BEFORE THE ENVIRONMENT COURT OF NEW ZEALAND
WELLINGTON REGISTRY

ENV-2016-WLG-000028

UNDER	Section 311 of the Resource Management Act
AND	
IN THE MATTER OF	an application for declarations
BETWEEN	**COASTAL RATEPAYERS UNITED INCORPORATED**
	Applicant
AND	**KAPITI COAST DISTRICT COUNCIL**
	Respondent

Submissions of Counsel for the Applicant

18 November 2016

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May it please the Court:

Introduction

1. This case concerns the legality of two decisions made by the Council on its proposed district plan ('PDP') notified in 2012. The application for declarations rests on two contentions which are simple in themselves, but raise issues of fundamental importance to the way in which plans under the Act are made and the rights of the public to participate.

2. The contentions by the Applicant are:
   a) When the Council notifies a full review of its district plan, then a full review is what it must do. If, after notification, it decides to withdraw proposed provisions from the PDP, then it must notify, under the Schedule 1 process, any replacement provisions (even if they are currently operative provisions).
   b) When a Council proposes to withdraw provisions from a PDP then it can only do so by notifying a variation to the PDP, if the proposed withdrawals will change the meaning or effect of the remaining provisions.

3. To reinforce the point the same contentions can be expressed negatively:
   a) When the Council notifies a full review of its district plan, then it cannot subsequently transition to a lesser review without notifying, under the Schedule 1 process, operative provisions which are intended to remain in force for an indefinite period, particularly if those operative provisions are due for review under section 79(1).
   b) When the Council exercises its power of withdrawal under Schedule 1 Clause 8D it cannot alter the effect or meaning of any remaining provision.

4. The first declaration sought ('declaration 1') concerns the Council's obligations under section 79 and what it must do to comply with those obligations.

5. The second declaration sought ('declaration 2') concerns the ambit of the Council's power under clause 8D, including whether any 'alteration' made by a withdrawal is to be subject to a materiality test.

Background

6. To assess the applications and the parties' respective positions, it is necessary to set out the background which led to the Council's decisions and the subsequent dispute. The background is essential context, but not determinative of the questions of law. The background has greater significance in the event that the Court finds that the Council has not

complied with the law and enabled public participation, but the Council submits that declarations should still not be made.

7. The key background facts are contained in the affidavits lodged by CRU in support of its application. In essence they are:
   a) Council notified the PDP as a full review of its operative district plan (1999) in 2012. Submissions and further submissions closed in 2013.
   b) CRU was established in November 2012 primarily by owners of coastal properties whose interests were affected by PDP provisions including hazard lines and hazard management areas.
   c) CRU made a submission on the PDP as did many of its members. Over half of the 777 submissions on the PDP were concerned with the coastal provisions. The great majority of those submissions opposed those provisions.
   d) In 2013 Council commissioned separate independent reviews of the PDP as a whole (the Allan/Fowler review), and of the science used to develop coastal hazard provisions in the PDP (the Science review).
   e) Both of those panels worked over late 2013 and early 2014, and both set up meetings with PDP submitters and other interested parties to inform their reviews.
   f) Both panels reported to the Council in June 2014. The Science panel concluded that the science advice used to develop the PDP coastal hazard provisions was not suffciently 'robust' for that purpose. It recommended that the Council undertake further work, in a collaborative way, on both science and risk management options.
   g) The Allan/Fowler panel conducted a wide ranging review of the PDP against the Council's declared goals. Its broad conclusion[1] (*At present, the PDP does not represent good practice, but it does not represent unacceptable practice. It could be substantially improved through the further statutory processes.)* resulted in a comprehensive of recommendations including some to address the results of the Science panel's review.
   h) The Council resolved in July 2014 to accept all the Allan/Fowler report recommendations[2]. Critically for present purposes, these recommendations included withdrawal of the PDP coastal hazard provisions, identification of ODP provisions to remain in effect, a consultative group to develop replacement provisions, and a variation to introduce those new provisions.
   i) In the same resolution the Council also endorsed[3] a draft timeline appended to the officers' report which showed a future plan change (to be commenced around now) rather than a variation. No reason has ever been suggested for the discrepancy - though the only logical conclusion is that the person preparing the timeline either did not understand the legal difference between a plan change and a variation, or think it significant.

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[1] Independent Review of the Kapiti Coast Proposed District Plan 2014 at p.iii
[2] Listed in para. 44 Allin affidavit, the resolution is recorded at para.70
[3] recorded at para.118 Allin affidavit; the timeline is Annexure A to the first Moody affidavit

j) The PDP coastal hazard provisions, and several parts of provisions, were withdrawn in October 2014
k) Of the recommendations and resolutions noted under h) above only the withdrawal of PDP provisions (or parts of provisions) had been implemented by the time this proceeding was lodged
l) The Council states that it will not notify a variation to the PDP on coastal hazard provisions, and will not notify, for public submission under a Schedule 1 process, the ODP provisions which it intends to remain in force.

8. So far as CRU is aware, none of the factual matters listed above is in dispute, though the significance of different matters is not agreed.

Public notification and participation as a core part of statutory planning

9. The requirement to publicly notify plans and policies has been a constant since the RMA was enacted. Similar requirements existed under the statutory antecedents. Delivering the Salmon lecture in 2013, the Chief Justice[4] referred to this statutory history in passages which contain a number of presently relevant points:

> Decisions about the environment they live in affect people directly in a number of ways. Regulation of the use of land directly affects property interests, both the land in issue and neighbouring land. Early planning statutes in all jurisdictions faced deep hostility, and were strictly supervised for legality by the courts, because they were seen to tend to expropriation of property interests. That is why close attention has always been paid to the criteria and standards by which discretion is conferred and by which it is exercised, in order that such regulation is predictable and the use of discretionary power can be explained.
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> The right of the community to impose restrictions on landowners in the wider public interest became accepted in part because there was wide public participation provided for in the subordinate legislative activity of establishing plans. That process bought democratic legitimacy.

10. In contrast to the notification provisions under Part 6 (for resource consent applications), which have been subject to numerous amendments, plan notification does not involve concepts of limited or non-notification, or any requirement to assess the effects of proposed plans on individuals.

11. Even the most simple or spatially limited proposal to change a plan, whether from the relevant Council or a 'private' person, must be publicly notified. Anyone, anywhere, may then make a submission on the proposal, is entitled

[4] The Rt Hon Dame Sian Elias, GNZM, Chief Justice of New Zealand: "Righting Environmental Justice"

to be heard on that submission, and may appeal against a decision on that submission. This participatory process, under which a plan is proposed, evaluated against submissions, and adopted, underpins its legitimacy.

