Decision No. A 055 /2005

IN THE MATTER	of the Resource Management Act 1991
AND	
IN THE MATTER	of an appeal pursuant to clause 14 of the First Schedule to the Act
BETWEEN	**WAITEMATA INFRASTRUCTURE LIMITED**
	(RMA 258/03)
	Appellant
AND	**AUCKLAND CITY COUNCL**
	Respondent
AND	
IN THE MATTER	of an appeal under s120 of the Act
BETWEEN	**COMMUNITY AND PEOPLE OF WAIHEKE ISLAND INC**
	(ENV A323/04)
	Appellant
AND	**AUCKLAND REGIONAL COUNCIL**
	Respondent
AND	**WAITEMATA INFRASTRUTURE LIMITED AND AUCKLAND CITY COUNCIL**
	Applicants

BEFORE THE ENVIRONMENT COURT

Environment Judge L J Newhook (presiding)

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

Environment Commissioner R M Dunlop
Environment Commissioner M P Oliver

HEARING at Auckland on 6, 8, 9, 10, 13, 14, 15 and 16 December 2004

APPEARANCES

D A Nolan and B J Matheson for Waitemata Infrastructure Limited ("WIL")
R B Brabant and S J Harvey for Community and People of Waiheke Island Inc and S Atkins and others ("CAPOW")
J A Burns and L S Fraser for Auckland Regional Council ("ARC")
D A Kirkpatrick and M L Quin for Auckland City Council ("ARC")
P Rikys for Gulf District Plan Association Inc ("GDPA")
H M Romanuik for Waihere Island Ferry Users Group ("WIFUG")
E Boghurst for Ostend Residents and Ratepayers Association ("ORRA")

INTERIM DECISION

Table of Contents

Introduction

[1] In early 2000 WIL purchased a piece of land, Lot 8 DP146325, of 7.0988 hectares, comprising most of the relatively flat land in the heart of the Matiatia valley at the western end of Waiheke Island. Matiatia is the main passenger port for the Island.

[2] WIL applied to the Auckland City Council for a private plan change, which in due course became proposed Plan Change 38 ("PC 38") to the operative Auckland City District Plan: Hauraki Gulf Islands Section ("the Plan"). PC38 proposes to rezone WIL's land, and some small adjoining pieces of land, from the existing Land Unit 25 ("Wharf") to Land Unit 27 ("Matiatia"), and to introduce detailed new provisions for the new Land Unit.

[3] The ACC appointed hearing commissioners who declined PC38. The appeal by WIL followed.

[4] At about the same time WIL and ACC applied to ARC for a discharge consent for tertiary treated domestic wastewater into the Matiatia wetland which is primarily on WIL's property. Consent having been granted on conditions, the Community and People of Waiheke Island Inc ("CAPOW") appealed. The latter appeal became the subject of agreement between the parties just before the hearing, and a draft Consent Order was lodged along with a Memorandum of Counsel seeking changes to some of the conditions of consent. That issue will need to be concluded at the same time as the main proceedings, the appeal by WIL.

[5] Since ACC declined PC38 in March 2003, WIL has worked with ACC and other parties such that proposed PC38 took on a very iterative character both prior to, and during, the hearing.

[6] A moderately high level of agreement was reached between WIL and ACC during this process, although there remained some fundamental differences, and a number of minor ones.

[7] CAPOW has remained opposed to PC38, and seeks that it be refused. Nevertheless, by way of an alternative approach, CAPOW vigorously pursued the making of some substantial changes and many minor ones, in particular a reduction in the amount of development that could be undertaken in the zone.

[8] GDPA called no evidence, but through its representative Mr Rikys announced that its attitude was that PC38 should be declined.

[9] Ms Boghurst, the representative of ORRA likewise called no evidence but presented submissions and sought that PC38 be refused, or in the alternative substantially modified particularly as to the extent of development authorised.

[10] Mr Romanuik, counsel for WIFUG attended very little of the hearing, and ultimately addressed no separate submissions. We perceived from statements from others during the hearing that WIFUG entertained serious concerns about carparking and access for ferry commuters. Ultimately, Mr Rikys on behalf of GDPA advised that his submissions to us were in fact made on behalf of both bodies.

[11] The extent of ARC's opposition to PC38 expanded shortly before the hearing commenced, with the ARC changing its view on whether PC38 was consistent with the Auckland Regional Policy Statement, and preparing evidence that it was not. It submitted that PC38 should be declined and further attention to zoning issues at Matiatia deferred till the next review of the district plan. This caused considerable controversy for WIL and ACC, and was resisted strongly by them.

The land and the surrounding area

[12] We have already described the WIL land as being the greater part of the valley floor in Matiatia. Its northern boundary is the edge of Ocean View Road which leads to the wharf. Its western boundary adjoins an esplanade reserve along the main part of the beach in Matiatia Bay. Its southern boundary more or less follows the edge of the flat valley floor at the foot of the southern regenerating slopes of Matiatia Valley.

[13] The existing LU25 and proposed LU27 include more than WIL's land; they take in an area of sealed carpark which comprises the western end or head of Ocean View Road adjacent to the wharf and esplanade reserve, as well as a significant traffic circulation area beyond that, beside the wharf, together with a small area of

land on the northern side of Ocean View Road which is privately owned by Swordfish Holdings Limited, and is in use for a carpark.

[14] To the north and the south of Matiatia Bay and valley are areas zoned LU22 which comprise in the main, large lifestyle blocks on which substantial homes have recently been built, and where significant areas of native regenerative and other planting have been established. Fringing Matiatia Bay and the southern side of the Matiatia Valley is Land Unit 17 ("Landscape Amenity"), comprising reserves for passive recreation and protection of natural environment.

PC38

[15] After purchasing the land WIL conducted a design competition, and appointed architects, landscape architects, a planning consultant, and others. The plan change application as originally notified contemplated up to 23,000m^2 gross floor area of development as a permitted activity (but with buildings themselves being subject to controlled activity consent), and a range of mixed use activities including retail, carparking, residential, conference facilities, visitor accommodation, residential units, restaurants, bars and taverns. A series of thresholds (expressed in square metre terms) were set for activities of permitted, controlled, restricted discretionary, discretionary, and non-complying activity status.

[16] After PC38 was rejected by the ACC and this appeal brought, a revised version was produced and circulated in October 2004. That reduced permitted gross floor area from 23,000m^2 to 12,000m^2, and provided that area between 12,000m^2 and 18500m^2, be of restricted discretionary activity status.

[17] PC38 contains detailed design criteria and principles for new buildings, and a structure plan dividing LU27 into several precincts. Each precinct has a different emphasis, Precinct 1 being called "Waterfront", 2 being "Matiatia", 3 "Parking", 4 "Wharf Gateway" and 5 "Natural". Precinct 5 comprises a significant wetland which is intended to be vested in ACC. In addition, the structure plan provides for areas of open space, vehicle circulation, pedestrian access, a parking precinct, height limits and other design controls. It also provides assessment criteria, and threshold controls to ensure establishment of certain mixes of activities.

[18] The intended new chapter follows more or less the format of the operative district plan in providing Resource Management Issues (being in this case to do with transportation networks, landscape values and natural character, facilitating mixed use development and its integration with adjoining public infrastructure, access to the coastline, and protection of the wetland area). It also includes a resource management strategy, framed overall and by precinct.

Agreed matters

[19] Almost without exception, the parties agreed that the area concerned is presently in a scruffy and somewhat unattractive state. It seemed agreed that either in the near or the more distant future, there should be provision for it to be attractively developed, and that the area is widely considered to be the "gateway to Waiheke". There also appeared to be agreement that planning now or in the future would authorise mixed use development and a wide range of activities. Strong disagreement emerged however as to what should be the emphasis on carparking and provision for transport networks, with the parties essentially falling into two camps: those who considered that transport and parking are adequately catered for and can be sufficiently planned in the future; and those who considered that PC38 or any future review of the district plan, should play a greater role in the issues.

[20] WIL endeavoured to persuade us in opening that there was no real contest between the parties as to noise issues, traffic, design, tourism benefits, acceptable levels of economic impact on existing centres, stormwater, ecological, and bulk and location of buildings from a visual and landscape perspective. WIL's perception may have arisen out of the fact that focussed expert evidence on those issues tended in the main to be offered by consultants called by itself. As the case developed however it became clear that the suggestion that there was "no real contest" over those issues, was something of an overstatement, because the somewhat general evidence called by opposition parties was augmented by vigorous cross-examination and detailed legal submissions on many points.

[21] During the course of the hearing we required services witnesses to meet and endeavour to settle issues about water supply and wastewater disposal. A measure of agreement was ultimately reached between those witnesses, and details provided to us. We will discuss those issues in a separate section of this decision.

[22] We were also provided with a memorandum by counsel for WIL, ARC, and ACC as to agreement reached about deletion of stormwater works in the wetland, creation of a 10-metre buffer strip around the wetland, and certain consequential amendments.

[23] We are grateful to the parties and their representatives for the amount of work that obviously went into achieving agreements where possible. Ironically however the extent of agreements reached belies the degree of heat that remained in unresolved issues.

Unresolved issues

[24] Mr Kirkpatrick, counsel for ACC, submitted that a distillation of the cases of the various parties indicated that the issues at large were:

(a) Is the plan change consistent with the Auckland Regional Policy Statement 1999?

(b) Should the private plan change be declined on the basis that a **public** plan change or the review of the plan scheduled for 2006, would offer a more appropriate means of enabling development on the land?

(c) Does the plan change adequately provide for the efficient movement of pedestrians, vehicular traffic, and freight, associated with Matiatia Wharf?

(d) Do the proposed gfa limits for permitted, restricted discretionary and discretionary activities achieve the purpose and principles of the RMA?

(e) Are there any infrastructural or environmental constraints in terms of wastewater disposal and groundwater availability?

[25] Mr Nolan, counsel for WIL, identified more or less the same 5 issues, but elevated the last of Mr Kirkpatrick's issues to second place in the list. We think that is appropriate, because, as the case unfolded, we formed the view that provision for certain levels of development is as dependent on infrastructural and environmental constraints being addressed, as on any other issue. Equally, we have come to the

view that (c), "transport issues", was considered by some parties as having greater prominence, and accordingly we will consider it ahead of the "statutory instrument" topic that was (b) on Mr Kirkpatrick's list.

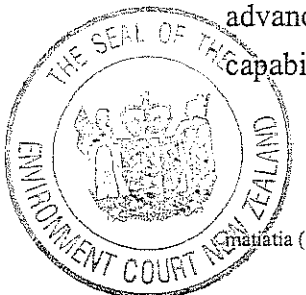
[26] Mr Brabant, counsel for CAPOW, submitted that there was an issue as to whether the privately promoted PC38 provisions would achieve integrated management of the natural and physical resources of Matiatia with adjoining land units and the transportation facilities at Matiatia and elsewhere on Waiheke, and consequently whether the plan provisions are appropriate in their content and detail. We will address that issue, noting that it became bound up with landscape issues in his case, and the "statutory instrument" issue. He saw as a related issue, to what extent development proposals in any Matiatia Land Unit ought to be subject to public notification and full discretionary assessment. We will address that also, noting that it is (at least in part) bound up with item (d) in Mr Kirkpatrick's list.

[27] While we consider that the 5 issues stated by counsel generally describe the cases brought by the parties, we record that we were confronted by an enormous amount of material, and heard protracted and vigorous cross-examination. It could be said that there were subsets of the 5 issues, and in general terms consider that Mr Brabant's further issues can be so regarded. We can assure the parties that even though we are not intending to record and analyse each and every nuance in the enormous volume of material provided to us over 8 hearing days, we have considered all material with great care, not only during the hearing, but subsequently in the course of preparing this decision. It has been necessary to bring the decision to bear on the essentials in order to avoid creating what would otherwise be an extremely long decision.

Further background – existing LU25 plan provisions

[28] We mention here that in 2004 parties represented by Mr Brabant sought and obtained a preliminary decision, from Judge Newhook sitting alone, of the possible availability of orders under s292 RMA about the provisions of the current LU25.

