr Brown’s proposed variations).

[92] The Court struggled somewhat to grasp the purpose of this evidence as it simply demonstrated how aspects of a comprehensive development plan might be prepared for the PMHA (presumably) under the discretionary activity Rule 12.5B.6.3. We did not understand that rule to be in dispute. We now comprehend from Mr Cavanagh’s post-hearing Memorandum<sup>87</sup> that if the Court were to find a comprehensive development plan overlay appropriate, and if such were based on Mr Scott’s Exhibit 3.1, it would be acceptable provided there was an opportunity to make submissions on any related assessment criteria and they were not based on the PC 12 provisions.

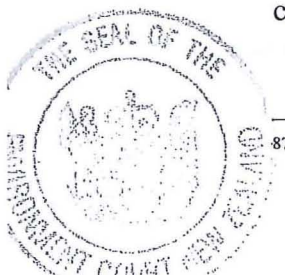
[93] This is not a path that the Court finds it necessary to follow. In short, we are not prepared to interfere with Rule 12.5B.6.3 or any related aspect on the basis of the submissions and evidence heard. Nor are we persuaded that doing so would result in a better or more appropriate formulation for meeting the statutory tests than we have determined above.

[94] We now turn as foreshadowed to the emphasis apparently placed by Mr Cavanagh and Mr Putt on having a residual zoning of “Commercial A1 sub-zone” as opposed to straight Commercial. Reference to operative district plan map 91A shows a zoning (essentially beneath the 2006 overlay on the subject properties) of “Commercial”. A group of properties to the north-west along Marsden Road in the direction of the School Road intersection has a Commercial sub-zone of “A1” applied, as does another group of properties on Kings Road roughly south of the subject sites.

[95] In paragraph 8 of his rebuttal evidence, Mr Putt identified from a table exhibited by the council’s planner Mr Wilson’s evidence, a [comparison] of *height, setback and roof pitch controls in the Commercial sub-zones A1 to A5*. We take this to be a reference to the last of 3 tables exhibited in Mr Wilson’s paragraph 96, which, although it does offer such a comparison, requires closer analysis. The analysis required for present purposes is not as between all 5 sub-zones but as between A1 and “Elsewhere in Paihia”, the latter essentially being the default Commercial zone. A comparison of those 2 sets of controls reveals no differences concerning building

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<sup>87</sup> Dated 14 November 2013 [14]ff





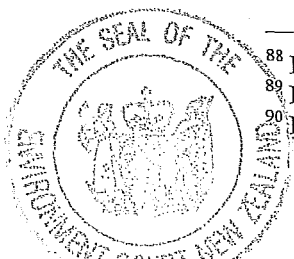
heights, setbacks, and roof pitches. As regards the critical element of setbacks, this is confirmed by looking at the relevant parts of Rule 7.7.5.1.4 (Setbacks relative to permitted activities). Further, a perusal of Rules 7.7.5.2 (Controlled Activities), 7.7.5.3 (Restricted Discretionary Activities), and 7.7.5.4 (Discretionary Activities) reveals no distinction of approach as amongst any of the sub-zones. Neither does an examination of Chapter 11, Assessment Criteria.

[96] We therefore find that Ms Baguely was right to submit<sup>88</sup> that there is no difference in Commercial A1 from the generic commercial zone as it applies in the PMHA.

[97] There is another reason we would shrink from holding that the A1 subzone should apply where we have uplifted the overlay. The owners of 3 Kings Road and the “Herald” plaque site were not represented in the proceedings. Their properties, like those at 16 to 22 Marsden Road, are shown on Map 91A in the operative plan as zoned straight Commercial. And we can see no good resource management reason to differentiate between these 2 groups of properties, having regard to our examination of the relevant plan provisions just outlined.