12. In *Westfield (New Zealand) Limited v North Shore City Council* [2005] 2 NZLR 597 the Supreme Court said:

> [10] The district plan is key to the Act's purpose of enabling "people and communities to provide for their social, economic, and cultural well being". It is arrived at through a participatory process, including through appeal to the Environment Court. The plan has legislative status. People and communities can order their lives under it with some assurance. A local authority is required by s 84 of the Act to observe and enforce the observance of the policy statement or plan adopted by it. A district plan is a frame within which resource consent has to be assessed. (Elias CJ)
>
> and
>
> [46] The purposes of those public participatory processes are twofold – first, to recognise and protect as appropriate the particular rights and interests of those affected and more general public interests and, second, to enhance the quality of the decision making. (Keith J)

13. These points and the supporting authorities are well summarised by Catherine Nolan[5]:

> 'Public participation is an integral element of the RMA. The proposition that increased public involvement in resource management processes results in more informed decision making, and ultimately better environmental outcomes, has been described as a 'founding principle' of the RMA by the Court of Appeal in *Murray v Whakatane District Council*. Similarly in the High Court decision of *Ports of Auckland Ltd v Auckland Regional Council* the 'whole thrust' of the RMA was described as favouring interested parties having an input into the decision-making process. The RMA affords a wide scope for public involvement, and a right of participation is available at many stages in the processes it governs. The statutory provisions help to ensure that the ordinary citizen, 'Joe and Josephine Bloggs ... can communicate their views on important matters that affect them and the world around them'. The centrality of this participation is such that the RMA cannot effectively work without it, as it resides at the very heart of its structure and philosophy'. (footnotes omitted)

14. A decade later, in *Environmental Defence Society v The New Zealand King Salmon Company Ltd* [2014] NZSC 38, the Court returned to the theme, identifying three features of the RMA's hierarchy of plans and policies. It characterised the third feature thus:

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[5] Affected Persons Under The Resource Management Act 1991: *Canterbury Law Review* [Vol13, 2007]

[15] Third, the RMA requires that the various planning documents be prepared through structured processes that provide considerable opportunities for public consultation. Open processes and opportunities for public input were obviously seen as important values by the RMA's framers.

15. In this analysis, the question of participation is not an issue of mere process, or a bundle of technical requirements which can be ignored or waived, or discarded because it is not convenient, or done away with for the sake of alleged pragmatism. It is central to the achievement of the purpose of the RMA.

16. It is an obvious point, but the statutory purpose is to enable people and communities - rather than local authorities - to make provisions for their well being. Local authorities are given the functions and obligations to manage resources and to propose and make policies and plans, but in a real sense they exercise those powers not only on behalf of, but subject to the oversight of, their people and communities. Public notification and participation are core parts of statutory planning under the RMA.

Declaration 1

17. Declaration 1 was sought in the following terms:

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

18. The grounds for declaration 1 are as follows[6]:

    1. In November 2012 the Council notified a proposed district plan as a full review of its operative district plan under section 79(4). Consequently section 79(5) applied to that review.

    2. Submissions on the proposed district plan closed in March/April 2013.

    3. In October 2014 the Council notified a withdrawal of a number of provisions and parts of provisions contained in the proposed district plan.

    4. In October 2014 the Council did not notify (or otherwise explain):

[6] The grounds have been amended here to correct dates in pars.3,4 and 6 (which were October instead of June) and to add emphasis to para.7

a) which provisions of the operative district plan were (consequent on the withdrawals) no longer subject to review, so that the ambit of the review after October 2014, for the purposes of section 79, is not defined; or

b) identify which provisions of the operative district plan (if any) are intended to remain in force when the PDP is made operative.

5. If section 79 authorises the Council to change the ambit of a review, then subs(2) and (3) apply and have not been complied with.

6. Since October 2014 to the date of this application both the matters in 4(a) and (b) above remain unclear.

7. Consequently the provisions of section 79 and Schedule 1 have not been complied with - and consequently the public have been denied their right to participate on the provisions of the ODP to apply.

19. As noted above, declaration 1 is concerned primarily with the Council's obligations under section 79, and thus what it must do to comply with that provision.

20. CRU submitted a statement of the issues arising from declaration 1 as follows:

1. If the provisions of the ODP which were reviewed by the withdrawn provisions:

a) are intended to remain in effect when the PDP is made operative; and

b) had been due for review under section 79(1) prior to notification of the PDP

is the Council required to notify these provisions under section 79(7) or section 79(3)?

2. If the answer to 1 is 'yes' then when must this notification occur?

3. The Council contends, in relation to both section 79(7) and (3) that neither can apply as it does not think that the relevant ODP provisions do not require alteration. Is the Council's decision that these ODP provisions should continue to have effect when the PDP is made operative, and until they are changed at some future date, a decision that the provisions do not require alteration within the timeframe contemplated by section 79?

4. If the answer to 1 is 'no', in the absence of any variation to the PDP, do the provisions of the ODP which were reviewed by the withdrawn provisions remain in effect when the PDP becomes operative?

5. If the answer to 4 is 'yes', and it it is not clear which provisions are to

remain in effect because there is no formal identification of them, how are the relevant provisions to be determined, and what process applies to resolve any differences of opinion between the Council and those affected? How do affected persons know that there are provisions in the ODP to remain in force and what they are?

6. If the provisions of the ODP which were reviewed by the withdrawn provisions are not intended to remain in effect, is the Council required to notify these provisions under section 79(7) or section79(3)?

7. Is the review obligation under section 79(1) satisfied by the commencement of a review notwithstanding that the reviewed provisions are then withdrawn under Schedule 1 clause 8D?

Section 79

21. Section 79 as enacted in 1991 required a full review of a district plan *'not later than 10 years after the plan became operative*' (section 79(2)). A full review had to include *'all sections of, and all changes to, the policy statement or plan regardless of when those sections or changes became operative*' (section 79(4)). Section 79(3) required that, if after reviewing a plan, the Council considered that it *'could remain without change or replacement*' it had to notify that plan under the First Schedule as if it were a proposed plan.

22. The current section 79 came into force in 2009 (and was thus applicable to decisions in 2012 and 2014). The key differences between the current and original provisions is that the current section 79:
    a) requires a review of any provision which has not been the subject of a proposed plan, a review or a change by the Council during the previous 10 years. Where the Council concludes that a provision does not require alteration, that provision must still be notified under Schedule 1 as if it were a proposed provision
    b) however the Council may still choose to undertake a full review of the plan: in this case, its obligations are the same as those in the 'original' section 79.