[29] That arose from a debate between the parties at the time of the council hearing on PC38, as to the development capability of current LU25, with WIL advancing the view that with PC38 authorising 23,000m^2 of permitted activity capability, there would be little change in overall development capability on the land.



[30] Judge Newhook held, that at the time of promulgating and confirming the operative plan the ACC had been in error in replacing the term "Gross Floor Area" with the term "Gross Dwelling Area" in provisions relating to the Visitor Facilities Precinct of LU25. If the error were to be corrected (an issue he left open in the exercise of his discretion) development capability in that precinct would be restricted to 5,000m^2.

[31] The Judge also held that a provision for building separation spaces in part of the Land Unit, intended by ACC to be placed in the LU25 provisions, had been omitted by error.

[32] Before us, WIL and ACC submitted that little turned on the answers provided by the Judge, and that PC38 should be judged on its own merits in terms of the requirements of the RMA. In contrast, CAPOW and others held some store by them, and indeed it was CAPOW's case (in the alternative to refusal of the plan change) that permitted activity development should be limited to 5,000m^2.

[33] In the case of the ARC, the Judge's decision evidently triggered the change in stance concerning the issue of whether PC38 is consistent with the provisions of the ARPS, in a way that we shall explain shortly.

Relevant legislation: pre-or post-2003 RMA Amendment?

[34] We are of the view, following certain recent decisions of the Environment Court[1], that the Act in its form prior to 1 August 2003, provides the legislative framework for this case, the appeal having been filed prior to that date.

Statutory framework for assessment of PC38

[35] Pursuant to clause 15 of the First Schedule to the Act, it is our duty to consider whether to confirm the change, or direct the local authority to modify, delete or insert any provision. These duties have been described in detail by the High Court in ***Countdown Properties (Northlands) v Dunedin City Council***[2] and by the Environment Court in ***Marlborough Ridge Limited v Marlborough District***

[1] Referring, amongst other cases, to *Environmental Defence Society v Far North District Council* Decision No. A112/2004; *Carter Holt Harvey Limited and Ors v Bay of Plenty Regional Council* Decision A160/2004; and *Pickerill v Rodney District Council* Decision No. A04/2005.

[2] [1994] NZRMA 145.

Council[3]. The critical provisions of the Act are s32 and s74 in their form prior to the 2003 Amendment.

[36] S74 of the Act pre-2003 provided:

> **74. Matters to be considered by territorial authority**
>
> (1) A territorial authority shall prepare and change its district plan in accordance with its functions under section 31, the provisions of Part 2, its duty under section 32, and any regulations.
>
> (2) In addition to the requirements of section 75(2), when preparing or changing a district plan, a territorial authority shall have regard to-
>
> (a) Any-
> (i) Proposed regional policy statement; or
> (ii) Proposed regional plan of its region in regard to any matter of regional significance for which the regional council has primary responsibility under Part 4; and
>
> (b) Any-
> (i) Management plans and strategies prepared under other Acts; and
> (ii) Relevant planning document recognised by an iwi authority affected by the district plan; and
> (iii) Regulations relating to ensuring sustainability, or the conservation, management, or sustainability of fisheries resources (including regulations or bylaws relating to taiapure, mahinga mataitai, or other non-commercial Maori customary fishing),-
>
> to the extent that their content has a bearing on resource management issues of the district; and
>
> (c) In preparing or changing any district plan, a territorial authority must not have regard to trade competition.

We note in particular the references to Part II of the Act and s32. We also note that the High Court held in ***Countdown*** that there are two tests for a plan under s74, first the "rigorous" test of s32(1)(c) and secondly "the broader and ultimate issue of whether it should action a change or direct the council to modify, delete or insert any provision which has been referred to it". The latter test is one to be decided "on balance" as opposed to the rigour of the s32(1)(c) one.

[3] [1998] NZMRA 73 at 90.

[37] S32(1) of the Act pre-2003 provided:

> **32. Duties to consider alternatives, assess benefits and costs, etc**
>
> (1) In achieving the purpose of this Act, before adopting any objective, policy, rule, or other method in relation to any function described in subsection (2), any person described in that subsection shall-
>
> (a) Have regard to-
> (i) The extent (if any) to which any such objective, policy, rule, or other method is necessary in achieving the purpose of this Act; and
> (ii) Other means in addition to or in place of such objective, policy, rule, or other method which, under this Act or any other enactment, may be used in achieving the purpose of this Act, including the provision of information, services, or incentives, and the levying of charges (including rates); and
> (iii) The reasons for and against adopting the proposed objective, policy, rule, or other method and the principal alternative means available, or of taking no action where this Act does not require otherwise; and
>
> (b) Carry out an evaluation, which that person is satisfied is appropriate to the circumstances, of the likely benefits and costs of the principal alternative means including, in the case of any rule or other method, the extent to which it is likely to be effective in achieving the objective or policy and the likely implementation and compliance costs; and
>
> (c) Be satisfied that any such objective, policy, rule, or other method (or any combination thereof)-
> (i) is necessary in achieving the purpose of this Act; and
> (ii) Is the most appropriate means of exercising the function, having regard to its efficiency and effectiveness relative to other means.

[38] The requirements of s32(1) were comprehensively summarised in ***Nugent Consultants Limited v Auckland City Council***[4]:

> In summary, a rule in a proposed district plan has to be necessary in achieving the purpose of the Act, being the sustainable management of natural and physical resources (as those terms are defined); it has to assist the territorial authority to carry out its functions of control of actual or potential effects of the use, development or protection of land in order to achieve the purpose of the Act; it has to be the most appropriate means of exercising that function; and it has to have a purpose of achieving the objectives and policies of the plan.

[4] [1996] NZRMA 481 at 484.

[39] It is noted in relation to s32(1)(a), that the matters there listed are simply to be "had regard to", whereas under subsection (c), the local authority (and this Court) must **be satisfied** as to the matters there listed. The word "necessary" has been held by the High Court to mean "expedient or desirable" rather than "essential in an absolute sense", and value judgments are involved[5]. The Court in ***Marlborough Ridge*** put the matter this way:

> In our view both the necessity for and appropriateness of a plan change need to be weighed against the existing plan (especially where the latter is a transitional plan) because necessity is a relevant concept in this situation. The plan change only needs to be preferable in resource management terms to the existing plan to be "necessary" and most appropriate for the purpose of the Act and thus pass the threshold test.

[40] The second part of s32(1)(a)(ii) involves an examination of other means or alternatives. As was said by the Court in ***Marlborough Ridge***[6]***:*** *"really the options are: the plan change or the existing plan or some compromise between the two".*

[41] In the context of a privately promoted plan change, the consideration of alternatives might be extended to considering whether a forthcoming review of the district plan is another option[7].

[42] We consider in the present case that waiting for the forthcoming review (one has been foreshadowed by ACC for 2006) does not provide the full answer. We note the High Court's approval of the approach taken by the Planning Tribunal in the ***Countdown*** case[8], described by the Tribunal in the following way[9]:

> Although we accept that issues raised by Plan Change 6 would have implications for a wider area than the subject block, these proceedings are not inappropriate for addressing those issues. The proposed plan change was publicly notified; a number of submissions were received and they were publicly notified; further submissions were received; the respondent's committee held a public hearing at which evidence was given; it made a full decision which was given to the parties; five parties exercised their rights to refer the change to the Tribunal; the Tribunal conducted a three week hearing in public at which public and private interests were represented, evidence was given by 19 witnesses, and full submissions were made. No one could be prejudiced by the Tribunal making decisions on matters in

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[5] *Westfield v Hamilton City Council* (2004) 10 ELRNZ 254 at 262-263 and *Marlborough Ridge v Marlborough District Council*, supra, at 91.

[6] At p.90.

[7] *Hall v Rodney District Plan* [1995] NZRMA 537 at 546, citing *Countdown Properties Limited v Dunedin City Council* [1984] NZRMA 145; and *Imrie Family Trust v Whangarei District Council* [1994] NZRMA 453.

[8] At pages 168-169.

[9] [1994] NZRMA 497 at 532.

> issue in the proceedings on the merits. On the contrary the applicants would be prejudiced and would be deprived of what they were entitled to expect, if the Tribunal were to withhold decisions on the merits on questions properly in issue before it. If we have discretion in the matter, we decline to exercise it for those reasons.

[43] The principal witness to address these matters was the planner called by CAPOW, Mr B W Putt. We note that Mr Putt generally accepted and agreed with the commentaries and analysis under the s32 head by WIL's planning witness Mr B L Kaye, and ACC's planning witness Ms S Nairn (both of whom were supportive of PC38 in those terms). Mr Putt briefly analysed PC38 against the four ***Nugent*** tests, previously described by us, and in particular agreed that the plan change was necessary for achieving the purpose of the Act, although he was concerned about detailed matters that he considered would give rise to uncertainties about sustainable management of the resources of Matiatia Bay. In relation to the further three ***Nugent*** tests, Mr Putt offered qualified approval, subject however to concerns that he registered concerning lack of integration of PC38 with other provisions of the district plan, in particular planning in the locality relating to transport matters, public access, and carparking. We will deal with those issues in more detail later in this decision. Indeed, as we found with many aspects of this case, *"the devil is in the detail"*.

[44] Mr Kaye and Ms Nairn provided an extensive analysis under s32, through examination of a number of documents which had been considered, including:

- New Zealand Coastal Policy Statement
- Auckland Conservation Management Strategy
- Auckland Regional Policy Statement
- Auckland Proposed Regional Plan: Coastal
- Auckland Regional Plan: Sediment Control
- Proposed Auckland Regional Plan: Air, Land and Water
- Hauraki Gulf Marine Park Act 2000
- Auckland City District Plan – Hauraki Gulf Islands Section
- "Essentially Waiheke" – an Urban and Rural Community Strategy (Auckland City)
- "Waiheke Island's Economic Future" – an Analysis of Waiheke Island's Economic Future, for ACC by Mr A Johnson (May 1999)
- "Projecting Commuter, Visitor and Total Passenger Growth – Matiatia – Waiheke Island to the year 2016", Draft Report for ACC prepared by Resource Management Solutions Limited (2002)

- A Vision for Managing Growth in the Auckland Region – Auckland Regional Growth Strategy 2050
- Hauraki Gulf Transport Strategy – November 2000

[45] As is often the case with s32 analyses, the evidence about the adequacy of them largely derives from the evidence about the substantive issues in the case. It would be highly repetitive of us to analyse the large number of factors twice. Rather, and particularly because the attack under this head (through the evidence of Mr Putt) was quite qualified, we intend to record now that we are satisfied with the adequacy of work undertaken by WIL in this connection, supported as it was by the significant body of work described to us by ACC witnesses, and move on to consider the substantive issues at large between the parties. We would simply observe in a general way at this point, that the national, regional and district statutory instruments that we have previously listed, have as a strong common theme the need to preserve the natural character of the coastal environment, and to protect it from inappropriate subdivision, use and development. The expert witnesses for WIL and ACC agreed that PC38 properly recognised and provided for those things to the extent necessary; however the ARC contended that PC38 enabled development that would be inconsistent with the provisions of the ARPS controlling coastal settlements in the region; CAPOW did not pursue that matter in submissions or evidence but agreed that it was an issue to be determined by the Court.

Summary of Key Findings in the Case

[46] To assist a reading of the decision from this point on, especially given the detail and complexity surrounding some of the subject-matter, we provide a summary of key findings now, noting however that there are many major **and** minor findings made throughout the decision:

- The legislative framework for this case is the Act in its form prior to 1 August 2003, the proceedings having been filed before that date.

- The s32 analysis has been adequately undertaken.

- PC38 is consistent with the Auckland Regional Policy Statement (a requirement of s75 (2)(c)(i).

- The existing land unit, LU25, would enable up to approximately 17,000m^2 GFA of development at Matiatia by way of permitted activities or controlled activity consents (the 5000m^2 capability identified in last year's decision A 116/04 being confined to the Visitor Facilities Precinct in that zone).