[98] Towards the end of the hearing a side-wind emerged, being an allegation that fore-runner provisions to the setback controls on the subject properties, in district schemes and plans, had over time become invalid on account of statutory change. Mr Cavanagh provided us with an analysis of a number of Court and Tribunal decisions pre-dating the 1991 RMA, criticising or declaring invalid “private open space” designations. Of slightly more possible relevance, he cited a decision of the Environment Court *Capital Coast Health Ltd v Wellington City Council*<sup>89</sup> where it was held that private land should not be zoned for reserve purposes except under special circumstances, and that the proper approach should be by designation/acquisition. In our view there can be no criticism of that decision, but we struggle to see its application here.

[99] Mr Cavanagh also cited another Environment Court decision *Yovich v Whangarei District Council*<sup>90</sup> where in its proposed plan (as indeed in several



<sup>88</sup> In paragraph 61 of her Opening Submissions

<sup>89</sup> Decision W101/98

<sup>90</sup> Decision A59/04

predecessor plans and schemes over decades) the council had chosen to use a “building line restriction” rather than a designation to protect a strip of land for potential future road widening (for which it had not at any stage made financial provision). The Court held that owners were disadvantaged and that the council should designate (and by implication compensate) instead if it wished to maintain the control in its plan.

[100] Again, we do not see a connection between the *Yovich* decision and the present circumstances. We find instead that Ms Baguely was correct to refer in her submissions in answer, to another decision of this Court, *Cornwall Park Trust Board v Auckland City Council*<sup>91</sup> where it was held that most zoning by its very nature is restrictive, and if the only way to attain sustainable management under s5 is by restrictive zoning then that mechanism should be employed. Our analysis of the PC12 provisions in relation to the sites where we consider the overlay should remain, reveals that the setbacks therein proposed are for a proper resource management purpose. As Ms Baguely submitted, setbacks are commonly used in RMA plans to manage adverse effects on the environment and to achieve the overall purpose of sustainable management under section 5.

### Outcome

[101] The outcome is that the appeal of Guyco and associated parties is allowed to the extent that the provisions of Plan Change 12 are modified by the preceding findings concerning the wording of Objective 12.5B.3.2 (paragraph [76] – the words “spacious surroundings” to be deleted), and the spatial extent of the PMHA overlay reduced as set out in paragraphs [87] and [88] above. It is otherwise dismissed.

[102] While the Society has succeeded in assisting the council to defend the PC12 provisions in part, it has not succeeded in strengthening the provisions as it sought. Its appeal must therefore be dismissed.

### Costs

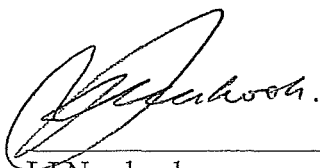
[103] While the changes made to PC 12 are partially in the direction sought by Guyco, no party was completely successful in this case. We record that we were



assisted in our deliberations by the submissions and evidence given by the Paihia Heritage Precinct Support Society. Our preliminary view is that this is not a case where an award of costs would be appropriate. Nevertheless, if any party is minded to make an application, it should be lodged within ten working days of the issue of this decision. A further ten days is allowed for responses.

**SIGNED** at AUCKLAND this 13<sup>th</sup> day of June 2014

*For the Court:*



LJ Newhook  
Principal Environment Judge









SCENARIO	SUNLIGHT RULE	SETBACK FROM MARSDEN RD.
1	0m	20m Building Setback
2	3m High, 45 degree slope	20m Building Setback
3	2m High, 45 degree slope	20m Building Setback
4	2m High, 45 degree slope	10m Building Setback
5	2m High, 45 degree slope	15m Building Setback
6	0m	10m Setback, 30 degree slope

NOTE: THE PROPOSED PHOTOMONTAGES ARE INDICATIVE AND ONLY INTENDED TO BE USED AS A GUIDE



## Appendix 2 - VIEWPOINT LOCATIONS

101524 Paihia Heritage Area Assessment  
Paihia Heritage Area Assessment Photomontages . Revision B . September 2011