23. Under section 79 the Council has always been required to notify, under Schedule 1, provisions which have been reviewed (or are required to be reviewed) whether or not it proposes to alter them.

24. Furthermore, a purposive approach points in the same direction as a literal or plain meaning approach to s 79 ie:

    a) the ODP coastal provisions are due for review and many of them predate even the 1999 ODP[7];

[7] Poole affidavit paras.20-21. However the Allan/Fowler report went on to state (at p.52): *The default*

b) those ODP provisions should not remain in place without providing an opportunity for people to submit on them - that presumably is the precise intent of s 79;

c) the ODP provisions being retained are a mixture of coastal hazard and amenity so people should be able to submit that amenity provisions should not be retained as coastal hazard provisions;

d) the provisions purportedly to remain in the ODP are problematic in a variety of ways so people should be able to submit on them;

e) notifying under Schedule 1 the ODP provisions not to be altered is what should occur;

f) that provides certainty for all and enables people to make submissions and appeal.

25. When the Council suggests, in this case, that a purposive approach be applied to the interpretation of the ambit and obligations of section 79 and clause 8D it is simply reinforcing the significance of its own failures to understand the central importance of public participation.

Is Council pursuing a full review?

26. It is unclear, in this case, whether the Council thinks it is pursuing a full review or not. There is no doubt that a full review was notified. There is no doubt that no change of intention has been notified under Schedule 1. Yet, as Ms Moody illustrates (Exhibit 3) Council's thinking seems to have been inconsistent during 2016.

27. The Council's very first Section 42A report (dated 11 February 2016 but released on 4 March 2016)) states: ***The Council overall remains in a full review of the Operative District Plan, and until new coastal hazard and hazardous substances and facilities provisions become operative, the Operative District Plan provisions relating to those topics will remain in force.*** Yet when Joan Allin queried this, Sarah Stevenson replied on 16 March 2016: ***While there may have been a full district plan review commenced, the Council is not now advancing a full replacement plan. As is the case in Wellington City which has taken a rolling review approach, the district plan can be made up of different components approved at different times.***

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provision of setback lines elsewhere in the operative District Plan may prove sufficient in other areas, but require testing, and their purpose (which may be a multiple purpose) clarified.

28. Ms Stevenson's reply quoted above makes two quite different points. The first is that the Council has changed its mind about the scope of the review (though it had never previously said so). The second is that under a 'rolling' review (the Wellington City Council's description of its approach) a district plan can, at any given time, contain provisions of different ages. The connection between the two points is not obvious: the Wellington example needed an acknowledgment that, in conducting a rolling review of specific parts and provisions, that Council had not notified a full review, but was simply doing what it said, by notification, it would do. The question begged here is whether this Council can notify one thing and do another.

29. Section 79 does not provide any mechanism to transition from a full review under subs.(4) to a more limited review, still less from a full review to a more limited review where it is unclear just what provisions are no longer being reviewed, and no Schedule 1 notification has been given enabling people to make submissions. Although this point is strongly symptomatic of a degree of conceptual and intellectual confusion within the Council as to just what it is doing, it may not matter, because whether the transition was allowed or not, the notification obligation to enable public participation is the same.

30. Whichever option the Council has chosen under section 79, the relevant ODP provisions, whatever they are, must be reviewed because section 79(1) applies to them. The Council originally proposed provisions to replace them, but then withdrew those proposed provisions. When it withdrew the proposed provisions it (apparently) intended that operative provisions remain for an indefinite period, though it could not, or would not, identify these provisions: see Allin affidavit paras.171-174 and 184-185 (para.185 states ***'It is apparent that the KCDC officers themselves do not know what is happening'***.)

Does it matter?

31. The intention to maintain operative provisions without alteration for an indefinite period, likely to be many years, must be subject to either subs.(3) or (7). The Council position, that these provisions do not apply because it does not consider that the provisions do not require alteration, is simply inconsistent with its actual decision that the provisions will remain without alteration until some unspecified future date. It cannot say one thing and do another (as it did with its July 2014 resolution). The public is entitled to participate on the proposal that the well overdue for review provisions (whatever they be) are to continue to remain and affect their properties or activities. They must be able to submit on whether those provisions are suitable or not to apply to their community.

32. Quite apart from the fundamental importance of such public participation in plans referred to in the previous part of this submission, there is also a compelling practical requirement to notify under Schedule 1. This is alluded to in Mr Poole's affidavit.

33. That point is this. Where a Council intends to retain provisions without change, and does not notify them under Schedule 1, how is anyone to know exactly what those provisions are? Particularly if the Council itself did not know.

Failure to identify ODP provisions

34. The Allin affidavit refers at para.184 to the first section 42A report (11 March 2016) written by a Council planner stating (at para.289) ***'in the meantime the Council is currently considering its position on which provisions contained in the ODP relating to coastal hazards will remain in force until they are replaced through a future piece of work on coastal hazards, and the district plan review process is completed'***. The first part of this extract is simply confirmation that the Council itself did not know the consequences of the withdrawals in terms of the ODP (a point which will also be relevant to Declaration 2), and the last part leaves a degree of ambiguity as to whether the 'future piece of work' would precede or follow the completion of the PDP process.

35. For nearly 2 years after the clause 8D withdrawals, the Council was unable or unwilling to specify the consequences of those withdrawals for currently operative provisions.

36. Finally, less than a month ago, on 26 October 2016 it advertised (in the local newspapers) a list of provisions ***'to remain in force until replaced through a Schedule 1 process'***. More importantly, the notice stated that the provisions listed ***'will continue to apply after the conclusion of the proposed district plan process'***. No indication is given, either as to when that Schedule 1 process might begin, or even that the Council regards such a process as an obligation.

37. The advertisement is not a Schedule 1 notification and no submissions were sought.

Ms Stevenson's narrative

38. Ms Stevenson's affidavit did not suggest a date for the commencement of a Schedule 1 process, but CRU understands (Poole affidavit para.19) that the Council's current intention is to have provisions available as far away as 2020, and then only in draft. In fact, the intention may be to wait longer, and seems dependent on other events. Ms Stevenson list a number of factors which are essentially contingencies (all of which are outside Council control) that will determine when, and if, a Schedule 1 change process is ever commenced. However there is not a single reference in her affidavit which indicates that the Council places any importance on the participatory aspects of planning and the obligations on councils to enable the public to have their say.