- The provisions of existing LU25 are outdated and inappropriate in many ways, especially as regards the important "Waiheke gateway" function the land provides.

- Noting WIL's proposal that up to 12,000m^2 GFA of development be a permitted activity, we find that there will be a sufficient water supply for that level of development, based on analysis of appropriately conservative predictions of activities and usages.

- It is possible that 12,000m2 GFA of development would generate more than WIL's authorized/allocated wastewater discharge of 97m^3/day to the Owhanake treatment plant. While that could possibly be addressed with recycling of treated effluent for certain purposes, there are some uncertainties presently surrounding that activity that militate in favour of limiting permitted development to 10,000m^2 GFA at the present time.

- Many further (if relatively minor) matters require to be addressed before a final decision can be made that servicing (water and wastewater) will be adequate. We anticipate that those matters can be appropriately addressed.

- PC38 adequately provides for parking and the efficient movement of pedestrians, traffic, and freight, in general terms.

- The existing council carpark near the wharf is an eyesore.

- Future construction of any multi-level above-ground carpark building near the wharf should be discouraged for reasons of traffic volumes likely to be attracted to the vicinity, and on visual grounds.

- PC38 does not seek to change the several important "layers" of planning provision in the district plan that surmount the Land Unit provisions, ie:

Resource Management Overview, Issues, Strategies, Outcomes, Means, Vision, and the Strategic Management Area provisions.

- The activity status for development up to 10,000m^2 GFA should be permitted (subject to buildings and structures requiring controlled activity consent).

- The activity status for consent purposes between aggregate 10,000m^2 and 18,500m^2 GFA levels should be full discretionary.

- PC38 should not espouse or emphasise non-notification of the discretionary activity applications, but instead sections 93 to 94D RMA should be left to play their part.

Is PC38 consistent with the ARPS?

[47] It was on this score that the ARC strongly challenged PC38.

[48] Included in the function of ARC under the Act, (in particular set by s30(1)(a)), is the establishment, implementation and review of objectives, polices and methods to achieve integration of the natural and physical resources of the region. It does this in large measure through the Auckland Regional Policy Statement ("ARPS") prepared under s59 of the Act, and as noted previously by the Environment Court in ***North Shore City Council v Auckland Regional Council***[10], the regional policy statement *"is to be the heart of resource management [in that] region"*.

[49] The ARPS is operative. Pursuant to s75(2)(c)(i) a district plan must not be inconsistent with it.

[50] We were told that it had been the position of an ARC witness Ms A R Stilwell at the ACC hearing that PC38 did not challenge the Metropolitan Urban Limits ("MUL") as they apply to Waiheke Island. The change in thinking came about on the part of ARC Policy Implementation Manager, Mr H D Jarvis, on his receiving and considering the decision of Judge Newhook previously referred to, concerning limits on development capability in the existing LU25.

[10] (1994) NZRMA 521.

[51] The evidence of Mr Jarvis at first indicated a two-fold concern: first that urban development enabled by LU27 would not be contained within the MUL shown on the relevant ARPS map and the limits of rural and coastal settlements as defined; secondly that PC38 and LU27 would enable expansion of development beyond limits set by Policy 2.5.2.3 of the ARPS, which provides as follows:

> Urban development is to be contained within the Metropolitan Urban Limits shown on Map Series 1 and limits of rural coastal settlements as defined so that: ...
>
> (ii) Environmental values protected by the Metropolitan Urban Limits and/or the limits of rural and coastal settlements are not adversely affected, and the integrity of those limits is maintained;
>
> (iv) Expansion of rural and coastal settlements outside the limits of existing urban zones and settlements (at the time of notification of the RPS whether shown and provided for in the RPS) is not permitted.

[52] We gained the impression during the hearing that ARC's concern about the MUL dissipated. We think that was probably a correct approach, because the thrust of the debate focussed on whether or not proposed Land Unit 27 would extend beyond the limits of an existing rural or coastal settlement.

[53] A difficulty arises in that *"rural and coastal settlements"* is not a term defined in the ARPS, although subparagraph (iv) of Policy 2.5.2.3 provides in a rather imprecise way that it involves "existing urban zones and settlements at the time of the notification of the ARPS or as shown or provided for in the ARPS". Certainly the ARPS does not map a settlement at Matiatia, so the debate becomes one about what was the extent of the existing urban zone LU25.

[54] Mr Jarvis provided us with a discussion of the objectives, policies and certain rules in LU25 and offered the opinion that "urban development" was geographically limited within LU25 to certain precincts, and (because of the decision of Judge Newhook last year) to 5,000m^2 gross floor area. He set out to contrast the provisions of PC38 and opined that there would be more than double the level of development enabled within LU27, with gross floor area as a permitted activity rising to 12,000m^2, then as a restricted discretionary activity to a level of 18,500m^2. While acknowledging that PC38 provides an improvement by keeping urban development out of the wetland, he considered that expansion of provision for urban development at Matiatia should not proceed until it had been subject to "integrated strategic consideration".

[55] Mr Jarvis' views were strongly responded to by Mr Kaye, Ms Nairn and another experienced planner Mr V R C Warren, in their evidence. A director of WIL, Mr S R Norrie provided a detailed analysis of the extent to which development including carparks could occur in the existing LU25, particularly by reference to precincts beyond the "visitor precinct" that had been the subject of Judge Newhook's decision. Mr Norrie's calculations were the subject of considerable cross-examination, but even allowing for certain significant concessions, it is apparent that by way of permitted or controlled activity development, LU25 would enable something approaching 17,000m^2 of gross floor area in total at Matiatia, taking into account the 5,000m^2 held to be available within the visitor precinct, potential development in the area currently used for carparking north of Ocean View Road, a moderate amount of activity near the wharf, the ACC carparking area, a carparking area on WIL land, and even (unhappily) a small amount of development in the wetland.

[56] The expert position taken on behalf of WIL and ACC was quite simply that the comparative level of development between old and new zonings, properly quantified, was not greatly different and could not possibly be a regionally significant issue. It therefore cannot be one requiring deferment of new planning provisions until the wider district plan review occurs. Importantly, we note that Mr Jarvis was forced to concede in cross-examination that open space areas and carparking should be accepted as coming within "urban development". Our finding is that Mr Jarvis took an improperly restricted view of what constitutes urban development within the existing LU25 provisions, by wrongly confining his focus to the narrow issue that was put before Judge Newhook for determination in the interlocutory proceedings, and without considering the wider provisions of LU25.

[57] WIL and ACC also contended that the process by which PC38 was launched involved a comprehensive assessment of all relevant statutory instruments, was integrated, and that it proceeded through a structure plan or similar mechanism. Although our finding in this regard depends to some extent on findings that we make later in this decision on the subject of "integrated approach", we record at this juncture that they are generally right about that, although there remains a need for considerably more attention to detail.

[58] Having regard to the terms of s75(2)(c)(i) we hold that PC38 is not inconsistent with the relevant provisions of the Act.

Are there any infrastructural constraints?

[59] The land presently lacks services necessary for urban activities of the type proposed by WIL, namely a potable water supply, wastewater and stormwater facilities. We received considerable evidence on these matters from technical witnesses, particularly on the questions of water availability and wastewater disposal. Mr G J McDonald and Mr M B Menzies gave engineering evidence for WIL and the respondent respectively, while Ms R E Floyd, a wastewater specialist and Mr G K Murphy, a water resources scientist gave evidence for the ARC.

[60] The councils' witnesses expressed significant reservations about a number of important aspects of Mr McDonald's evidence in chief, including his conclusion that:

> The combined use of captured rainwater, abstracted borewater and recycled wastewater...to supply the potable water needs and flushing requirements for the development is a sustainable solution provided the assumptions inherent in my assessment and evidence are met.

[61] While each of the council witnesses had their own perspective, and differed in the matters they elected to emphasise, there were common themes to their concerns, namely:

- The appropriateness of the assumptions used by Mr McDonald in his water balance analysis in the face of uncertainty about key variables. For example, the development's prospective built form, including gross roof area (GRA); likely occupancy rates for different components; and potable water demand and wastewater volumes by specific activities;
- The potential for different mixes of relatively high and low water demand activities;
- The level of treated effluent reuse/recycling assumed by Mr McDonald may not eventuate, necessitating increased groundwater abstraction above the consented volume;
- Under-estimation of potential water usage;
- The potential for water usage at credible "upper limits" to exceed the available treated wastewater discharge capacity;
- The need for further approvals from statutory authorities for aspects of the servicing strategy.

[62] Notwithstanding his reservations, Mr Menzies was able to conclude that the planned systems *"should be capable"* (which we take to mean has a high probability) of adequately meeting potable water demand for development up to 12,000m^2 GFA subject to certain critical provisos which we set out below. Any proposal to increase the GFA over 12,000m^2 would, in Mr Menzies' view, run serious risks of water shortages being experienced. Mr Murphy shared this view, stating in his conclusion *"....there is too much uncertainty in the ultimate groundwater water demand to allow for development of greater than 12,000m^2 GFA in accordance with Plan Change 38".*

[63] In summary, the provisos Mr Menzies considered necessary for development to 12,000m^2 GFA as a permitted activity were:

(i) An effective demand management plan with a strong conservation component consistent with the directions contained in ARC TP 58. Mr Murphy supported this.

(ii) WIL would need to obtain Metrowater's (the respondent's water/wastewater LATE) prior approval for the reuse of treated effluent and any Owhanake wastewater treatment plant operational matters associated with elevated phosphorous levels resulting from reuse. The need for prior Medical Officer of Health approval for reuse was also noted.

(iii) There should be a formal risk management plan dealing with specified matters, such as higher than forecast demand; the groundwater bore being shut down temporarily due to faecal contamination; and the rainwater storage tank having to be emptied due to contamination.

(iv) The imposition of conditions to ensure that critical parameters assumed by Mr McDonald and/or WIL are met, these being:

- minimum roof area
- occupancy/usage limits
- the preparation of a suitable water conservation/demand management plan
- prohibition on high water usage activities, eg laundromats

- a comprehensive water usage monitoring programme in the event WIL seeks an extension in GFA beyond 12,000m^2.

[64] It was Mr Menzies' opinion that to avoid *"unpleasant surprises"* later, these matters should be dealt with as part of the PC38 and not be left until the detailed design and/or consenting stage. We endorse that view.

[65] Subject to related and carefully worded qualifications, Mr Menzies concluded that suitable wastewater facilities could also be available for up to 12,000m^2 GFA. He expressed that conclusion in the following terms:

> Assuming that Mr McDonald's analysis of Waitemata Infrastructure Ltd's entitlement is valid, and that the governing factor is the discharge to the Owhanake wetland, the discharge consent appears to provide adequate capacity for proposed discharges from a 12,000m^2 GFA development by Waitemata Infrastructure Ltd.

[66] Mr Menzies did not offer an opinion on the proposal's ability to satisfactorily treat/discharge wastewater from a development greater than 12,000m^2 GFA. On the basis that "water in equals water out" Ms Floyd accepted, subject to her other reservations, that the likely water demand figure would fit within the discharge volume available to WIL.

[67] Creditably, Mr McDonald responded to these and related matters with comprehensive rebuttal evidence. This material provided the basis for a constructive meeting of the services witnesses that we directed occur during the hearing. Counsel were able subsequently to report that the witnesses had reached a large measure of agreement on the matters at issue. Resultant changes were included in the revised PC 38 "Closing Submissions Version". We now describe the basis of those agreements, with particular reference to Mr McDonald's rebuttal evidence, utilising the following headings.

Will there be a sufficient potable water supply?

[68] By way of background we note that WIL holds a resource consent to take groundwater at its site, which it proposes to treat to provide a large part of the necessary potable supply. Of relevance:

- The consent has a term of 15 years from commencement;

- It authorises abstraction at a maximum rate of 200m^3/day and 17,000m^3/pa;
- Monitoring is required to correlate observed water levels and production bore data as well as possible saline intrusion;
- Within 12 months of commencement a *"site water processes, systems and practices"* audit is to be undertaken that identifies *"the range of water sources, water uses, ways in which water consumption may be reduced, a cost-benefit analysis of these aspects and recommendations to be implemented"* (Condition 8);
- WIL is to *"adopt all reasonably practicable measures to maintain and enhance the water efficiency of the water supply system, and to minimise losses from the system in accordance with"* the preceding condition.

[69] We mention the latter two conditions because of their relevance to land use aspects of servicing the proposal. There is also a wide ranging Section 128 RMA review condition reflecting the uncertainties that attach to groundwater management.

[70] The groundwater supply is to be complemented by water "harvested" from the development's roof areas, and the reuse, through toilet systems, of treated effluent from the respondent's Owhanake wastewater treatment plant.

[71] Responding to the technical concerns previously described, Mr McDonald reviewed and revised various of his earlier assumptions in his rebuttal evidence, including:

- A commitment by WIL to cap the maximum area of restaurants/bars at 1,500m^2 recognising that these are relatively high water use activities (We note this is now built into the draft Threshold Controls in Rule 6.27.4.2B(e));
- A revised Activity Mix totalling 12,000m^2 GFA;
- Per capita water consumption figures to allow for both peak and average days;
- A reduction in recycled effluent use for non potable purposes to 15% of total use (although he also retained a higher figure for sensitivity test purposes);
- The likely yield from roof areas, assuming a more conservative eave dimension than that given by Mr C R Goldie, an architect witness called by WIL;

- Dry and average year yields for an assumed gross roof area ("GRA") of 9,196m^2.

He also reviewed but maintained for reasons which we accept at this point for the purposes of sensitivity testing, his preferred per capita consumption figures for hotel and apartment occupants.

[72] Mr McDonald then applied his revised assumptions to four key variables in a sensitivity test designed to establish likely water usage in 16 different combinations of circumstances or scenarios. Results were produced for total bore water usage in driest recorded and average rainfall years, the key variables being:

- The GFA mix with allowance for high (1,486m^2) and low (773m^2) restaurant/bar figures;
- Per capita consumption rates with allowance for maximum and average rates;
- Degree of wastewater recycling as a percentage of total water use (15% and 30%);
- Annual occupancy (80% and 100%).

[73] We find the variables and values adopted by Mr McDonald to be appropriate for the purposes at hand. We find the scenarios best suited to evaluating the plan change to be those based on a mix of:

- High or low restaurant/bar levels (m^2 GFA);
- Maximum or average per capita consumption (litres/person/day);
- 15% recycling, which requires reuse solely in "public toilets" in restaurants/bars, movie theatres, conference centre and public toilets;
- 80% occupancy, which is consistent with evidence of Mr S H S Hamilton, a tourism consultant called by WIL, on prospective occupancy rates at this location.

We have preferred some relatively conservative values because the evidence suggests a high measure of uncertainty about some aspects, especially water usage per capita and by activity. Recycling is viewed similarly, being a new, albeit welcome, initiative. As Mr Menzies emphasised, caution is required because of *"..... the fundamental need for an adequate supply of water to the proposed development and the potential consequences in the event of deficiencies in its quantity or quality"*.

[74] Scenarios incorporating the preferred values were numbered by Mr McDonald as 3, 7, 11 and 15, pertinent results being as follows:

- Scenario 3 with maximum per capita consumption and a high restaurant/bar area would require 18,529m^3 pa of borewater in the "driest year", which exceeds the available 17,000m^3 pa. We recognise Mr McDonald's opinion on the potential for the latter to be increased effectively to 20,000m^3 pa by on-site storage but are mindful of Mr Menzies' evidence on the need to mitigate risks to the integrity of such storage if it were to be relied upon.
- Scenario 11 with maximum per capita consumption and a low restaurant/bar area could be serviced by the available 17,000m^3 pa.
- Scenario 7 with average per capita consumption and a high restaurant/bar area could also be serviced by the available 17,000m^3 pa as could (understandably) Scenario 15 having average per capita consumption and a low restaurant/bar area;

[75] We consider scenarios based on average per capita consumption levels to be potentially sustainable. However, we take cognizance of Ms Floyd's reservations in this area given limited experience with comparable developments, especially the hotel and apartment components which may account for up to 50% of total consumption. Because this component is potentially such a large percentage of the total, any underestimation could have a significant effect on overall demand. We are minded to endorse a high restaurant/bar area because it better suits the plan change's mixed use objective than a lower figure. With these matters in mind we find ourselves - albeit with qualifications that we will come to - generally in agreement with Mr McDonald's assessment that:

> I believe .... the most realistic upper bound case on which to assess the overall water sustainability of the proposed 12,000m^2 development is for the High Restaurant case, annual average water consumption, an 80% occupancy or patronage, and 15% recycle ratio for toilet flushing, ie Scenario 7. The bore water demand for this scenario is 13,088cu. m in the driest year and only 9,819 cu. m in an average year. This is well below the consent limit for the bore of 17,000 cu. m annual abstraction.

[76] We accordingly find that there should be a suitable water supply for the proposed level of development subject to measures being in place that satisfy Mr Menzies' provisos. This comes with an important qualification that we shall shortly come to, as to whether the permitted activity GFA level should be set at

12,000m^2 or a lower figure in recognition of the uncertainties attaching to likely consumption rates for some activities and other servicing reasons.

[77] We note Mr McDonald did not offer an opinion in his rebuttal on the availability of water supply to service development beyond 12,000m^2 GFA.

[78] The measures adopted by WIL to meet Mr Menzies' provisos and the related concerns of other services witnesses is contained largely in Clause 6.27.4.7 of PC38 (Environmental Principles) and, more particularly, in Section B (Water and Wastewater Management). Specific comments on the latter section are made below. Suffice to note at this stage that the approach taken is appropriate conceptually. Subject to our detailed review, the only ones not expressly allowed for in the preferred scenarios of Mr McDonald and the "Closing Submissions Version" of Section 6.27.4.7B, appear to be risk management and a "high water use" activity prohibition.

Will the Wastewater Discharged, Minus Any Recycling, Fit Within the Available Allocation?

[79] The respondent and WIL jointly hold a resource consent for the discharge of treated effluent from the former's Owhanake wastewater treatment plant ("WWTP"), which is to be upgraded. The consent was subject to appeal by CAPOW but terms of settlement have been placed before us. The plant is located to the north of proposed Land Unit 27 at a location where it can accept effluent from PC 38 development and other users. Treated effluent from the WWTP would be discharged into LU27 Precinct 5, a wetland within the WIL property. Relevantly, the consent:

- Has a term of 15 years from commencement;
- Authorises a maximum discharge of 250m^3/day;
- Requires the ARC to approve further specialist steps before a tender is let for construction (Conditions 4 and 5);
- Requires (in Condition 45) that the consent holder investigate beneficial non potable reuse of the treated wastewater; particularly reuse during summer. (Public consultation is to be undertaken on this matter. Advice Note G records that should the investigations identify a beneficial reuse, this may occur subject to Condition 46).
- Requires that ARC and Medical Officer of Health approval be obtained prior to any off-site beneficial reuse of treated wastewater (Condition 46).

[80] A number of the conditions interface with the land use proposals in PC 38 and could be viewed as pre-requisites for development commencing (Conditions 4 and 5). It is also pertinent that conditions 45 and 46 require third party approvals and, for this reason, reuse of treated effluent cannot be assumed.

[81] A deed between the council and WIL provides the latter with an assured proportion of the authorised maximum discharge volume from the Owhanake WWTP, namely $97m^3$/day.

[82] It was Mr McDonald's evidence that:

> For the $12,000m^2$ GFA development the estimated total wastewater volume is $83m^3$/day, which is less than the WIL discharge allocation of $97m^3$. Therefore the total wastewater flow could be discharged to the Owhanake WWTP without the need for recycling of effluent for reuse. ...
>
> The estimated total daily wastewater flow for the $18,500m^2$ GFA development is $14m^3$/day ... therefore ... a portion of wastewater recycling will always be required to control the net discharge within consent limits.

[83] As for water supply, however, the councils' technical experts expressed concerns about the robustness of the assumptions relied on by Mr McDonald in his evidence in chief. The need to accommodate both peak and average discharge volumes within the available allocation was emphasised. Ms Floyd for example, produced an amended water demand table based on ARC TP 58 On-site Wastewater Systems: Design and Management Manual (August 2004). Applying the "water in equals water out" theory, her evidence indicated that Mr McDonald's figure of $83m^3$/day could, without effective conservation measures and recycling, reach $120m^3$/day for a $12,000m^2$ GFA development.

[84] Helpfully, the previously described development scenarios produced by Mr McDonald in rebuttal also addressed likely wastewater flows. In response to concerns expressed, Mr McDonald as stated, revised his per capita consumption figures to allow for two different situations.

- A *"peak day"* based mostly on TP 58 recommended MAX values and to be used in the assessment of maximum daily wastewater production in relation to WIL's 97 cu.m/day share of the 250 cu.m/day ARC discharge consent ...
- An *"average day"* based on MAX values divided by 1.3 (23% less) to be used in the assessment of total water consumption over a full 12 months.

[85] Focusing on the four scenarios (Numbers 3, 7, 11 and 15) that we have previously found most consistent with sustainable management, it is evident from Mr McDonald's Rebuttal Table 4 that they all produce wastewater flows of less than $97m^3$/day with not more than 15% recycling. The highest discharge volume given in Table 4 for a scenario based on values we find potentially sustainable, is $84m^3$/day for Scenario 3. Scenario 7, which with the previously described characteristics, has a highest discharge figure of $66m^3$/day.

[86] We accordingly find, with qualifications, that the wastewater likely to be generated by up to $12,000m^2$ GFA with 15% recycling can potentially be accommodated within the $97m^3$/day allocation available to WIL. The qualifications are:

- The need to secure outstanding approvals for the Owhanake WWTP upgrade from the ARC,
- The need for public consultation, and ARC and Medical Officer of Health approval for, treated effluent reuse (Conditions 45 and 46 of the discharge consent),
- The need for effective measures to address related aspects of Mr Menzies' water supply provisos.

Should 12,000m2 GFA be the Permitted Activity or is some lesser threshold appropriate?

[87] When addressing this question we are mindful of a number of factors. Ms Floyd in response to questions from Mr Brabant gave the very fair answer that the relationship between GFA and water management is *"always uncertain."* We would place per capita consumption in the same category recognising in particular, the difference between Ms Floyd and Mr McDonald on hotel and apartment occupants' potential consumption. There is also the potential, which both Mr Brabant and Mr Nolan acknowledged, for reviews to occur under s128 RMA, to alter (in either direction) consented groundwater take and treated wastewater discharge volumes. By the end of the hearing it was evident there was a consensus among the technical witnesses that Mr McDonald had done his best in a critical area where there are no guarantees.

[88] So while it seems possible that 12,000m^2 GFA could be serviced satisfactorily, it is in our view not certain. Even at this level WIL's preferred scenario is reliant on recycling. Neither ARC nor Medical Officer of Health approval can be assumed, and it was Mr Menzies' evidence that "…. *before health authorities gave their consent to use recycled water there would have to be a matter of one or two years operational experience with the Owhanake plant so it could be satisfied in terms of effluent quality….*". There would also be a possible requirement for phosphorous stripping. We consider that Mr Menzies was factoring these considerations into his thinking when he gave the answer to Mr Brabant that, if approval for reuse were not forthcoming, *"….it could possibly be a situation where it might not be possible to reach the 12,000 square metre limit …..".*

[89] For these collective reasons we have formed the view that it is not prudent at this time, from a servicing perspective, to set the permitted activity GFA level at a point where the development is reliant on reuse. Where the cut-off point might be is not absolutely clear, but it seems reasonable to accept Mr Menzies' position *"…. that development can probably get to the likes of 10,000 square metres before this becomes an issue*", and find this to be a more suitable permitted activity threshold than 12,000m^2 GFA.