39. That omission is not an oversight on Ms Stevenson's part. The inescapable conclusion for CRU is that the Council attaches little if any importance to the participatory process:

    a) it has withdrawn provisions which eliminate or reduce the ability of over half the submitters on the PDP to be heard on issues which concern them;
    b) it has not consulted with CRU or its members (nor with anyone else as far as can be ascertained) regarding its decisions not to implement the variation recommendation which it resolved to accept, despite its obligations under section 78 LGA, and despite the nature and outcome of the process which led to the withdrawals
    c) it has not consulted with anyone on the identification of ODP provisions to remain in effect
    d) its approach to this application has included a reluctance to provide information (or to admit there is none) and a refusal to spell out its legal position(s).

40. Ms Stevenson refers to Council taking 'guidance' from the approach taken in the Christchurch district plan replacement process, and she quotes extracts from the Canterbury Earthquake (Christchurch Replacement District Plan) Order 2014 as supportive of Council's approach. Nowhere does she note that this Order specifically directs that RMA section 79 and Schedule 1 do not apply to the Christchurch plan (clause 4(1) (b) and (d) of the Order), and nowhere does she note that the Order was made under legislation that allowed the Minister to make orders exempting or modifying the application of the RMA (section 71 Canterbury Earthquake Recovery Act 2011).

41. Parliament has enacted separate specific legislation for both the Christchurch Replacement Plan and the Auckland Unitary Plan. In both cases, the process differs significantly from the 'normal' process established under the RMA. That, after all, is the purpose of specific legislation. In that context, at least, it is difficult to see how the consideration of the Christchurch approach could be regarded as legally relevant, let alone influential, for this Council's decisions. It is even more extraordinary (if that is possible) that there is apparently no analysis of any factual similarities between Christchurch and Kapiti. Indeed the only similarity appear to be that Christchurch was specifically authorised by a statutory order to do something which Kapiti has already decided to do without any statutory order or any apparent legal analysis of the basis for its actions.

Defining the problem

42. Mr Poole records (para.23) that he asked the Council to specify the statutory authority under which the notice of 26 October was given. The Council refused to answer (para.24) because the issue of legality was before the

Court. This is an extraordinary reply. Any organisation exercising a statutory power, or conducting a statutory process, should not only be able to answer such a question, but should do so. The Council's reply to this question leaves only three possibilities - either that it does not know if it was exercising a statutory power, or that it does not know whether there is a relevant statutory power, or that it can validly refuse to disclose its position for some tactical reason.

43. And if, as Ms Moody notes, the question as to which ODP provisions remain is one on which Council's experts have differed (Moody affidavit Exhibit 2)), how does a non-statutory notice from the Council advance the point? And how can it achieve legislative certainty and enforceability? Can the Council simply change its mind from time to time?

44. These questions are fundamental to an understanding of which currently operative provisions are to continue in effect once the PDP process is concluded. It is axiomatic that certainty of application is fundamental. But, by deciding not to notify the provisions under Schedule 1, as it ought to have done under s79 to enable public participation, the Council has also removed the only pathway to certainty - and has deprived people of the opportunity to make submissions on the ODP provisions that are purportedly to remain in effect.

45. All of these fundamental and practical difficulties would have been avoided by notification of the ODP provisions under a Schedule 1 process.

46. There is a further conceptual problem with the Council's approach to the retention of operative provisions once the PDP process is completed. This arises from the withdrawal of the PDP hazardous substances provisions. As with the PDP coastal hazard provisions, the PDP hazardous substances provisions were a review of ODP provisions. However there has been no attempt by Council to identify these provisions of the ODP to continue to apply, notwithstanding being many years overdue for review, or to consider how and when the review of them might continue or occur. It is not clear why this point has not been addressed in any Council work over the last 2 years. If the intention is that the ODP provisions will simply disappear when the PDP is completed, we are left to consider whether a simple statement of intention is sufficient to achieve different results from the same process. If the intention is that the ODP provisions remain in effect, there has been no notification of this.

Do the ODP provisions simply expire when PDP is completed?

47. There is an issue as to whether the effect of withdrawing PDP provisions under clause 8D is to terminate the review of the relevant ODP provisions so that the latter are simply extinguished when the PDP is complete. In other words, where there is a full review, as occurred in this case no ODP provisions (including the coastal hazards and hazardous substances) survive the completion of the PDP.

48. The argument (if there is one) that the ODP provisions which are no longer subject to the current review expire when the PDP is completed faces three significant difficulties.

49. First, there is no statutory power to withdraw an operative provision without a Schedule 1 process. The only way to withdraw an operative provision, no matter how small, is to notify and complete a proposed plan change or whole plan review under the Schedule 1 process so that all or part of the operative plan is superseded . Of course on a full review, it is possible that the Council will propose to abandon a particular approach to management, and there is no requirement for it to show how each individual provision in an ODP is reviewed and 'matched' to individual PDP provisions.

50. Second, as noted above, if the expressed intention of the Council is (as it is here) that ODP provisions can remain without alteration for some years, then section 79(7) requires these to be notified under Schedule 1 and the public has the right to say whether or not they consider those ongoing provisions are appropriate.

51. Third, if there are no coastal hazard provisions at all following the completion of the PDP, it becomes impossible to establish any basis on which the Plan has given effect to the NZCPS as required by section 75(3). A future intention to give effect, at some more convenient stage, is no different from a decision not to give effect now when a full review is being conducted.

52. The conclusion from the points above is that, in the context of a full review under section 79 (which is all the Council has notified), the withdrawal of PDP provisions which were a review of provisions in the ODP does not extinguish those ODP provisions if there is no variation to the PDP. In other words the full review remains incomplete. The scheme of section 79 requires the Council to notify some replacement for the provisions it has withdrawn - whether it be amended new provisions or the existing ODP provisions.

Has Council complied with the obligation to review ODP provisions?

53. The 'argument' below has neither been formally advanced by the Council nor rejected. It is therefore necessary to consider it.

54. The issue is whether having commenced a full review of the ODP, including its coastal hazard provisions, the Council has satisfied the requirements of section 79 in relation to those provisions. That is, whether the review requirement under section 79 is simply to commence a review - and if a review has been commenced and discontinued through withdrawal, then the Council need not commence a further review for another 10 years (and the public are denied any opportunity to submit on those operative provisions remaining in place for another ten years.)

55. In other words are the ODP provisions (whatever they may be) which are intended to remain still due for review or not?