Additional Findings and Questions on Services

[90] Clause 6.27.4.7 Environmental Principles: Part B (Water and Wastewater Management) included in the "Closing Submissions Version" of PC38 deals with various of the previously described matters of concern to councils' services witnesses. Effective implementation of these provisions is integral to development occurring on a sustainable permitted activity basis. The provisions are to be secured by Rule 6.27.4.7 *"All developments in Land Unit 27 shall be assessed* (and we would add operated) *in accordance with the following outcomes."* We have concerns and some comments regarding aspects of Part B, and related facets of the proposed plan change, which we set out in succeeding paragraphs.

[91] **Part (a)** is a requirement for water conservation measures. Specified provisions of ARC Technical Publication 58 (2004) are given as a means of compliance.

Comment: Mr McDonald's water demand calculations expressly assume implementation of conservation measures and we apprehend this approach was maintained in his rebuttal figures. Water conservation measures are therefore part of the base case. On this basis, we question the appropriateness of Part (a) as an assessment criterion. Conservation measures should be a mandatory part of all permitted, controlled and discretionary activities.

[92] **Part (b)** requires a Water and Wastewater Management Plan ("WWM plan"), which shall "include operational policies regarding water conservation and demand management, and …a strong educational component".

Comment: Ms Floyd sought that the introduction be altered to read that a WWM Plan "shall be prepared for approval by Auckland City Council in consultation with the ARC".

We understand and accept her preference for her reasons given in evidence-in-chief. Our concerns are however even more fundamental:

- Who is to prepare the plan and keep it current?
- Is it a plan for all of Land Unit 27 or the current WIL site?
- How are individual sites, created by future subdivision and separately owned developments, to be managed?
- Who is to conduct the requisite education?
- Who is to incur associated costs and how might they be recouped if appropriate?
- Is the provision accurately described as an "outcome" as Rule 6.27.4.7 provides, a pre-requisite to qualification as a permitted activity/controlled activity/discretionary activity, or an assessment criterion?
- What integration is anticipated between the WWM plan and the audit required by Condition 8 of the groundwater consent and the beneficial non-potable reuse investigations required by Condition 45 of the joint ACC/WIL discharge consent?
- The need for a specific risk management section in the WWM plan, that addresses matters of the type in para 6.4 of Mr Menzies' evidence in chief.

We have a preliminary view that PC38 should provide for a suitable legal entity with ongoing responsibility for the WWM plan.

[93] **Part (c)** specifies further matters to be included in the WWM plan.

Comment: Additional concerns to those expressed regarding Part (b):

- Who is to allocate the available wastewater flow between future sites and activities?
- What legal instrument will protect associated rights/interests?
- Who is to collate the requisite data on actual flows?

[94] **Parts (d) and** (e) specify monitoring to be done in accordance with the WWM plan.

Comment: Additional concerns to those expressed regarding Part (b):

- What authority will the party (or parties) operating the plan have to obtain the information required from others, including potentially commercially sensitive information?
- Is mandatory metering anticipated?
- Are occupancy and/or patronage logs to be required as conditions of consent?

[95] We understand **Part (f)** to provide that the "development" (however defined) may be required to "strip" phosphorous from recycled effluent prior to its use for toilet flushing if the ARC deems this necessary under the Owhanake wastewater treatment plan consent.

Comment: Again, issues arise about how the requirement will be met as the WIL land (or all land within LU27) is progressively subdivided and developed.

- Would the ARC seek to implement any requirements directly through the joint ACC/WIL discharge consent?
- Would the ARC expect the respondent to initiate the requirement through its district plan or conditions of land use resource consent.
- Assuming "stripping" is most efficiently done by one plant, what entity would own/operate it?

[96] **Part (h)** requires all necessary ARC resource consents and approvals be obtained prior to any reuse of treated effluent.

Comment: the requirement that any necessary resource consents be obtained prior to the use commencing seems superfluous but perhaps a degree of cross-referencing is desirable given the complex matters at hand. The provision duplicates Condition 46 of the Owhanake wastewater treatment plant consent but fails to record that Ministry of Health approval is also required.

[97] Development on the WIL site should not commence in reliance on the PC 38 provisions until Conditions 4 and 5 of the wastewater discharge consent are satisfied. We see this as a necessary measure to ensure the availability of suitable wastewater services.

[98] An express provision is required stating that development reliant on reuse of treated effluent from the Owhanake WWTP is not to proceed until approval for this has been gained under Condition 46 of the joint WIL/ACC wastewater discharge consent plus any approval required from Metrowater for managing phosphorous levels in the effluent.

[99] Implementation of Section 6.27.4.6 Design Principles: Section D Water and Wastewater Management (a) (Water Capture) requires a definition for Gross Roof Area ("GRA"). We anticipate this need not be as comprehensive as the one and a half pages spent on GFA.

[100] The "Closing Submissions Version" Clause 6.27.4.1 (Activity Table) provides for laundromats as restricted discretionary activities in Precincts 1 – 4. The Activity Mix tables in Mr McDonald's evidence in chief (Tables 1A, 1B, Tables 2 – 3) and Rebuttal (Table 1) do not allow for these. In his rebuttal evidence Mr McDonald expressly stated *"Hotel laundry ....will be taken off the development site for cleaning"*. Mr Murphy recorded this as a noteworthy change from the "*original development*". Mr Menzies opined that conditions may be required to ensure certain parameters critical to the overall viability of WIL's water supply scheme proposal are met. Amongst these was a *"prohibition on high water use activities (eg laundromat)*". If the water balance has been done specifically without laundromats, which we understand to be the case, it seems questionable whether they should be allowed for as restricted discretionary activities. Further, a generic control on "high water use" activities may be required as Mr Menzies suggests. Additional information on this subject will be required before our final decision issues.

[101] We have formed the preliminary view that the plan change should expressly require not less than 3,000m^3 water storage on the WIL site as part of any permitted activity development to afford buffering capacity generally in the manner described by Mr McDonald in his evidence in chief and rebuttal. We will hear further from the parties on this issue if agreement cannot be reached between them.

[102] Activity Table 6.27.4.1 lists utility services as a permitted activity in all precincts. They are defined broadly to include 'essential infrastructure", including pump stations, piping etc. Stormwater management and wastewater treatment facilities are separately listed. Those facilities with ARC consent are permitted in all precincts as a restricted discretionary activity consent is required where ARC consent is not held. Water supply infrastructure is not separately listed. The reference to wastewater treatment facilities as distinct from other wastewater system components may be conscious drafting, leaving utility services to permit wastewater storage tanks, rising mains, pump stations etc. There is a potential problem, however, as the broad utility services definition could be read (perhaps unintentionally) to authorise all aspects of stormwater management and wastewater treatment facilities.

> **Comment**: This needs attention to avoid the stormwater and wastewater rules being negated by the broad utility services definition or unnecessary legal interpretation complications arising. There may also be aspects of the water supply system that council should retain an ability to review.

Issues of Traffic, Pedestrians, and Parking at Matiatia

[103] The appeals and statements of issues by the parties appeared to foreshadow a heavy emphasis on matters of traffic and pedestrian circulation, and parking. It was therefore something of a surprise to us that expert traffic evidence was presented to us only by WIL, whose witness Mr B Harries gave extensive evidence in chief and rebuttal evidence, and by the respondent who offered a brief statement of a traffic consultant Mr T J Langwell.

[104] We have already commented that WIFUG called no evidence and took very little part in the hearing, and that GDPA called no evidence. The combined submissions on behalf of those groups offered by Mr Rikys, made but brief and general reference to traffic matters. CAPOW, although it did not call traffic evidence, participated more vigorously in the issue through submissions and cross-examination by its counsel.

[105] Before we analyse the evidence and make findings on these issues, it is worthy of note that there are two factors at work that have some influence on them and on our decision so far as it concerns them. The first is that ACC, having engaged in studies of parking and traffic circulation at Matiatia in recent years, expressly has no intention of issuing Requirements to designate any land there for those purposes, let alone in particular the land owned by WIL; secondly that some of

the parking currently undertaken near the waterfront at Matiatia, is on WIL land pursuant to informal arrangements that have no long-term contractual or other basis, and which WIL cannot as a matter of law be forced to continue short of any successful designation by the council. These features may well be to the regret of some of the parties, just as the visual presence of the existing council carpark on legal road appears to be to the considerable regret of other parties.

[106] What this means for our inquiry is that within the constraints presented by those features, we must ascertain whether PC38 adequately provides for parking and the efficient movement of pedestrians, vehicular traffic and freight. Our finding is that it does, for the reasons that follow, noting that the opposing views were put forward almost exclusively through submissions and cross-examination, and included reference to an alleged need to foster public carparking adjacent to the wharf (not an unanimous opposition view), alleged inadequacy of past traffic studies, alleged inadequacy of current roading/parking configuration and recent changes, and inadequacy of hours proposed on WIL land for 90 commuter carparking spaces.

[107] Mr Harries gave detailed evidence about the locational context of proposed LU27, existing traffic and parking conditions in the area, the transportation parking and planning background to Mataitia Wharf, the nature of potential development within LU27, the likely trip generating potential that would result from development of LU27, traffic management characteristics of the indicative plans for LU27, proposed parking provisions to apply within PC38, together with a discussion of the transportation objectives and polices of PC38.

[108] He described the nature of the five precincts in LU27 with emphasis on parking and vehicular and pedestrian access, egress and circulation. He told us that Ocean View Road as classified is a Principal Road in the district plan, and described its current physical configuration. He described current transportation demands (commuter trips, "kiss and ride" trips, bus and taxi movements, vehicle rental activities, and pedestrian and cycle movements). He described the existing carparking facilities including kerbside parking along Ocean View Road, the council carpark between the WIL land and the wharf, current temporary parking on the WIL site, parking on the Swordfish Holdings' site, and a new unsealed long-stay council carpark about 600 metres east of the wharf up Ocean View Road (outside the boundaries of LU27).

[109] Based on estimates of trips by different types of ferry passengers provided by Dr J D M Fairgray (a consultant economist called by WIL) including breakdown of them as between commuters, school students, non-commuters, and visitors, Mr Harries provided his opinion as a transportation planner that the land within PC38 would provide for its intended mixed use development (to a level of 12,000m^2 as a permitted activity and then to 18500m^2 by way of restricted discretionary activity) in such a way as to take full advantage of:

(a) a location immediately adjacent to a major public and private transportation hub;

(b) the highest concentration of visitors existing on the Island;

(c) being on a road that links directly to, and is only a short trip from the town of Oneroa;

(d) being on a road that forms part of the major east-west distributor road on the Island;

(e) being a location that is able fully to accommodate on-site all of its generated parking demands;

(f) being a location that enables an interface between the visitor and public transportation functions on the Island.

[110] Mr Harries analysed existing traffic conditions and offered the opinion that there was ample capacity available on Ocean View Road to accommodate at least a trebling of existing traffic demands to and from Matiatia Wharf, and offered reasons why the road would cope during the busiest time of day, the morning commuter peak flow time.

[111] He described previous reports and studies on transportation and parking issues at Matiatia, and offered reasons why the relocation of vehicle rental activities as proposed by PC38, would be very appropriate. He analysed crash data and expressed the opinion that the area has a good safety record given the number and complexity of traffic movements associated with wharf activities.

[112] Mr Harries described several studies, particularly one by Parlane & Associates in 2001, and a draft transportation and parking plan by Traffic Planning Consultants Limited in 2002. He noted and agreed with a forecast demand for approximately 750 casual day-time carparks by about 2015; noted that many recommendations for improvements in parking, traffic and transportation characteristics at Matiatia have been implemented since then; and considered that there had been adequate identification of key constraints, including compatibility with the WIL development concepts. He also noted that some recommendations were now out of date, but of importance he noted that current initiatives and planning, including the use of the Owhanake site 600 metres up the road, was evidence of a substantially reduced focus on incorporating additional public carparking into the WIL site.