56. Two reasons suggest strongly that any such argument is misconceived.

57. First, section 79 needs to be read as a whole and integrated framework for the plan review obligation. The relevant obligations - all expressed in mandatory terms - must all be satisfied, and satisfied within the time period of the review. Once a review is commenced, the Council has two choices - either notify new provisions or a whole new plan, or if it considers that the provisions or the plan can remain without alteration, notify the existing provisions or the existing plan. Section 79 is not satisfied by simply addressing individual components in isolation.

58. Second, such an approach would elevate Clause 8D to a 'trump' status where section 79 could be 'satisfied' by notification of new provisions or a new plan which are then immediately withdrawn with the effect that the Council need do nothing further for another 10 years, so the ongoing operative plan is not opened up for public participation, at which stage the process could be repeated. This interpretation would lead to repugnancy.

Conclusion on declaration 1

59. In 2014 the Council sought and obtained expert advice on the best way to progress its PDP. That advice followed a thorough review which engaged many parts of the community, including CRU, and addressed widespread

concerns (not least from newly elected councillors) that the PDP was deeply flawed.

60. Having committed itself to accept the recommendations of that independent review, the Council set about doing something quite different. It is by no means clear that, initially at least, it even knew that it was doing so. It was certainly not clear to CRU that the Council had no intention of undertaking the consultation to develop new provisions that it had agreed to, or that it had no intention of notifying a variation as it had agreed to do by resolutions. And it was not clear to CRU that the Council's intention was to retain ODP coastal hazard provisions indefinitely.

61. Had these things been clear, it is entirely likely that CRU would have commenced judicial review proceedings. Since mid 2014 the Council's decision making has been flawed by failure to understand (or at least to record an understanding) of legal requirements, failure to ignore legal irrelevancies (eg Christchurch), failure to consult with affected people, failure to acknowledge and reconcile inconsistencies in its own approach, and, in respect of its inability to identify 'default' ODP provisions, irrationality - an absence of adequate and informed reasoning. There must be some likelihood that the process would not, and still might not, survive such a challenge.

62. This is not a judicial review challenge, but these factors are directly relevant to any question of discretion. The point of declaration 1 is not a conceptual critique about compliance with section 79. It is rather a remedy to a process which abandoned the community's participatory expectations in favour of an entirely self-referential and inwardly focused approach to planning.

63. Declaration 1 will require the Council to notify under Schedule 1 any ODP provisions which it intends will continue to apply to the coastal area over the next number of years, until the Council finally gets around to proposing replacement provisions, contingent on central and regional government first taking other preparatory steps.

64. Given the age of the ODP provisions, and the fact that many were designed only for the southern part of the coast, that others have a mixed purpose[8], and that there are problems with the interaction between the PDP and the ODP, such an outcome would not only comply with the statutory requirement, to enable the public to submit on the merits of those provisions applying but through the almost certainly create a much better plan by making any ongoing rules and other provisions more relevant, up-to-date and a better fit with the rest of the PDP.

[8] Poole affidavit paras.21-22, Allan/fowler report pp.51-52

Declaration 2

65. Declaration 2 was sought in the following terms:

> In withdrawing the coastal hazard and other provisions under Clause 8D of Schedule 1 of the RMA, the Council changed the meaning of the remainder of the PDP.

66. The grounds for Declaration 2 were as follows:

a) In November 2012 the Council notified a proposed district plan as a full review of its operative district plan under section 79(4).

b) In June 2014 the Council notified a withdrawal of a number of provisions and parts of provisions contained in the proposed district plan. The provisions of the PDP affected by these withdrawals included those relating to coastal hazards.

c) Schedule 1 Clause 8D authorises the Council to withdraw a proposed district plan, but does not expressly authorise the withdrawal of parts of a proposed district plan.

d) However the High Court, in *West Coast Regional Council v Royal Forest and Bird Protection Society of New Zealand* [2007] NZRMA32, has held that the power under Clause 8D is a power to withdraw part(s) of a proposed plan. The Court constrained the power to withdraw part as follows:

> **[25]** Assuming that there is power to withdraw part of a proposed plan it seems to us that it is implicit that the balance must be left as it was. For cl 8D only confers power to withdraw a plan. Anything new has to be notified and tested by a process in which the public can participate. If there is a power to withdraw part, that power cannot include a power to make a change to the meaning of the remainder of the policy statement or plan. Provided it is a withdrawal and not a variation by the back door, it does not matter whether the withdrawal is of a complete part, some few provisions, or a mix. But it must only be a withdrawal and not a variation.

e) The withdrawal of parts of some provisions has changed not only the meaning of those provisions but also their effect within the proposed plan. Thus, for example, the withdrawal of words such as 'coastal', 'coastal hazard' or specified CHMAs (Coastal Hazard Management Areas) from provisions has the effect, in some instances, that the ambit of that provision changes from a specific part of the environment to a wider one.

f) The withdrawal in June 2014 accordingly 'changed the meaning of the remainder of the plan'. The withdrawal, at least to that extent, could only be validly effected by variation to the proposed plan.

g) Consequently Schedule 1 Clause 8D has not been complied with.

67. CRU was directed by the Court to particularise the examples where the withdrawals had changed meaning and/or effect. Those examples were given in the memorandum of 12 September 2016. However the point made in that memorandum about the limitations of those examples, and also made in the Moody affidavit, remains. The point is this: the PDP, when completed, is intended by the Council to be integrated with remnant ODP provisions into a 'composite' plan - but if we do not know what those remnant ODP provisions are, then it is impossible to be certain about whether the effect of the PDP provisions altered by the withdrawals remains the same or has changed. More to the point, it was impossible for the Council to know this when it notified the withdrawals.

68. To illustrate the difficulty (and it is merely an illustration) it is useful to refer to an example given in the memorandum of 12 September 2016

> **Rule 4A.5.4 (non-complying activity)**
>
> 4. Buildings, structures and earthworks on land in the coastal environment which has been identified as having high natural character in District Plan Maps ~~where they are not located in a CHMA~~ which do not comply with one or more of the permitted activity or restricted discretionary activity standards.

69. Plainly, as noted in the memorandum, the effect of the withdrawal shown in red above is to make areas which were in the proposed CHMA subject to this rule. And, as was noted in the memorandum, the works listed in this rule had been classified as discretionary under proposed Rule 4A.4.1. So what was proposed as discretionary under the PDP as notified became non-complying though an alteration by withdrawal. [It should be noted that Ms Thomson disagrees (paras 91-92) with this analysis though she accepts the broad point that the change of classification might affect some activities. The specific example is given by Joan Allin at paras.207-211: she deposes that stream cutting occurs landward of the CMA (contrary to Ms Thomson's assumption), and as she lives a short distance from the Mangaone Stream she might be credited with some knowledge of this.]

70. The non-complying classification, made with no right of public participation for owners of the affected land in the CHMA, involves a consideration of the potential effect of section 104D. What are the relevant policies (noting that all references to coastal hazards have been removed from the PDP policies)? Because the rule applies specifically to high natural character, the relevant policies are strongly weighted towards the protection of natural character. Some ODP provisions on the coastal environment will apply as well but there has been potentially significant difference as to what these are (see Moody exhibit 2). A shift from a discretionary classification to a non-complying classification where the significance of the section 104D cannot

be evaluated is a direct consequence of the withdrawal process. Regardless of that, a shift from discretionary activity to a non-complying activity is significant.

71. The illustration above is intended to point to the difficulty of any precise defintion of the extent of the effects resulting from the Council's approach. It also presages another issue which will be considered further on below, which is whether the Court should engage in the kind of retrospective materiality assesments urged by the Council.

72. The focus of declaration 2 is on the coastal hazard provisions. Similar issues may affect the hazardous substances provisions - but whether these are affected or not should not affect the issue. The issue is whether the Council made changes to the PDP through the Clause 8D process which were, in reality, non-notifed variations. If so, there is no such power or discretion under the RMA. The public have a right to participate.

73. The initial focus is thus on Clause 8D.

Clause 8D and the West Coast decision

74. When the RMA was enacted, the power to withdraw a proposed plan (defined at that time to include a proposed change) was given by section 78. Section 78 was repealed in 2003 and replaced by Clause 8D. Clause 8D was amended in 2003 but has otherwise remained unchanged. However the ambit of Clause 8D has changed with the expansion of the definition of 'proposed plan'[9] to include variations and changes requested under Schedule 1 Part 2.

75. On its face the power is to withdraw the entire document. In its ambit defining decision in *West Coast Regional Council v Royal Forest and Bird Protection Society* [2007] NZRMA 32 ('the *West Coast* decision'), the High Court considered an appeal from an Environment Court decision which had concluded that the Council's withdrawal of wetland provisions from its proposed regional plan was an alteration to the plan which could only be effected by variation. In allowing the Council's appeal the High Court said:.

> **[24]** Although "alteration" is not defined, it can be seen that within the scheme of the RMA the concept of "alteration" is used to cover both "variations" and "amendments". However, it does not have a wider generic effect to include "withdrawals" (which are not defined) and beyond its use in the definitions of "variation" and "amendment" the concept has no life of its own. Thus we consider that in the first and second sentences of para [53] the Environment Court was in error when it elevated the concept of "alteration" to include a withdrawal.

[9] Section 43AAC

[25] Assuming that there is power to withdraw part of a proposed plan it seems to us that it is implicit that the balance must be left as it was. For cl 8D only confers power to withdraw a plan. Anything new has to be notified and tested by a process in which the public can participate. If there is a power to withdraw part, that power cannot include a power to make a change to the meaning of the remainder of the policy statement or plan. Provided it is a withdrawal and not a variation by the back door, it does not matter whether the withdrawal is of a complete part, some few provisions, or a mix. But it must only be a withdrawal and not a variation.

Conclusion

[26] The council has purported to withdraw part of the plan. As the foregoing analysis demonstrates, the provisions withdrawn have simply returned the legality of activities back to the default provisions of ss 9, 13 and 14. Notwithstanding that the council has not withdrawn all references to wetlands, the withdrawal does not, in our opinion, constitute a variation to the plan.

76. This decision must be treated as authoritative in the present case, and CRU does not submit otherwise. However, with respect, three points are advanced by way of submission on this decision:
    a) First, there are significant factual differences between the *West Coast* decision and the current situation
    b) Second, the careful and detailed analysis engaged in by the Court, requires us to respect not just the outcome, but also the reasoning which led to it - para[25] in particular is a precise definition of the limits or boundaries of clause 8D.
    c) Third, in its review of the use of the concept of 'alteration' in [24] the Court appears to have overlooked the use of that concept in section 79.

77. The first two of these of these points are now considered further.

78. An understanding of the differences is a necessary first step in applying the West Coast decision in this context. These differences include:
    a) The provisions withdrawn by the Council from the PRP had no antecedents in the operative Regional Plan. There was thus no issue as to 'default' operative provisions
    b) As the Court noted, the withdrawal of these provisions left people in the same position they were before the Plan was notified - sections 9, 13 and 14 continued to regulate activities within wetlands. There was no sense in which any of the withdrawals changed the meaning of the rest of the PRP.
    c) The issue of the potential effect of the withdrawal on participation was acknowledged, but the context is that the West Coast Regional Council had notifed a variation to replace the withdrawn provisions within 3 months of the withdrawal. Both the Environment Court and the High Court noted this. The High Court makes the point several times that participation will resume once the Council proposes replacement provisions.

79. The High Court's decision essentially commences with a conclusion which is then discussed in a detailed review of the legislation, and the consequences of different positions. However, the analysis at [24] and [25] is the key to the decision: 'withdrawal' does not include 'alteration'. An 'alteration', in the sense of a consequential change to the meaning or effect of the rest of plan is outside the scope of Clause 8D.

80. The last point is a defining difference in this case where the Council expert evidence essentially urges a 'materiality' test: namely, 'if there has been an alteration, then in the context of the PDP it is not significant'. The difficulties of this approach are referred to below. For present purposes it is sufficient to note that nothing in the High Court's decision suggests that such an approach is lawful or should be taken. On the contrary, a change to the meaning or effect of the rest of the PDP is a non-notified 'variation by the back door' and outside the scope of Clause 8D.

81. In addition to changes arising from decisions on submissions and appeals, a proposed plan may be changed by the Council under the following provisions;
    a) By withdrawal under Clause 8D Schedule 1.
    b) By amendment under Clause 16(2) Schedule 1.
    c) By variation under Clause 16A Schedule 1.

82. Both a variation (defined now in section 43AA) and an amendment is an 'alteration', but a withdrawal is not an 'alteration' (at [24]). The Court then distinguished (at [25]) between a 'power to withdraw' and a 'power to make a change to the remainder of the plan'. A withdrawal which makes a 'change to the remainder of the plan' is a 'variation by the back door' and not within the Clause 8D power.