[113] Mr Harries analysed the development potential coming from the listed proposed mixed use activities of the then proposed thresholds (in particular 12,000m^2 permitted activity and a further 6,500m^2 restricted discretionary activity), and expressed confidence in the trip generating potential of the site, its ability to handle all of its traffic movements including at peak hour times, and its ability to provide for all of its own parking requirements together with a further 90 public spaces pursuant to an agreement WIL has entered with the council.

[114] Mr Harries examined the proposed objectives and policies of PC38 as regards transportation and parking, particularly those relating to promotion of development of transport infrastructure to meet the needs of residents of and visitors to Waiheke, and enabling Matiatia to function as an attractive gateway to the Island. He expressed his opinion that he considered them entirely appropriate.

[115] Mr Langwell, a traffic engineering consultant, gave evidence at the request of the council. His task had been to review the detailed evidence provided by Mr Harries, and assess the traffic engineering and transportation planning implications of PC38. He had had significant involvement with the draft 2002 plan, which was undertaken specifically because PC38 had been initiated.

[116] Mr Langwell strongly supported the analysis that had been offered by Mr Harries, and expressed confidence about traffic and parking outcomes in the Matiatia valley in years to come.

[117] As we have mentioned that the traffic witnesses were vigorously questioned, particularly by Mr Brabant. They were cross-examined on a large number of matters such as past reports, aspects of the current physical situation, and postulated traffic movements and parking in the future. They exhibited a detailed knowledge of matters as they stand in physical terms, a detailed understanding of current limitations and constraints, and of improvements recently effected, and were confident in their reasoned views about the effects of future implementation of PC38 in the configuration presented to us. Although the cross-examination was detailed and lengthy, our view is that Mr Harries and Mr Langwell were ultimately almost completely untroubled by it.

[118] Mr Harries was well familiar with the current road and parking configurations, recent improvements, and the morning peak commuter traffic situation, and he considered that they were no different from any other major road where there is kerbside parking, and that there was no particular problem. He was not concerned that traffic counts had not been taken since 2001, because the circumstances had not changed appreciably, and he was able to look at peak hour traffic movements on Ocean View Road and compare them with the 2001 count, noting that there wasn't any real discernible difference. He was also able to factor in the passenger and vehicle movements discussed by Dr Fairgray. He considered that although the 2002 transportation plan was still in draft, there had been enough research done in the several studies to give reliable projections up to the year 2016. He considered that levels of service, and provision for parking, would be acceptable. He was not concerned that the newly established Owhanake parking area was some hundreds of metres up Ocean View Road from the wharf. He considered that in future the Island would be able to take advantage of a large latent capacity in terms of public transport, such as park and ride facilities and bus services. If necessary, a multi level parking structure could be built on the Owhanake site, and he considered that such would be appropriate and entirely possible.

[119] Mr Harries offered confident answers about the objectives and policies, and considered them appropriate as drafted, but conceded that he would not oppose the inclusion of a policy:

> By facilitating the provision of efficient and economic transport services for wharf users.

[120] Under questioning by Mr Brabant, Mr Harries offered the firm opinion that a multi level parking structure adjacent to the wharf and the beach on the current site of the "at grade" council parking area, would not be preferable to a parking structure on the Owhanake site, because with the former there would be the likelihood of drawing too much traffic along to the western (or beach) end of Ocean View Road. That, coupled with the chorus of concerns that we heard about the poor visual qualities of parking being placed in that location at Matiatia, led us to consider that provision should expressly be built into PC38 to discourage or even preclude the construction of a carpark structure above ground in the location by the beach. This should be by way of objective, policy, and amendment to Activity Table 6.27.4.1.

[121] Mr Langwell was cross-examined less extensively, but was as confident in his answers, and apparently as knowledgeable as Mr Harries. It would be repetitive of us to describe that evidence in the same detail. Nevertheless it is worth recording that while Mr Langwell conceded that a parking area 600 or 700 metres from the wharf might be less attractive to commuters, or might offer less "utility", it would provide the necessary future carpark numbers adequately and quite efficiently, and that public transport (we infer even perhaps a shuttle service) might provide an adequate answer. Certainly Mr Langwell strongly supported Mr Harries' view that in future, public transport services would be at least as important as access to Matiatia by private motorcar.

[122] Both witnesses were questioned about a 7am to 6pm limitation intended by an agreement between ACC and WIL for the 90 commuter spaces to be provided on WIL land. Each of them answered confidently that while some commuters might not be able to cope with those hours, many would, and the spaces would serve a useful purpose.

[123] While we had initial misgivings about the 2002 transportation plan remaining in draft even now, it is clear that the council has engaged in considerable forward planning about parking and traffic circulation, with assistance from many and highly qualified consultants including Mr Harries and Mr Langwell. Through their evidence in chief and rebuttal, and answers in cross-examination, we came to the view that the traffic and parking concerns of opposition parties (advanced almost entirely through cross-examination of WIL and ACC witnesses) were not sufficiently made out as to require us to reject PC38. Rather, we were left with the impression that the opposition parties (or at least some of them) were unduly focussed on

gaining as many commuter carparking spaces as close to the wharf as possible, without sufficient concern for the visual or amenity consequences of that, while also having insufficient regard to the part that public transport could play. We have no power to direct that ACC designate further land near the wharf for parking, and having regard to the opinions expressed by Mr Harries in cross-examination, we have strong doubts about the wisdom of the provision of ever increasing quantities of carparking at the western end of Ocean View Road.

[124] It is clear to us that despite the 2002 transportation plan remaining in draft, ACC and WIL have considered transportation and parking matters adequately, and we have no basis for holding other than that PC38 provides adequately for parking, and for the efficient movement of pedestrians, vehicular traffic and freight associated with Matiatia Wharf, in addition to making appropriate provision for the development that it will enable. Ultimately, we have no hesitation in accepting the submission made by Mr Nolan in reply at the end of the case, that, on this score, the LU27 provisions fairly and properly reflect the balance between private development rights and the provision of public transportation.

[125] The geographic extent of proposed LU27 is the same as for existing LU25, but that is not in itself a negative. It is clear to us that the council, through the provisions of PC38, and by means of future planning in the wider area, has the ability to plan adequately for matters of transportation and parking.

An Integrated Approach– approve PC38 or await District Plan Review or Public Plan Change?

[126] Resource management on Waiheke as on other islands in the Hauraki Gulf, is the subject matter of the Auckland City District Plan – Hauraki Gulf Islands Section – operative since 1996. In Part 3 (Resource Management Overview) we find, in clause 3.0 the following statement:

> The Plan will enable the continued protection, preservation and conservation of the Hauraki Gulf Islands in conjunction with development and land use activities at a scale and intensity compatible with the land use capability of the Islands.

[127] The Plan divides the Hauraki Gulf Islands into Strategic Management Areas (SMAs) before moving to further classify areas into Land Units (in common parlance, zones). Waiheke Island is divided into two SMAs – Western Waiheke and Eastern Waiheke. The Western SMA is the more "urbanised" area, and the Eastern

area the more rural, open, and natural, albeit that there are also some significant natural areas on the coastline in the western area, for instance on the headlands of Matiatia Bay.

[128] The Western SMA has historically been the focus of most residential, retail and industrial development on the Island. This development has occurred in a series of small settlements or villages separated by rural land or green belts, encouraged in this pattern by the Plan itself.

[129] The Matiatia land included in PC38 is in the flat part of the valley floor, and is presently classified in LU25 along with other areas including Waiheke's other port, Kennedy Point, and Sandy Bay on Rakino Island.

[130] It was fairly generally acknowledged by the parties that the provisions of LU25 at Matiatia are outdated and inappropriate, particularly given the important "gateway" function, and we agree.

[131] We have previously mentioned the presence of LU17 ("Landscape Amenity") around the edge of the Bay and on the southern side of Matiatia Valley, and LU22 ("Western Landscape") on the headlands and on sloping land surrounding the valley floor.

[132] Mr D J Scott, a landscape architect with long experience and involvement in Waiheke planning matters, gave evidence on behalf of CAPOW. He spoke about past development of the Waiheke Island landscape framework for planning purposes, including comprehensive community consultation. This planning was done by development of a strategic spatial framework for proposed landscape management areas based around the 4 principal physical water catchments of the Island, comprising the western end of the Island, the central area with a somewhat urban focus, a rural hinterland to the east of that, and the slopes of the eastern end of the Island.

[133] Mr Scott described to us a number of studies in and around Matiatia including his own, commissioned by ACC mainly during the 1980s. A significant focus within those studies was on traffic movements, carparking, and their relationship with the wharf, together with landscape impacts. In particular Mr Scott expressed his concern that a 1989 wharf study had *"little chance of predicting the quantum of the rate of increased visitor numbers, passenger transport demand and*

development growth that would result in...changes in ferry services", (the latter being a reference to the increase in fast ferry services and the acceleration in development on Waiheke, and on commuter travel). He then moved on to express concern about pressure on the existing "at grade" council carpark, circulation patterns, and the visual and landscape amenity issues that arise from the location of the carpark.

[134] Mr Scott advocated that there now existed a prime opportunity to resolve these issues with an holistic integrated approach that was inclusive of both private and public land uses. He considered that further research was necessary for the purpose.

[135] For ourselves, we note that PC38 says relatively little about management of the existing carpark area established on the widened out portion of legal road near the wharf. Likewise there is little recorded about vehicle/pedestrian circulation in and around it, and its relationship with other precincts.

[136] The focus of Mr Scott's evidence was largely on that area around the carpark and the ferry terminal wharf, particularly in his discussion of some of the evidence offered by the landscape witness called by WIL, Mr S K Brown. In particular Mr Scott recorded:

> 9.10 While I have no specific critique of, and indeed concur with the philosophical intent of Private Plan Change 38, and the accompanying site analysis and assessment and projected outcomes contained within the dialogue of Mr Brown's and Ms Skidmore's evidence pertaining to the subject site; there remains a fundamental flaw in terms of process to address the existing and ongoing dynamics between the private land subject site and the public lands of the Matiatia Bay landscape identity areas. Specifically the public lands focus on the wharf and associated service areas, carpark, traffic and pedestrian circulation space, coastal margins and the Ocean View Road corridor.
>
> 9.11 The dominant issue of concern in landscape spatial analytical terms is the need to address the council carparking and associated traffic circulation elements and patterns. It is these final elements of detail that require addressing in a comprehensive way in order to secure a fully resolved outcome in relation to the landscape and visual amenity of the Matiatia Bay identity and ultimately the completion of the implementation of the gateway experience Waiheke Island.

[137] Put simply, we apprehend Mr Scott to be saying that development of the council carpark should be suitably integrated with the adjacent wharf, esplanade reserve, and WIL land, and that those relationships should be provided for in a

positive manner in PC38. Subject to the detail that follows, in landscape terms we agree.

[138] Mr Scott's conclusion referred us to commentary on the planning process offered by Mr B W Putt, the planner called by CAPOW. Mr Scott expressed agreement with Mr Putt's evidence, while noting that Mr Putt was offering a "stop gap" solution that would allow the council to "catch up with the integrated plan change required to manage the resource issues at Matiatia and the gateway experience".

[139] We have already described Mr Putt's evidence as involving qualified, if limited, approval of the planning approach of WIL. Indeed, in a number of ways Mr Putt's approach was quite constructive, an approach not necessarily foreshadowed by what had been announced by counsel as CAPOW's overall approach to the case.

[140] One of the themes of Mr Putt's evidence was that for reasons we will come to, there should be an encouragement of, or indeed a requirement for, public notification of development proposals within LU27 beyond a certain level of permitted development. The level chosen by Mr Putt was 10,000m^2 of gross floor area. Amongst Mr Putt's stated concerns were the "expectations" of Waiheke residents that they be able fully to participate in planning processes including development applications, and lack of integration of the entire wharf activity under the plan change. The public participation aspect we will deal with later. As to integration of the entire wharf activity into the plan change, we note that a substantial part of the transport activities at Matiatia, that of the wharf and terminal themselves, are located beyond the jurisdiction of the district plan, and are the subject of existing and quite recent Consent Orders made by this Court, in respect of which the ARC is the planning authority, and the subject of development recently undertaken. Integrated planning is required, but ACC has no jurisdiction beyond High Water Springs Mark.