83. The power under Clause 16(2) is akin to a 'slip' rule. In Environmental and Resource Management Law (5th ed Nolan) it is described at chapter 4.7:

    'The test to determine whether this power is available is to consider whether the amendment will affect the rights of any member of the public, either positively or negatively, or whether it will be neutral: only neutral amendments are permissible under this rule. Similarly the correction of any error is confined to a degree similar to that of the 'slip' rule, r.1.15 District Court Rules 2009, which is limited to expression rather than content' (referring to Waiareka Valley Preservation Society Inc v Waitaki District Council C.159/07).

84. Obligations to make changes under sections 55(2) and 293 could be added to the above list, but as with Clause 16(2) Schedule 1, these provisions are not currently relevant. Section 292 will be addressed later in this submission.

85. The option of a variation is, of course what the Allan/Fowler report recommended and the Council resolved to do. While Clause 8D may have enabled the Council to 'cleanly' withdraw a number of provisions, the withdrawal of part provisions always had the potential (which seems to have gone unrecognised by Council) to create exactly the problems which have occured. The origin of all these problems is a simple failure by the Council to do what it said it would do and use the variation process.

Issues on which CRU and the Council differ

86. The issues submitted by CRU (memorandum of 25 October 2016) were:
    a) Is the High Court's decision in *West Coast Regional Council v Royal Forest and Bird Protection Society of New Zealand* [2007] NZRMA 32 accepted as the authoritative statement of the limit of clause 8D?
    b) If not, what refinement is contended for?
    c) Have any of the provisions identified by CRU been 'altered' by the withdrawals in the sense excluded by the *West Coast* decision?
    d) If so, is an evaluation of the significance of such alterations required for the purposes of this declaration?
    e) If an evaluation of significance is required what is/are the reference point(s), given the power in clause 16(2)?

87. The Council has not formally confirmed its position on any of these issues. However the working assumptions for these submissions (based on the affidavits lodged by the Council) are that the Council:
    a) Accepts that the *West Coast* case is authority for the application of Clause 8D to partial withdrawals
    b) But regards refinement of the High Court's decision in that case as necessary to the extent that the significance of any individual alteration created by a withdrawal must be considered
    c) The reference point for the determination of significance is the entire PDP
    d) Subject to b) above, appears to accept that at least some of the CRU examples involve alteration to provisions which is excluded by the *West Coast* decision as beyond the ambit of Clause 8D
    e) However its view is that even in the case of such alterations no variation is needed to correct any problem

88. That brings us to the issue of significance.

89. As noted above, what is absent from the High Court's withdrawal/alteration dichotomy above is any requirement for an assessment of significance. There is no suggestion that, once an analysis concludes that a withdrawal has become a 'variation by the back door', there should be a further analysis to determine how 'serious' it might be. Rather the High Court's demarcation should be regarded as a 'bright line' rule - if by withdrawing part of a

provision, for example, the Council has altered its effect and thus varied it, then that use of clause 8D must be invalid.

90. Put simply, as provisions of the PDP have been altered by the withdrawals, that was unlawful as the RMA requires a variation to have been used with rights of public participation

91. In this sense, the argument on the assessment of significance is similar to that advanced in relation to the failure to notify, under a Schedule 1 process, ODP provisions which are intended to 'survive', where the Council has taken 2 years to consider which provisions it actually wants. In the case of withdrawals, the Council wants the ability to submit retrospective assessments of significance. The point is that the Council's approach requires expert assessment, and experts may differ even if they agree on the parameters of any assessment. Such an outcome is the antithesis of a 'clean' and certain decision. If an assessment was to be done, it must surely have preceded and informed the withdrawals, not occur two years later. The only record of contemporaneous analysis provided by the Council (Moody Exhibit 5) contained no such assessment, nor any acknowledgment of the constraints of the *West Coast* decision.

92. More importantly, on what evidence could the Court reach any other conclusions? Anything from the Council will now be perceived by those who have been 'shut out' of the process as purely self-serving and exculpatory. The retrospective assessments by Council deponents take a narrowness of view which is more appropriate to an assessment of notification under Part 6. For reasons discussed below the Council approach is too narrow and largely misconceived even if the Court wanted to consider relative significance, which it is submitted it should not.

93. Finally, on the issue of significance or materiality, it should be emphasised that the Applicant does not suggest that the Court should be interested in plainly trivial errors - noting (para.83 above) that Council has some scope to correct minor errors under Clause 16(2).

The Council approach to CRU examples

94. Council witnesses have proposed a set of categories for the examples provided by CRU. Ms Thomson proposes 3 categories. The first category applies to provisions which have been 'skewed' by the removal of the coastal hazard etc references. Ms Thomson says that these have 'minimal effect on the balance of the [PDP] plan' because the ODP provisions remain in force. The second category is where the withdrawal of references to CHMA from provisions, so that these provisions now apply to land within the CHMA where they did not before. Again Ms Thomson says that these have

minimal effects on the balance of the plan. The third category is provisions which do have an effect on the balance of the plan but, in her view, can be dealt with through the PDP process or further withdrawals.

95. CRU's position is that Ms Thomson's frame of reference is wrong. In defining a change to the meaning and effect of the balance of the PDP it is highly improbable that the Court was contemplating an effect on the PDP, but rather of the PDP.

96. The PDP has perhaps thousands of provisions. Of course, a change to a few of them is unlikely to have a major effect on the plan. But individuals may be significantly affected by even one provision. More to the point, they have been denied an opportunty to submit on a provision that now affects them but did not before. It is no answer to say that the 'new' provision is probably more benign: the potential submitter may have wanted different contols or no control at all, for very good reasons which will not now be considered. It is also no answer for a Council planner, or indeed the Court, to step in the shoes of an affected land owner and purport to say how that owner would or should have reacted.

97. A further handicap faced by the assessment is illustrated by Ms Moody's question 'what plan?'. If the ongoing ODP provisions are not identified then how can their role in supposedly minimising any effect of the withdrawals be assessed?

98. The problem of non-compliance in this case is fundamental: if the PDP now contains provisions which should have been notified by a variation but were not, then the Council has not only compromised the interests of persons whose submissions were regarded as 'non-justiciable', but also the interests of any other persons who might have been affected by the provisions altered in this way.

Other methods of addressing declaration 2 issues

99. The alternative solutions identified by the Council (in the Thomson affidavit) are perhaps more relevant to an enforcement order context where a failure to comply with a purely mechanical requirement is in issue. That is not the case here. The position here is that the Council took a course of action which deprived many submitters of their participatory rights - and while that may not have been the point of the exercise it was a well recognised consequence.