[141] The relative absence of provisions about management of development on the carpark land, and integration of it with other precincts on land, nevertheless remains an issue. We are not presently persuaded that the lack of these things should cause the plan change to be refused. We say this by reference to the ***Nugent*** tests as we discussed them in paras [38] to [40] above, and the constraints of ownership and want of designation previously discussed.

[142] In broad terms, and having regard to our findings in para [129] above, we consider that the continuation of the existing council carpark is "preferable" (to use the language of the ***Marlborough Ridge***[11] decision, but our final view on that will be dependent on the detail that we require to be advanced to meet the shortcomings identified in para [134] above.

[143] The statements by Mr Scott concerning the wider landscape across the three Land Units, were extremely general. We must take into account that in geographical terms, LU27 would have precisely the same boundaries as LU25, and that the total area of land within it is little more than 7 hectares. We have also noted that in terms of development authorised overall, and subject to any limitations that should be placed on PC38, development authorised by LU27 would be within much the same "ball park" in terms of scale as LU25.

[144] An holistic overview of the SMA and the Land Units at the Western end of Waiheke was undertaken by Mr Scott and his team in 1989. The main things to have changed since then are, on the evidence, and as confirmed by our own inspection, that lifestyle blocks have been created within LU22 and have had houses built on them; regenerative native planting has been successfully established; fast ferry transport from Auckland has grown, and significantly increased rates of development on Waiheke Island have raised levels of traffic and pedestrian activity around the carpark, the wharf, and Ocean View Road. Further, (as agreed by almost all who participated in the hearing) the existing activities within LU25 have (subject only to some landscaping very recently undertaken by ACC) become rundown, unattractive, and out of step with the improved wharf and terminal facilities recently completed.

[145] Mr Scott naturally conceded that he did not possess traffic engineering qualifications, and was unable to challenge the technical evidence offered by traffic witnesses called by the parties expressing confidence about carparking and traffic circulation matters.

[146] It is fair to say that while in a general sense Mr Scott's evidence had a broad (but rather inspecific) thrust, his main focus was clearly on the relationships between carparking and traffic and pedestrian circulation, and their impact on the landscape. Indeed, as we have noted, all landscape witnesses agreed that the existing ACC carpark on the waterfront is an eyesore. ACC however purported (again as previously noted) to introduce two "givens" into the case, namely that the existing

[11] See our para [39] above.

carpark, established as it is on land dedicated for road, is not to be shifted; and that ACC has no intention of designating land privately owned by WIL, or anywhere else within LU25, for carparking purposes (as to which we note that we have no power to make it issue a Requirement for Designation). If PC38 is to proceed, it would need to face these constraints and work with them. Once again we encounter a situation where detail will become important. The ultimate success of WIL's application will depend on satisfactory resolution of those matters (and others).

[147] So far as integrated planning is concerned, it is important to note that in the district plan there are descending layers of policy statement:

- At the broadest level, applying to all of the Hauraki Gulf Islands, is Part 3 which contains the Resource Management Overview and sets out Issues, Strategies, Outcomes, Means, and Vision.

- Next is Part 4 – Resource Management Issues and Strategy – Inner and Outer Islands, identifying Waiheke as an Inner Island and containing further statements of issues and strategy elements.

- Then there is Part 5 – Strategic Management Areas, in which at section 5.18 is the Strategic Management Area 18: Western Waiheke, with further statements of issues, strategy, objectives and policies.

- Finally, there are the individual land units or zones.

[148] The 3 broader strategic layers remain effective and PC38 does not seek to change them. It is only at the "lowest" level that changes are sought by PC38, that is at Land Unit level.

[149] The evidence of Ms Nairn, the ACC policy planner who gave evidence, offered a thorough succinct analysis in this area, particularly in its consideration of guiding documents both statutory and non-statutory, and the integrated task that is needed. It is worth quoting her summary of the task, from paragraph 4.22 of her evidence in chief, as follows:

- To be consistent with the national and regional statutory documents, any plan change should ensure that future development does not detract from the natural coastal character of Matiatia, with a particular emphasis on the wider Matiatia Bay area.

- To maintain the integrity of the ARPS, the HGI District Plan and "Essentially Waiheke", any plan change should preserve the existing pattern of development on the Island by ensuring that development is located in existing commercial areas and is separated by rural buffers.

- To ensure consistency with the metropolitan urban limits in the ARPS, any plan change should not provide for development outside the boundaries of the existing LU25 zoning.

- The existing LU25 provisions highlight the importance of the transport function of the area. As this function will continue in the future it should be recognised in any plan change.

- In accordance with the development strategy in "Essentially Waiheke", the commercial activity in the area should continue and, if appropriate, mixed-use development should be encouraged.

- In accordance with the Environmental Principles in "Essentially Waiheke", the plan change should protect the environmental value of the wetland at Matiatia.

- In accordance with the Economic Principles in "Essentially Waiheke", long-term economic growth should be fostered.

[150] Ms Nairn's evidence served to help us to confirm that the approach taken on behalf of WIL had been to take very full account of those matters, and indeed we were presented with extremely long and comprehensive evidence in chief on the subject and in rebuttal by Mr B L Kaye the planner called by WIL.

[151] At a general level therefore, we have little difficulty in confirming that an appropriately integrated approach seems available in the preparation and subsequent refining of PC38, although this is subject to satisfactory resolution of matters of detail to a sufficient degree, such that the success of the exercise will ultimately depend on that.

What are appropriate threshold levels for development, and what activity status should apply to each stage?

[152] A reading of our decision to this point should convey that subject to attention being successfully applied to a number of matters, we presently have the view that proposed private Plan Change 38 should not be rejected. That could change, if those matters are not successfully attended to.

[153] Equally, a trend may be discerned that a level of comfort may have developed for authorising up to 12,000m^2 of development as a permitted activity having regard to traffic engineering and noise effects (the latter was barely in

contention), and visual effects. This of course is once again conditional on considerable further work being successfully undertaken.

[154] It will also be clear however that the issues of wastewater disposal and water availability do not carry the same level of comfort, but instead the gfa level authorised as a permitted activity should not be more than 10,000m^2.

[155] We do not consider the need, on the evidence overall, to find in favour of a level more conservative than 10,000m^2. Indeed we consider that there is some merit in the thrust of the combined evidence of Mr Norrie, Mr Hamilton, and Dr Fairgray, that tourism, economic, and commercial viability factors, favour maintaining a reasonable permitted activity level. We note also that Mr Putt, CAPOW's planning witness, tentatively suggested 10,000m^2, if we were to approve the plan change.

[156] PC38 in its current form provides that gross floor area between 12,000m^2 and 18,500m^2 may be authorised by restricted discretionary activity applications, and that the same status should be applied to modification of the areas of any particular group or type of activity (mixed) within certain limits. The document also espouses a non-notified approach to such applications.

[157] The parties opposing PC38 strongly resisted both the restricted discretionary approach, and the concept of non-notification which is emphasised above 12,000m^2. Mr Putt offered us the opinion that Waiheke was somehow rather different from much of the rest of New Zealand in terms of the interest of its inhabitants in participating in resource consent applications. We find no guidance in the Act as to that, and can see no other reason for marking Waiheke apart from the rest of New Zealand on that score.

[158] We disagree with the approach to notification taken by each of WIL and the opposition parties. We prefer the opinion of Ms Nairn, the planner called by ACC. On the evidence before us, we consider that it is quite likely that developments exceeding the permitted activity limitation may have potential effects that are more than minor. We think the issue is best left to the operation of sections 93 to 94D RMA. That part of the Act has recently been refined by Parliament, but remains based largely on provisions that have been tried and tested for over a decade which tend to favour public participation but with express qualifications. We are not persuaded to depart from that in either direction.

[159] As regards the difference of opinion as between restricted discretionary activity status and discretionary status, we again favour the approach taken by Ms Nairn. She considered that the list of effects to be considered under the proposed assessment criteria in PC38 is very comprehensive, and has every appearance of being full analysis under s104 RMA. We consider that in general terms a restricted discretionary activity approach should involve a rather more restricted list of criteria for assessment, as befits its name. Ms Nairn also drew attention to the fact that the activity mix controls as presently drafted contain an element of flexibility that have the potential to add another 2,000m^2 to permitted activity gross floor area, so it is appropriate to record that given our findings about water availability and wastewater matters, we are not comfortable with that flexibility being built into the provisions. We are aware that it was designed to encourage a certain activity mix, but we consider the engineering limitations outweigh that. In any event there are likely to be other ways to achieve particular activity mixes.

[160] While on the subject of maintaining an aggregate limit of 10,000m^2 for permitted activities so as to ensure servicing capability, we have a concern about the second sentence in Rule 6.27.4.2 B(e) which limits defined Threshold Activities to a certain level, but which would not appear to prevent a higher aggregate level being reached if in the early stages activities established as permitted activities and others obtained discretionary activity consent – noting that Rule 6.27.4.7 does not include amongst its assessment criteria or "principles" the adequacy or otherwise of water availability and wastewater disposal.

[161] We also accept a further reason put forward by Ms Nairn (which of course at the time she made it was subject to whatever our findings would be on the engineering matters): given the uncertainties surrounding the engineering assessments, and the somewhat ground breaking (if praiseworthy) nature of the proposal to reuse treated effluent through toilet systems, and the need for further approvals in that regard, a full and thorough assessment seems called for in the resource consent process, favouring full discretionary activity status. The same may be said in relation to visual matters, particularly having regard to the concession made by Mr S K Brown under cross-examination. That was that while he was comfortable with 12,000m^2 gfa development "as of right" (but with controlled activity consents needed for buildings), he favoured public participation above that level because of the sensitivity of the location – a position he slightly qualified under re-examination by reference to "environmental principles" provided for in restricted discretionary activity application assessments. Nevertheless we take guidance from

his straightforward and unqualified concessions under cross-examination, and agree with them.

[162] Mr Brown's concession seemed appropriately to reinforce the evidence in chief of Ms R A Skidmore, landscape architect called by ACC, whose assessment of "Waiheke character" as quite distinct from the "mainland", including as to the former's "relaxed" aspect and slower pace with strong maritime flavour, seemed well founded. Ms Skidmore recommended that the council should have the ability to carry out a full assessment on a discretionary activity basis above 12,000m^2, in particular because to a large extent the appropriateness of going above that level would depend on the built outcome that had preceded it. We agree with those views, and add that if PC38 is ultimately to be approved, there will be a strong emphasis throughout it on coherent and attractive design and respect for surrounding landscape.

Subsidiary issues, and detail requiring attention

[163] A host of detail was raised during the course of the hearing, concerning a great many matters. We have already indicated that in the main they can be regarded as subsets of the main issues that we have covered. Some of them now need expressly to be discussed.

[164] First, in general terms, our setting of revised thresholds will trigger a need for a great many consequential changes throughout PC38. Secondly, it will be observed that many of our comments that follow, concern the detailed provisions of the draft plan change. In making these comments we have worked from the last of several versions of the document, the one that WIL has termed the "Closing Submissions Version".

Subdivision

[165] The rules proposed concerning subdivision would allow for lots down to very small areas, for instance individual carpark spaces and accessory lots. We have the impression from a reading of the provisions that there is no limitation on subdivision occurring ahead of the erection of buildings and other development, which we consider could well make the implementation of the provisions that aim for good design, less effective or even unworkable. Subject to it being demonstrated to us that a combination of provisions of PC38 and provisions of the existing plan might

already achieve these things, we consider that it would be appropriate to require subdivision and development to be undertaken on an integrated basis in terms of consents, or in the alternative that subdivision may be undertaken by itself only if it follows the construction of buildings and other development that have been subjected to the various assessment criteria and approved. Otherwise, we consider that there is the potential for fragmentation of ownership that could put development at serious odds with good environmental and design outcomes. After all, the total area of land concerned (just over 7 hectares) is not large even now.