100. What is less clear is why the Council is so determined to avoid further participation. Even if one were to accept the strength of Ms Stevenson's

reasons for not undertaking a full science and policy review at this stage (which is not accepted, any more than such a delay was envisaged by the Allan/Fowler and Science panels), that does not preclude a participatory process on interim ODP provisions or on amended PDP provisions.

101. To this extent, declarations 1 and 2 are linked: if the result of declaration 1 is that some ODP provisions must be notified under Schedule 1, to give the public its right to submit on the intended ongoing coastal hazard provisions that will be combining with the PDP, there seems to be no reason at all why a variation to include the amendments being made to the PDP provisions as a result of the withdrawals should not occur together. This joint process will provide the essential public participation rights and with such input allow the old and the new parts of the Plans to be melded together in a much more satisfactory and error-free way. It seems such an obvious way forward which could already be under way by now if the Council wasn't so focussed on doing all it can to delay or deprive the public of their rights to participate

102. The CRU objection to the Council's proposed 'fixes' is fundamentally that they seek to legitimise something which was unlawful. It was unlawful because some of the PDP changes should have been done by variation rather than withdrawal. Indeed a better solution may have been to undertake the whole exercise as a variation and not used clause 8D at all. But the consequences of the unlawful withdrawals was that submitters were deprived of rights - and that is what any solution must address.

103. Instead what the Council is asking the Court to endorse is a solution, or bundle of solutions based on the assessment of its planners that the people whose rights were removed are not really affected to any significant degree. This approach can be contrasted with the famous observation of Megarry J in *John v Rees* [1970] Ch 345 at 402 (cited by Elias J in *Murray v Whakatane District Council*).

> It may be that there are some who would decry the importance which the Courts attach to the observance of the rules of natural justice. 'When something is obvious', they may say 'why force everybody to go through the tiresome waste of time involved in framing charges and giving an opportunity to be heard? The result is obvious from the start.' Those who take this view do not, I think, do themselves justice. As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determination that, by discussion, suffered a change. Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events.'

104. There remains also an unavoidable problem with the suggestion that the PDP hearings panel can fix problematic provisions by simply following all the relevant section 42A recommendations. First, that panel is expected to act independently, and its decisions are some months away. The Court cannot and should not assume that it will do what Ms Thomson thinks it should. Second, how can it be assumed that the PDP hearings panel has the power to change provisions which were not (and could not in their amended form) have been subject to submissions? Third, why should submitters need to consider not only the matters raised in their submissions but also whether the Council's withdrawals have changed the effect of the PDP and whether the panel has corrected such an outcome.

105. Finally, there is the issue of appeals. No submissions have been made on the partial withdrawals. Submitters may be affected by the partial withdrawals who did not make submissions on the relevant provisions. People who are not submitters at all may be affected. If the panel does not fix the problems, who will have standing to appeal?

Section 292 application?

106. A point about the potential application of section 292 was raised during the course of one of the pre-hearing conferences. It does not appear to assist in any material way. A review of the authorities suggests that section 292:

a) Is fundamentally a 'slip rule' which does not have the purpose or ambit of authorising amendments where there some live issue as to what those amendments should be.
b) Does not apply to proposed plans.
c) Is directed at the content of plans, not to any failure of process.

107. For these reasons, section 292 does not provide an alternative means of resolving the issues raised in this proceeding.

Conclusion on declaration 2

108. As with declaration 1, error has been compounded by inaction. The difficulties created by the misuse of the Clause 8D process have been indirectly acknowledged by the Council in the range of recommendations made by the Council to its PDP hearings panel to amend or 'fix' provisions which were altered by the withdrawals. But any submitters who were particularly interested in these issues when the PDP was notified will not have their views considered.

109. This is contrary to the basic scheme of the RMA in relation to planning - that it should be participatory and informed by the views of the community who will be subject to and affected by the plans. As with the issue of the surviving ODP provisions, the Council's view appears to be that it does not need to be further informed by public participation.

110. Whether the nine specific examples given by CRU of the unlawful use of the Clause 8D process are an exhaustive list, and whether the examples are in themselves significant, and if so to who, are matters which are not as important as the principle. The legislation has a clear purpose of participation which has been subordinated to the Council's own internal priorities, and a clear demarcation has been established by the High Court on the limits of withdrawal - which the Council now seeks to elasticise because it did not think it important to understand that demarcation before exercising the power.

111. It does appear that the Council accepts that, by the withdrawal of some provisions from the PDP, changes were made to the meaning or effect of remaining PDP provisions. Whether that can be 'fixed' or not in one or more of the ways now suggested by the Council simply begs the question: 'why not just do it properly and lawfully?'

112. CRU seeks a declaration which will have the effect of reinstating the submissions (and allowing new ones) on those provisions which have been wrongly varied by the withdrawals.

Effect of the declaration sought and the Court's discretion

113. The effect of making the declaration sought will undoubtedly have consequences for the Council (and thus the wider community) in terms of time and costs. However from CRU's perspective, the issues in this proceeding need not delay (let alone undermine) the great majority of the PDP work.

114. However it would artificial to think that the notification of ODP (or replacement) provisions which must follow declaration 1 would occur in isolation. CRU has always flagged that this topic needs to be integrated with other PDP provisions (notably the definition of the 'coastal environment') which the Council has so far refused to ring fence. Just how these issues of integration are best managed, and whether the current PDP panel can or should continue, are matters which would have to be resolved, ideally through a consultative process.

115. The Allan/Fowler report recommended proceeding with the PDP ('option 4') by a 'relatively narrow margin'[10] from the option of starting again. It made a particular point of recommending adequate resourcing, detailed communication plans, and high levels of technical skill.[11] CRU is not responsible for the Council's failure to take this advice, or to do the things it said it would when it re-started the PDP process in July 2014. If there are unpopular delays and costs associated with the declarations, these are matters that the Council will have to account for.

116. Disputes of this kind can only be resolved by the Court as arbiter between the community and government. Declarations are always a discretionary remedy, but the Courts have consistently said that, where a legal error is established, upholding the rule of law is generally paramount. Only in exceptional circumstances should relief be refused and legal error excused. There are no such circumstances here. The result of any extra work that the Council will have to do will be a plan which is not only better and up to date, but has the public legitimacy referred to at the start of these submissions.

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[10] Allan/Fowler report p.42
[11] Allan/Fowler report p.43-44