[166] It occurs to us in terms of fairness however that an exception could perhaps be created to an extent of about 2 ½ or 3 hectares being subdivided off before development is approved and implemented, but further thought may be needed as to how this could work viz a viz the provisions overall concerning staging, design and other high quality environmental outcomes.

Setback of buildings from foreshore

[167] Ms Nairn strongly recommended that no building be constructed within 40, or even 50 metres of mean high water springs (inclusive of esplanade reserve) so as to be consistent with what she described as coastal setbacks on adjoining sites, that is 10 to 20 metres further back than proposed in PC38. That advice did not generally find favour with the landscape witnesses. For instance Mr Scott called by CAPOW said under cross-examination that he did not have a problem with the relationship of the building frontages to the foreshore in the position proposed. Mr S K Brown, called by WIL, considered that it was desirable having regard to the nature of development on and around the wharf and in Matiatia Bay generally, that structures be allowed to approach the water as closely as possible – indeed he recorded in his rebuttal evidence that he would have no problem with carefully designed and sited components of the village "dipping their toes in Matiatia Bay". Ms Skidmore agreed in cross-examination that no further set-back should be required.

[168] It is not possible to accommodate Mr Brown's "dipping of the toes" sentiment as there is an esplanade reserve along the edge of the Matiatia Beach. We do not share Ms Nairn's sentiments on this issue, however, and will not require a further setback than presently indicated.

Urban design controls

[169] The urban design controls proposed in PC38 attained an important position in the debate about matters visual in the hearing.

[170] During the course of the hearing, a decision of the High Court about urban design in the context of non-notification of a resource consent application became available[12]. As part of a carefully reasoned decision, Justice Keane there held that the Act makes the aesthetic an indispensable concern in every planning regime and for every consent authority[13].

[171] WIL volunteered to add a provision into PC38 that any application for a restricted discretionary activity should be placed before a body currently set up on an informal basis by ACC, called its Design Panel (or any equivalent established concerning Hauraki Gulf Island matters). It has subsequently added such a provision to the rules put forward concerning restricted discretionary activities in the "Closing Submissions Version" of PC38.

[172] The question that we placed before the parties was as to whether some more definitive regime might be established. We are however presently inclined to favour the general approach adopted by WIL but of course now in the context of full discretionary status above 10,000m^2, and also in connection with the controlled activity consent regime for structures up to that level of development. One reason for this is that assessment criteria concerning design and visual impact are set out in the draft plan change in detail. There are also some legal fish-hooks in adopting a more mandatory approach, not the least of which concern the extent to which a consent authority can delegate decision-making powers, as discussed by the Court of Appeal in ***Turner v Allison***[14]. We are prepared to give this matter further consideration, but presently incline to the regime proposed by WIL.

Signs

[173] As a result of some debate about the control over signs during the course of the hearing, ACC proposed (and there came to be included in the "Closing Submissions Version") provision that all signs would be dealt with separate from the

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[12] *Urban Auckland (the Society for the Protection of Auckland City and Waterfront) Inc v Auckland City Council and Anor* Decision CIV 407/04 HC Auckland 2 December 2004 (Keane J).

[13] [At para 73].

[14] [1971] NZLR 833; (1971) 4 NZTPA 104; 14 NZLGR 348 (CA).

resource consent regime, that is through an Auckland City Council Consolidated Bylaw[15].

[174] We are not presently satisfied that this would be a satisfactory approach at the gateway to Waiheke Island. We consider that the issue should be dealt within the plan change. The gateway factor does not however necessarily militate in favour of signs being controlled to the point where they are insignificant, and indeed we consider that they can be an interesting even exciting part of such a place. What we seek is a strategy that identifies and regulates activities in generic terms, without unnecessary detail, but controls visibility of signs, particularly clutter and lighting of them, from sensitive viewpoints outside the land unit.

Maximum heights

[175] PC38 proposes controls over maximum heights, particularly on a stepped basis, with provision for approximately one more storey of height on buildings in the southern part of the site. This seems generally appropriate, although we feel that there should be some adjustment in the line separating the two height limits, towards its eastern end, to lessen the impact of 3-storey building form on the low point of the horizon at the head of Matiatia Valley, when viewed from the wharf and ferries berthed on its southern side. The effect that we are addressing can be seen in Exhibit C of Mr S K Brown. We doubt that the adjustment needed is major, but we consider that there needs to be some slightly more sympathetic response to the surrounding topography than is presently indicated.

Minimum apartment size

[176] ACC's planning witness Ms Nairn expressed concern that dwellings ("apartments" as she termed them) should not be less than 60m^2 in area. Ms Nairn was questioned quite closely about that, and conceded that if a less restrictive minimum was applied, say 40m^2, there would be greater flexibility of choice of design. She maintained a slight concern about "quality" and the appropriate size of development for apartments at Waiheke, but we were not convinced that there was an important resource management issue coming from her evidence. The "Closing Submissions Version" makes provision for minimum apartment size of 40m^2, and

[15] 1998 Part 27 – Signs.

this (surprisingly) is attributed to input from ACC. We also alert the parties that there is no definition of "apartment" in PC38 or the operative plan.

Ownership of open space and restricting uses on the ground floor adjacent to open space

[177] The structure plan attached to PC38 shows a significant private open space (with public access to be available at most times) being inserted on an east-west axis from the esplanade reserve into the centre of a major part of the Precinct 1 area.

[178] Ms Nairn considered that there should be a limit on the amount of permanent residential use or visitor accommodation activities which could be established on the ground floor of buildings adjoining such space. Her reason for this was that "active" things such as retail shops and cafés should be required at the edge of the open space, in order to make it an enjoyable area for use by the public.

[179] Ms Nairn accepted in cross-examination that the distance across the open space area to the likely southern wing of the development in Precinct 1, would mean that commercial activity would be less likely to be viable if established there. Dr Fairgray and Mr Norrie had strongly advanced that opinion, and we accept the force of what they said.

[180] Somewhat by way of compromise, and we suspect reluctantly, WIL offered in the "Closing Submissions Version" a control that residential units and visitor facilities should not in aggregate comprise more than 50% of the ground floor of buildings in Precinct 1 north of the height differential line shown on the structure plan (that is confining the control to the likely northern wing of the development, and leaving the market to establish the nature of development in the southern wing). Frankly, that is as prescriptive as we would be prepared to require matters to be on that account in these buildings.

[181] As to Ms Nairn's view that the open space area should be vested as public space, we favour the position taken by WIL that it should be under private control, and available for events such as wine festival activities, and not made part of a public reserve. That however would be subject to the provisions of PC38 making it plain that the area is to be relatively clear, open, and free of permanent structures, with no permanent physical or psychological deterrence to entry by the public, and with adequate and enforceable provision for maintenance of it on an ongoing basis.

Building coverage

[182] Ms Nairn suggested that building coverage be reduced somewhat for both the permitted and controlled activity standard in PC38. We do not consider there to be need for further such restriction. Looking however at the tables relating to building coverage on page 8 of the "Closing Submissions Version", we do not understand the significance of the asterisk placed in the final column, and this will need to be explained to us.

Design and environmental principles

[183] These are essential to the implementation of the proposed zoning. They should apply to the whole of LU27, and to all buildings and for all types of resource consent. As presently drafted they appear very comprehensive, but may need some refinements. For instance we question the appropriateness of them applying to infrastructure and services. Further, we wonder whether the two lists could be combined into one.

[184] At the top of page 30 there are suggested restrictions on the design of buildings fronting the council carpark and open space. The heading ***"Buildings/Council Carpark (Precinct 3)"*** appears ambiguous and might need attention, but more importantly it reminds us that in view of the almost unanimous view of those who gave evidence on visual issues, the construction of a carparking building above ground level in the existing council carpark area would appear very undesirable, and in our view should be discouraged or even precluded by PC38.

[185] Clause 6.27.4.6 should carry on additional category "Buildings/Roads", which requires pedestrian connectivity and attractive built form. Subclause (a) ("General") should be strengthened with mention of the same topic. "Roads" are not to be treated visually as some sort of inferior public open space.

[186] In 6.27.4.6B(d), second bullet point, there is some repetition to be deleted.

[187] In 6.27.4.6C(a), fifth bullet point, there is vagueness in the term "existing trees of public significance". In (d) there is some repetition between the sixth and tenth bullet points. In D(a), we question whether Lot 8 DP146325 means Precincts 1 and 2, and if so, it should say so.

[188] In 6.27.4.7D, we are not sure of the meaning of "Natural Precinct". If it is Precinct 5, it should say so. If it includes any other area, it should also say so.

Further miscellaneous changes needed

[189] Ms Nairn raised a number of small and miscellaneous matters. We have the impression from the colour coding used in the "Closing Submissions Version" in PC38, that these may have come to be included by and large, but we have not checked that in fine detail. An example of one that does not appear to have found its way into the document (although we could be demonstrated wrong, such is the size and complexity of the document now), is noise standards for temporary activities.

[190] This point leads us to comment in a more general way, that due to the iterative approach taken over this long and complex document, that after further changes have been made to it, it would benefit from an overview of a peer review type to check for internal consistency, consistency with the relevant provisions of the district plan not being changed, and overall clarity and workability.

[191] In saying this, we make no criticism of the iterative approach that has been taken. Although PC38 presently has the feeling of being quite highly prescriptive and even perhaps unwieldy, many of the changes that have been introduced have been to endeavour to accommodate input from parties.

[192] We turn now to some particular matters that we have noted in the current version. First, on page 7, construction of new buildings within 10 metres of the wetland has been introduced as a non-complying activity at the end of the activity table, but at the bottom of p.7 under the heading "Particular Rules", it appears to be assigned something approaching prohibited activity status.

[193] At the top of p.8 under the subheading "Building Location", we are unsure what is meant by *"and alterations to existing buildings"*. Also, we wonder how the percentages in sub-rule (b) are to be monitored.

[194] At the bottom of p.9 the stated exemption might need to be reformatted if it is to apply only to situation (2) and not to both (1) and (2).

[195] On pages 6 and 12, we note a term "residential unit". This is not defined in PC38 or the district plan.

[196] On p.13, in the earthworks table, there is ambiguity as to whether the volumes are measured on a time basis, per lot basis, or "forever".

[197] On p.14, the introductory words under the heading "Particular Rules" will need to have a reference added to sub-rule (e) concerning Urban Design. On p.15 we wonder whether sub-rules (c) and (d) are really rules at all. If they are to be rules, the wording may need to be sharpened up.

[198] On p.25, there appears to be a typographical error in the fourth line of the introductory words under the heading "Discretionary Assessment Criteria", involving the second numbered provision mentioned in that line.

[199] Although we have found some matters of detail, we are sure that others will emerge as further work is done, reinforcing the merits of an independent peer review.

Conclusion

[200] We have made numbers of findings on many issues throughout this rather lengthy decision. For ease of reading by parties and other interested persons, we provided a **summary of the more significant findings at para [46] of the decision**. We note however that there are other findings both major and minor, located throughout the decision.

[201] We hold the hope that this Interim Decision may now guide the parties to finalise matters by agreement amongst themselves. We direct that the parties report on progress with this, through the respondent, by the end of May 2005. If all matters cannot be agreed, we will hold a further hearing after first having set a timetable for preparation as necessary.

[202] Costs are reserved at this stage, but are unlikely to be an issue concerning this leg of the proceedings (noting that there is an extant application concerning rulings given by Judge Newhook last year).

[203] Finally, we remind ourselves of a request having been made by parties for Consent Orders relating to the discharge of tertiary treated domestic wastewater into the Matiatia Wetland, in proceedings ENV A323/04. It will be appropriate for us to finalise that matter at the time the present proceeding is being finalised.

DATED at **AUCKLAND** this 31st day of March 2005.

For the Court:

L J Newhook
Environment Judge

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND