IN THE HIGH COURT OF NEW ZEALAND
TIMARU REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE TIHI-O-MARU ROHE

CIV-2020-476-000004
[2021] NZHC 1354

BETWEEN	LAKE TEKAPO COMMUNITY AND FRIENDS INCORPORATED Applicant
AND	MACKENZIE DISTRICT COUNCIL First Respondent
AND	TEKAPO SKY HOTEL LIMITED Second Respondent

Hearing: 25 September 2020

Appearances: P A Steven QC and A R C Hawkins for the Applicant
D C Caldwell and G J Cleary for the First Respondent
S M Chadwick for the Second Respondent

Judgment: 9 June 2021

JUDGMENT OF NATION J

Introduction

[1] The applicant (the Society) was incorporated in December 2019, arising out of concerns some members of the Lake Tekapo community had over a development in the Lake Tekapo township.

[2] The second respondent (TSHL) is proposing to develop a new hotel. On 25 September 2014, the first respondent (the Council) granted consent to TSHL for a new development (the 2014 development) on a site on the corner of Aorangi Crescent and D'Archiac Drive, Lake Tekapo (the site). The Council authorised construction and operation of a development comprising motel units and hotel rooms.

[3] In November 2016, TSHL applied for a resource consent for a somewhat varied visitor accommodation complex and associated car parking (the 2017 development). With the proposed changes, the 2017 development was to be for 114 apartments in the nature of a hotel rather than motel accommodation.

[4] On 3 July 2017, the Council issued decisions that the application not be notified and granting consent for the 2017 development (the 2017 decisions).

[5] In January 2020, the Society filed these judicial review proceedings seeking declarations that both the notification and substantive decisions in the 2017 decisions were invalid and to quash them.

Legal framework

[6] The Society referred to a statement from the High Court in *Videbeck v Auckland City Council*:[1]

> In effect, the consent authority (or its delegate) is making a decision to deny the public (or a particular member of the public) the right to be heard, without giving to them any opportunity to influence that decision. The very nature of the decision requires the Court to be vigilant when exercising its supervisory jurisdiction, on review.

[7] The Council suggested the approach referred to in *Videbeck* and the reference to the "extraordinary nature of a non-notification decision", might no longer be appropriate given the substantial legislative changes to the Resource Management Act 1991 (RMA) notification regime in 2009. These changes led to the removal of the previous presumption in favour of notification.

[8] The Council referred to statements made by the Court of Appeal in *Far North District Council v Te Runanga-A-Iwi O Ngati Kahu*.[2] In that case, the Court of Appeal referred to Blanchard J's statement in the Supreme Court in *Discount Brands Ltd v Westfield (New Zealand) Ltd* (Discount Brands) as to the need for the Court on a judicial review application to carefully scrutinise the material on which the consent

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1 *Videbeck v Auckland City Council* [2002] 3 NZLR 842 (HC) at [35].
2 *Far North District Council v Te Runanga-A-Iwi O Ngati Kahu* [2013] NZCA 221.

authority's non-notification decision was based because the consequence of such a decision excludes those who might have sought to oppose the application.[3]

[9] The Court of Appeal said:[4]

> [55] It is unclear whether and to what extent White J ultimately relied on Blanchard J's statement in *Discount Brands*. However, we reject Mr Gardner-Hopkins' submission that in this context the statement can be construed as supporting what has been labelled the "hard look" approach to judicial review and this non-notification decision in particular.
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> [56] In our judgment the aims and purposes of the RMA cannot be construed as justifying a more intensive standard of review of a non-notification decision than would otherwise be appropriate for a Court when exercising its powers. The judicial inquiry is required to determine whether the decision maker has complied with its statutory powers or duties. The construction or application of the relevant provisions remain objectively constant, and there can be no justification for adopting a sliding scale of review of decisions under the RMA according to a judicial perception of relative importance based upon subject matter.

[10] The Court of Appeal however then confirmed the High Court needed to carefully scrutinise the material in support of the application where a Council decision not to notify is challenged.[5]

[11] In *Coro Mainstreet (Inc) v Thames-Coromandel District Council*, the Court of Appeal made it clear they should not be taken to have accepted that amendments made to the RMA since *Discount Brands* have had no effect on the non-notification process and on the analysis of the previous law in the Supreme Court's decision in *Discount Brands*.[6] They said that, if the point had affected the outcome of the case, they:[7]

> … would have wanted to consider whether the 2009 amendments gave effect to the apparent intention of Parliament to give consent authorities greater scope to decide not to notify resource consent applications, and to reduce the intensity of review to be applied to non-notification decisions from that mandated in *Discount Brands*.

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3 *Far North District Council v Te Runanga-A-Iwi O Ngati Kahu*, above n 2 at [53], citing *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] NZSC 17, [2005] 2 NZLR 597 at [116], also known as *Westfield (New Zealand) Ltd v North Shore City Council*.

4 *Far North District Council v Te Runanga-A-Iwi O Ngati Kahu*, above n 2.

5 *Far North District Council v Te Runanga-A-Iwi O Ngati Kahu*, above n 2, at [57], citing *Palmerston North City Council v Dury* [2007] NZCA 521, [2008] NZRMA 519.

6 *Coro Mainstreet (Inc) v Thames-Coromandel District Council*, [2013] NZCA 665, [2013] NZRMA 73 at [41].

7 At [41].

[12] In *Auckland Council v Wendco (NZ) Ltd*, the Supreme Court said, because it was satisfied the *Discount Brands* standard was in fact met, it did not have to decide whether that standard was still appropriate, but noted:[8]

> [47] It is arguable that subsequent changes to the RMA mean that an approach to non-notification decisions which is less exacting than that required by *Discount Brands* should now be adopted.

[13] In *Speargrass Holdings Ltd v van Brandenburg*, the Court of Appeal said the fact the consent application was for a restricted discretionary activity was a factor which the Council (or, in that case, a Commissioner) could take into account in deciding that notification was not necessary.[9] Also, where there had been an error material to the Commissioner's decision not to notify, the significance of that error had to be assessed against the whole background, including the fact the Council was required to treat the application as requiring restricted discretionary activity consent.[10]

[14] This Court did not receive extensive detailed submissions on how the Court should assess the adequacy of the information which the Council had before it when making its non-notification decision.

[15] In the *Discount Brands* approach, as articulated by Blanchard J, the Judges recognised that, prior to 1 August 2003, s 93(1) of the RMA provided that a Council's obligations on receipt of an application, including its obligations in regard to notification, were triggered once it was satisfied that it had received adequate information.[11] There is no longer that threshold in the RMA.

[16] The approach the Court should take in assessing the adequacy of information has been carefully discussed in a number of subsequent High Court cases. These were carefully considered and referred to in the judgment of Fitzgerald J in *Mills v Far North District Court*.[12] She decided it was appropriate to proceed:[13]

> … on the basis that while there is no separate ground for judicial review based on the (now repealed) statutory requirement for a consenting authority to be satisfied as to the adequacy of the information, a decision [not] to notify a

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8 *Auckland Council v Wendco (NZ) Ltd* [2017] NZSC 113, [2017] 1 NZLR 1008.
9 *Speargrass Holdings Ltd v van Brandenburg* [2019] NZCA 564, (2019) 21 ELRNZ 466, at [71].
10 At [75].
11 *Discount Brands Ltd v Westfield (New Zealand) Ltd*, above n 3, at [101].
12 *Mills v Far North District Court* [2018] NZHC 2082.
13 At [142].

> resource consent, and to grant a consent itself, must nevertheless be reached on the basis of adequate and reliable information.

I approach matters the same way.

[17] It cannot however be said that the Court must start with a presumption that a council should consult with or obtain information from potentially affected parties before making a notification decision. To start with such a presumption would be to ignore the intent of Parliament's 2009 legislative amendments which gave greater scope to councils to decide not to notify resource consent applications.

[18] It is accepted that the principles applying to judicial review of notification decisions are summarised in the following passage from *Coro Mainstreet (Inc) v Thames-Coromandel District Council*:[14]

> It is not the function of the Court on an application for review to substitute its own decision for that of the consent authority. Nor, will the court assess the merits of the resource consent application or the decision on notification. The inquiry the Court undertakes on an application for review is confined to whether or not the consent authority exceeded its limited jurisdiction conferred by the Act. In practice the Court generally restricts its review to whether the Council as decision maker followed proper procedures, whether all relevant and no irrelevant considerations were taken into account, and whether the decision was manifestly reasonable. The Court has a discretion whether or not to grant relief even if it is persuaded that there is a reviewable error.

Evidential framework

[19] The Society referred to statements from the High Court, such as that of Wylie J in *Tasti Products Ltd v Auckland Council*:[15]

> [75] It is the decision itself which is the subject of the review application, and not what Council officers, with the benefit of hindsight, say they did or did not do in their affidavits. Nor it is helpful for parties to applications like this to file voluminous affidavits by planners seeking to criticise or support the Council's decision. It stands to be considered in its terms and no amount of ex post facto criticism or justification can change it.

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[14] *Coro Mainstreet (Inc) v Thames-Coromandel District Council*, [2013] NZHC 1163, [2013] NZRMA 442 at [40] (footnotes omitted).

[15] *Tasti Products Ltd v Auckland Council* [2016] NZHC 1673, [2017] NZRMA 22.

[20] The Society submitted that much of the affidavit evidence provided for the Council and TSHL sought to justify aspects of the Council's process and decision-making ex post facto and should not be read to the extent it did this.

[21] I agree that, on judicial review, it is the decision itself which is the subject of review. Because the Court is not normally concerned with the merits of the decision, opinion evidence seeking either to support or challenge the decision, by reference to reasons referred to in the decision or otherwise, will be of no relevance. For that reason, as Wylie J said in *Tasti Products Ltd*, it is not helpful for parties to file affidavits from planners or from the parties themselves seeking to criticise or support the Council's decision.

[22] Evidence of that sort was filed with an affidavit for TSHL from a traffic engineer. He began by saying he had been asked to provide his expert opinion in respect of a number of transportation-related matters pertaining to the notification decision and subsequent granting of consent.

[23] The Society also filed affidavits from its spokesperson Dr Zuleta and Mr M R Norman who is a member of the Society and also a traffic engineer. Both affidavits, particularly by way of reply, include many expressions of opinion or are by way of submission on evidence filed for the Council or TSHL.

[24] The Council filed an affidavit from a Mr Matthew Noon, a professional transportation planner employed by Abley Transportation Consultants Ltd (Abley)[16] which the Council had peer review an integrated transport assessment undertaken by Avanzar Consulting Ltd (Avanzar), consultants for TSHL. Much of Mr Noon's evidence as to the enquiries Abley made in the recommendations they gave to the Council was unnecessary because it simply replicated what was apparent from the reports that had been made to the Council. The affidavit however also referred to information he had utilised in his peer review, which was not referred to specifically in the reports to the Council but which he knew of through earlier work for the Council. For instance, he knew the Council had recently completed an upgrade of carparking at the community hall near the site. Through earlier work for the Council, he was aware

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[16] Abley is a specialist professional services company with abilities in transportation planning and engineering, spatial and data intelligence.

of the times at which tourist coaches could be expected to arrive at the site and when they would normally leave. In some instances, Mr Noon gave an explanation for a view expressed in the Abley report, not apparent from the report itself, for instance that Abley's consideration of parking requirements was undertaken from a normal demand perspective, not from a peak demand perspective.

[25] Affidavits were also filed by Ms Aswegen, the planner who, exercising delegated authority, had made the notification and substantive decisions. In her affidavit, she explained the approach she had taken in adopting a s 42A report prepared by the consultant planner engaged by the Council to assist in the Council's assessment of the application. The Council also filed a lengthy affidavit from its consultant planner, Ms Hart. That affidavit provided planning information relevant to the site, which was unnecessary because it was included in the s 42A report she prepared for the Council. She also referred to steps taken by the Council and TSHL in the processing of the application, again, unnecessary because these were apparent from the documents in the common bundle.

[26] Ms Harte's affidavit however also included information she had as to relevant matters which was not in her s 42A report. She was aware of an agreement between the Council and TSHL requiring TSHL to pay for an upgrade of carparking at the Tekapo Community Hall as well as the Council's agreement to TSHL's development of 10 additional parks on Aorangi Crescent. She said she had a good knowledge of the site and its surrounding environment, including the primary school, community hall and early childhood facility, and the amount of vacant zoned land within the tourist and residential one zones and the zone provisions which anticipated a degree of growth for visitor accommodation and other activities within the receiving environment. Ms Harte responded to certain criticisms that had been made for the Society, either through Dr Zuleta's affidavit or the statement of claim. For instance, the Society's claim that, with the resource consent, there was the potential for the complex to be used for motel accommodation rather than hotel units. She referred to certain concerns that she had in preparing her report and the way she had dealt with those in her s 42A report. In that way, she sought to provide an explanation for certain assessments she had made in her s 42A report and sought to justify those assessments. Such evidence could be

considered an attempt to provide ex post justification for the assessment that was apparent in the report itself so as to be objectionable.

[27] I do not consider all the evidence of Ms Hart, Ms Aswegen and Mr Noon to be objectionable in the way Wylie J referred to in *Tasti Products*.[17]

[28] On review, the Court is concerned with the process by which the Council reached its decisions and has to assess the information Council and its officers took into account in reaching its decisions. But, not all steps taken by the Council or its officers in considering an application will be apparent from the documentary record or from the Council's decision.

[29] Not all information relied on by the Council and its officers or engaged consultants will be apparent from reports prepared for the Council or from its decision. That is especially so, as here, where those involved in the assessment of an application and the decision-making process have a knowledge of the area concerned from previous familiarity with the area and relevant issues relating to it.

[30] In *Duggan v Auckland Council*, Venning J said:[18]

> … a consent authority is not required to expressly refer to every relevant consideration and decision on every application. To do so would be to impose an impossible burden on the consent authority. Where the provisions are not expressly referred to in the relevant decision it is for this Court to determine on the facts of the case before it whether it can be said the consent authority has considered the relevant provisions and weighed them as part of its decision.

[31] In *Trilane Industries Ltd v Queenstown Lakes District Council*, Dunningham J said:[19]

> It is not appropriate, on an application for judicial review of a notification decision under the RMA, to produce further expert evidence to support or reject the evidence relied upon by the relevant consent authority. If the Council relied on evidence which was prepared by someone with appropriate expertise, and expressed a view that was reasonably available to that person on the proposal before them, the Council will not have erred.

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17 *Tasti Products Ltd v Auckland Council*, above n 15.
18 *Duggan v Auckland Council* [2017] NZHC 1540, [2017] NZRMA 317 at [79] (footnotes omitted).
19 *Trilane Industries Ltd v Queenstown Lakes District Council* [2020] NZHC 1647 at [53].

[32] In *Discount Brands*, Blanchard J, relevant to notification decisions under the then legislation but still applicable now, said, before a consent authority can properly be satisfied that notification can be dispensed:[20]

> [106] … it must have sufficient information in order to be able to make a thorough comparison of the proposal with the applicable rules of the district plan.
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> [107] The information before the authority can be supplied by the applicant, gathered by the authority itself or derived from the general experience and specialist knowledge of its officers and decision-makers concerning the district and the plan. …

[33] Where the appropriateness of the Council's processes and the adequacy of information it took into account are subject to challenge, evidence responding to those challenges is appropriate and is of assistance. However, the merits of the Council decisions or of the steps it or its officers took cannot be based on ex-post justification derived from further information or further opinions which were not taken into account at the time.

The background in summary

[34] On 16 July 2014, TSHL applied to the Council for resource consent to enable the construction and operation of a visitor accommodation complex on the site. As mentioned, the proposal was treated as including both hotel and motel units and a restaurant/bar.

[35] Under the district plan, the proposal was treated as requiring provision of 77 on-site carparks. TSHL proposed that 56 spaces would be provided on-site with an additional 20 spaces on the road reserve on Aorangi Crescent.

[36] The 2014 consent was granted by the Council on 25 September 2014 stating that the additional 20 on-street spaces would be sufficient to accommodate members of the public using the community hall and deal with overflow from the hotel.

[37] On 23 November 2016, TSHL lodged another application with the Council for a similar visitor accommodation complex at the same site. This was for 114 apartments, all of a hotel nature without cooking facilities. The design was no longer

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[20] *Discount Brands Ltd v Westfield (New Zealand) Ltd*, above n 3.

for a C-shaped building but for two separate accommodation buildings with a grass swale between them. The proposal was for 40 on-site carparks and 15 on the road reserve on Aorangi Crescent.

[38] The application was accompanied by an assessment of environmental effects provided by TSHL. That assessment referred to visitor accommodation being a permitted activity but the application for the hotel building being for a controlled activity generally because of plan rules as to design and appearance. The quantum of onsite parking anticipated was identified as a discretionary activity. It suggested that notification of the application was not required. In that regard, TSHL asserted the 2014 consent was part of the consented environment. They stated "the parking demand and anticipated curb parking solution is similar to the existing consented environment". TSHL said no person had been identified as being affected by the proposed activity.

[39] On 14 December 2016, the Council, through its resource management planner, issued a request for further information. Amongst other matters, in that request, the Council asked for confirmation as to the number of carparking spaces relating to the accommodation aspect of the proposal, confirmation that use of the café/restaurant would be limited to paying guests of the hotel and further information as to the 15 carparking spaces which would be provided within the road reserve of Aorangi Crescent. The Council asked for a traffic impact assessment to be provided by a suitably qualified individual "for a complete assessment of the potential effects". The request was for the assessment to address certain specified matters and "any others the expert considers to be relevant".

[40] The request referred to a requirement in the plan for road boundary planting of a certain depth and of that standard not being met along the road boundary of D'Archiac Drive. The Council required a landscaping plan to be provided "to allow a thorough assessment to be completed as part of the consenting process". The assessment was to deal with specific matters mentioned by the Council.

[41] On 31 January 2017, TSHL's planners provided a landscape assessment from Chris Glasson Landscape Architects and also attached a traffic assessment report from Avanzar prepared by its traffic engineer and director.

[42] On 10 March 2017, the Council, through its resource management planner, said it had reviewed the application and further information response but it required still further information. It required the landscape assessment to be peer reviewed by Mr Jeremy Head, a landscape architect familiar with the Mackenzie Basin, and for the traffic impact assessment to be reviewed by Abley.

[43] On 19 March 2017, Dr Zuleta, as president of the Lake Tekapo playgroup, wrote to the Council expressing concerns regarding the proposed development.

[44] On 25 March 2017, a letter was sent by the Lake Tekapo School Board of Trustees to the Mackenzie District councillors indicating they had traffic-related concerns that might arise with future developments in the area.

[45] On 4 April 2017, the Chief Executive Office (CEO) of the Council wrote to Dr Zuleta at the P O Box number she had used for her letter written as Lake Tekapo Playgroup president (she says she never received the letter). The CEO said the Council had to consider all resource consent applications within the parameters of the RMA and the operative district plan, this required the Council to assess all proposals on their merits. He stated "the issue of traffic management will be a central consideration of this application and our planning staff will be taking care to ensure these matters are fully considered".

[46] Between 24 March 2017 and 12 April 2017, there was correspondence between the Council and TSHL's planner over the terms on which peer reviewers were to be engaged. TSHL suggested, in considering the current proposal, it was just the difference in effects from those that would have resulted from the 2014 consent that should be considered. The Council said they had not decided to what extent the existing consent was relevant but the Council was "simply trying to understand fully the effects of the proposal in relation to the existing environment so [they could] make a notification on [sic] decision". The Council made it clear it did not agree to the terms of reference being restricted to a comparison between the previous consent and the then current proposal. TSHL engaged the reviewers on that basis.

[47] On 18 May 2017, Abley provided its peer review of the Avanzar assessment.

[48] In June 2017, Jeremy Head, landscape architect, provided a peer review of TSHL's landscape assessment.

[49] On 30 June 2017, the Council's consultant planners, Arlene Baird and Patricia Harte, of the firm Davie Lovell-Smith, issued a report on the proposed application for the purposes of ss 95A(3)(a) and 95B(2) as to notification and ss 104 and 104C as to the substantive application (the s 42A report). Subject to conditions, the report recommended the application be processed on a non-notified basis.

[50] On 3 July 2017, the Council's planning and regulations manager, Ms Aswegen, issued a decision that the application proceed on a non-notified basis and granting the 2017 consent pursuant to ss 104 and 104C of the RMA.

[51] On 21 December 2017, the Council, through Ms Aswegen, issued a decision approving changes to the conditions on the 2017 consent. In these proceedings, there is no challenge to the Council's process or decisions in approving those variations.

Planning context for the application

[52] As mentioned, visitor accommodation was a permitted activity within the tourist zone which applied to the site (subject to standards).

[53] Resource consent was required under certain rules in the Mackenzie District Plan (the district plan). Under the district plan, all buildings, extensions and redevelopments in the zone with a gross floor area greater than 10 square metres were a controlled activity in relation to design and appearance.

[54] As required by the Council, TSHL provided a detailed assessment as to landscaping design and appearance from Chris Glasson Landscape Architects Ltd. It referred to the dimensions of the proposed buildings, certain rooms being indented in the buildings resulting in shadow lines to reduce the flatness of the building walls, the materials to be used in the construction, the views other properties would have of the site and the development, the proposed planting, and the retention of a large open space between the two main buildings for drainage and amenity purposes. The Council's landscape architect and the Council's consultant planners accepted that these

elements were consistent with the conclusion in the landscape report that the development would be well integrated into the site.

[55] Rule 4.5.1 stated that any permitted activity that did not comply with a specified permitted activity standard would be a discretionary activity but that "in considering any such Discretionary Activity the consent authority (the Council) shall limit the exercise of its discretionary to the matters of non-compliance". One of the permitted activity standards referred to, which the proposal did not comply with, was landscaping.

[56] The district plan required a landscaped area of an average depth of three metres and a minimum depth of one metre to be established along all road boundaries except entranceways. For the purpose of the rule, at least 50 per cent of the landscaped area had to be planted with trees and shrubs. The proposal did not comply in terms of percentage or depth.

[57] These matters of non-compliance were also addressed in the landscaping assessment obtained from Chris Glasson Landscape Architects and were the subject of their overall conclusion earlier referred to.[21]

[58] As to transportation, r 1 in chapter 15 of the District Plan stated:

> Any activity which does not provide for parking, access and loading in accordance with the following standards shall be a discretionary activity in respect of the matter(s) of non-compliance.

[59] The district plan required that the surface of all parking and loading was to be formed and paved or otherwise maintained so as not to create dust or noise nuisance or to deteriorate in adverse weather conditions. The proposal did not comply in that parking spaces 34 to 40 were identified as being gravelled spaces over the swale (the open area between the two buildings). The s 42A report recommended the Council's decision be made on the basis that parking spaces 34 to 40 were to be identified and also to be sealed or constructed using permeable paving, and to be so maintained.

[60] The district plan required the length of the vehicle crossing from the street to the site to be a minimum of four metres and maximum of nine metres. The proposal

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[21] At para [54].

did not comply in that the vehicle crossing for the northern access on Aorangi Crescent was more than nine metres. (The proposed northern vehicle crossing was approximately 10.5 metres wide at the curb face but reduced to less than nine metres on the site boundary.)

[61] The s 42A report recorded concerns that the width of the crossing might indicate to drivers there was two-way access at this point creating confusion for vehicles turning at the access. To address that concern, it recommended it be a condition of the consent that "no entry" signs and arrow markings should be installed at the relevant points to facilitate outbound traffic movements and to avoid traffic conflict.

[62] The district plan required 53 parking spaces for the 114 hotel room complex, accompanying manager's accommodation and a café/restaurant. The proposal provided 40 on-site but 15 off site.

[63] In the planner's s 42A report and in Ms Aswegen's decision, there was reference to the provisions in the District Plan which made the proposed development a discretionary activity but that was followed with the statement:

> In accordance with the above, the hotel building is a controlled activity in relation to design and appearance. The activity is a restricted discretionary activity under this plan in relation to landscaping, parking numbers, surfacing of carparks and the length of vehicle crossings.

[64] The plan did not however use the term "restricted discretionary activity". In the Act, restricted discretionary activity is defined as meaning an activity described in s 87A(3). It states:

> **87A Classes of activities**
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> …
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> (3) If an activity is described in this Act, regulations (including any national environmental standard), a plan, or a proposed plan as a restricted discretionary activity, a resource consent is required for the activity and—
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> (a) the consent authority's power to decline a consent, or to grant a consent and to impose conditions on the consent, is restricted to the matters over which discretion is restricted (whether in its plan or proposed plan, a national environmental standard, or otherwise); and

(b) if granted, the activity must comply with the requirements, conditions, and permissions, if any, specified in the Act, regulations, plan, or proposed plan.

[65] Section 87A(3) defines a restricted discretionary plan as being an activity that has been so described in a relevant document as such. Section 87A(3) however limits the way in which a Council must consider an application for consent as to such an activity. It is clear from s 87A(3)(b) that the grant of a consent for a restricted discretionary activity cannot change the requirements, conditions and permissions otherwise provided for in the District Plan.

[66] Here, the planners referred to the matters as to which the consent was for a restricted discretionary activity when they had not been so described in the District Plan. This was not however a ground on which the Society sought review of the Council's decisions. Nor would it have been a reviewable error. It was clear from the District Plan that the development was for a discretionary activity only as to matters over which the plan reserved a discretion to grant or refuse a consent or to impose conditions on a consent. The plan expressly limited the Council's discretion to the ways in which the development did not comply with the standards for the development to be a permitted activity. The plan thus required the Council to consider the application for the 2018 development and the matters of non-compliance with standards in precisely the same way as would have been necessary had the term "restricted discretionary activity" as to such matters been used in the District Plan. That being the case, observations from the Court of Appeal and the Supreme Court, as to how applications for consent to a restricted discretionary activity are to be considered by consent authorities and how that is relevant on judicial review, are pertinent in this case.

[67] Consistent with the Supreme Court's judgment in *Auckland Council v Wendco*, in determining whether to grant a resource consent for the restricted discretionary activities, the Council was entitled to have regard only to those matters over which it had a restricted discretion in the district plan.[22]

[68] The Council was required to notify those affected by the application unless the adverse effects on them of the lack of parking were less than minor. In addressing

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22 *Auckland Council v Wendco*, above n 8.

whether that was so, the Council was required by s 95E(2)(b) of the RMA to ignore any effects which did not relate to a matter for which a rule in the plan reserves control or restricts discretion.

[69] Apart from the non-compliance for stipulated parking spaces, there is no suggestion that the other matters, which resulted in the development being a discretionary activity, required notification of the application or the refusal of the substantive application. This is of some importance in this case.

[70] On 19 March 2017, Dr Zuleta wrote to the Council in her capacity as the Lake Tekapo playgroup president to express concerns regarding the proposed development on the site. While acknowledging the site in question was in the tourist zone, she said:

> The school and playgroup are the hub of this community and having high density tourist accommodation in such close proximity is poor planning and simply dangerous.
>
> I trust you will look after the interests of our community and not those of a greedy developer.

[71] In her first affidavit filed in support of the review application, Dr Zuleta said, in late 2016, residents were unaware of a Council decision not to notify the application for its lack of sufficient parking but said that, at the time, they thought the private covenants (with restrictions as to the height of any buildings on the site) would mean the hotel complex could not be constructed.

[72] Quite reasonably, TSHL could have expected they would be able to develop a visitors' accommodation facility on the site because it would be a permitted activity, except as to the few aspects of the development which did not comply with relevant standards. There is evidence the Society is challenging the decision over notification, not to ensure the developer would provide parking spaces to meet the requirements for the proposed development as set out in the District Plan, but to prevent the site being used for an activity which is permitted within a tourist zone.

[73] Whatever the position, the Council nevertheless had to ensure it reached its notification decision and dealt with the application substantively in accordance with the requirements of the RMA. I must decide whether it did so.

Did the Council fail to consider whether there were any persons who might be adversely affected by the 2017 development such that they ought to be limited notified on the basis:

(a) that the district plan contained a rule that precluded limited notification of the application;

(b) because the notification relied upon the earlier substantive assessment of effects under s 104(1)(a) and there was no separate consideration of effects in making the notification decision.

[74] The Society contends there were owners and occupiers of adjacent land who ought to have been considered including the Lake Tekapo playgroup, Lake Tekapo kindergarten and Lake Tekapo school. The Society contends there was no attempt to identify persons such as those who might be affected or to consider how they might be affected.

[75] The Council accepted the Society correctly summarised the relevant provisions of the RMA as to notification:

> 1. By s95A(1) of the RMA, a consent authority may, in its discretion, decide whether to publicly notify an application for a resource consent for an activity unless (relevantly) by s95A(3) a rule in a plan precludes public notification of the application and the applicant has not requested public notification;
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> 2. By s95A(2) of the RMA, a consent authority must publicly notify the application if it decides that the activity will have or is likely to have adverse effects on the environment that are *more than minor*;
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> 3. By s95D (a), in determining whether an activity will have or is likely to have adverse effects on the environment that are *more than minor*, a consent authority must disregard any effects on persons who own or occupy–
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>   (i) the land in, on, or over which the activity will occur; or
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>   (ii) any land adjacent to that land;
>
> 4. By s95B of the RMA, if a consent authority does not publicly notify an application for resource consent for an activity, it must decide (under s95E) whether, for the purposes of considering limited notification:
>
>   (1) … there is any affected person, affected protected customary rights group, or affected customary marine title group in relation to the activity;

5. By s95B(2) of the RMA, the consent authority:

> … must give limited notification of the application to any affected person unless a rule or national environmental standard precludes limited notification of the application;

6. By s95E of the RMA, the consent authority must decide that a person is an affected person, in relation to an activity, if the activity's adverse effects on the person are *minor or more than minor*, including on persons who own or occupy land adjacent to or on the site the subject of the application.

[76] Both Ms Harte, the consultant planner who prepared the s 42A report, and Ms Aswegen who made the non-notification decision deposed in affidavits that they had not considered the district plan precluded either public or limited notification. More significantly, that approach was consistent with the terms of the s 42A report, adopted as the reasons for the 2017 decisions.

[77] In the 2017 decisions there were these sections:

> **Notification**
>
> Section 95A-D of the RMA sets out the criteria for determining whether an application should be publicly notified, limited notified or non-notified. In accordance with section 95A(2)(a) a consent authority must publicly notify the application if it decides (under section 95D) that the activity will have or is likely to have adverse effects on the environment that are more than minor.
>
> For the reasons given in the above discussion of effects, I consider that any adverse effects from this proposal on the environment would be less than minor, and therefore the application **need not be publicly notified** in accordance with Section 95A of the Resource Management Act 1991.
>
> **Persons who may be adversely affected by the activity [Section 95E]**
>
> In accordance with section 95B(2) of the RMA, the consent authority must give limited notification of the application to any affected person unless a rule or national environmental standard precludes limited notification of the application.
>
> Part 4.0 of the Transport Chapter states that resource consents in relation to surface of parking areas (2j) are to be non-notified.
>
> I consider that no persons are affected by the proposal and therefore the application **need not be limited notified**.
>
> **Conclusion**
>
> It is considered that the application can be processed on a **non-notified** basis in accordance with Sections 95A(2)(b) and 95B(2) of the Resource Management Act 1991.

> For the above reasons, it is considered that [sic] appropriate that the application **be granted** pursuant to Sections 104C, and 108 of the Resource Management Act 1991, subject to the imposed conditions.

[78] There was thus reference to a rule which said there was to be non-notification as to applications for resource consents in relation to surfaces of parking areas. It was appropriate for that limitation to be mentioned because one of the areas of non-compliance which required resource consent related to the surface of the parking area on the swale.

[79] It is the substance of the decision which must be looked at.[23] The next paragraph clearly states that the application need not be limited notified because the planner and then the decision-maker considered that no persons were affected by the proposal. Nowhere in the decision was it said that the application need not be limited notified because of a rule precluding limited notification.

[80] The Council was not in error in reaching its decision as to non-notification based on an error that a rule in the plan prohibited the limited notification.

[81] Earlier in the report and the decision, it was made clear that resource consent was required for matters other than as to surface of parking areas. Those matters were discussed extensively in the report, all under the heading "effects on the environment". The conclusion reached after such consideration was that "overall it is considered that the proposed scheme achieves an outcome acceptable within the tourist zone and that any adverse effects are less than minor".

[82] It is apparent from the decision and from the documentary record of the Council's assessment of the proposal that the Council did consider whether there were persons or parties in the vicinity affected by the application.

[83] In responding to TSHL's application of 14 December 2016, the Council required TSHL to provide a traffic impact assessment from a suitably qualified individual. It required the assessment to address various specified matters and any others the expert considered relevant. One of the specified matters was:

> Effect of increased traffic flow and cumulative effects on existing activities. The proposal relates to a site adjoining a residential zone which includes Lake

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23 *Sutton v Moule* (1992) 2 NZRMA 41 (CA).

> Tekapo Primary School and [a] recently consented early childhood education facility. Consideration should be given to the potential to adversely impact these activities and safety for pedestrians, particularly around drop off/pick up times.

[84] TSHL's application included an assessment of environmental effects. The integrated transport assessment provided by Avanzar in response to the Council's request referred to the adjacent road environment. There was specific reference to "a small school with 35 students" being to the north of the site, a community hall with an 18 space off-street carpark being opposite and backpacker accommodation being located directly to the south of the community hall.

[85] Under the heading "Road safety" Avanzar said:

> A search of the NZ Transport Agency CAS database has shown that there are no crashes associated with the intersection of SH 8/Aorangi Crescent in the last 10 years. There are also no crashes on Aorangi Crescent over the same period. This suggests there are no underlying road safety issues. There is no reason to expect the currently proposed development to create any road safety issues.

[86] Avanzar referred to angle parking to be installed on Aorangi Crescent to service both the hotel and the community hall. They also referred to the primary school being served by a pedestrian crossing in the vicinity of the proposed hotel access.

[87] In processing the application, the Council required TSHL to arrange a peer review of the traffic impact assessment first provided by TSHL by the Council's nominated consultant, Mr Noon, of Abley. The consultants were specifically asked to review the TSHL traffic impact assessment in terms of:

(a) rules under the district plan (section 15) including parking requirements for visitor accommodation activity;

(b) differences between the consented and proposed activity, particularly on activity, parking and vehicle access; and

(c) other traffic-related considerations such as pedestrian movements, effects on the adjoining road network, specifically Aorangi Crescent and loading arrangements, etc.

[88] The primary school, community centre and early childhood care facility were all located on or immediately off Aorangi Crescent.

[89] In its peer review, Abley noted the proposed provision of additional spaces on Aorangi Crescent were intended to service both the hotel and the community hall.

[90] In the introduction to its review, Abley did refer to the 2014 consent but then said:

> The review of the traffic and transportation aspects of the resource consent ha[ve] been informed by an assessment of the transportation rules in the Mackenzie District Plan and an analysis of the effects of the non-compliances that may arise.

[91] Abley considered how pedestrians on Aorangi Crescent could be affected by the non-complying width of a vehicle crossing. They concluded there would be no adverse effects arising from this non-compliance provided that the landscaping area at the northern access was amended as was ultimately required and "entry only" signage and markings were installed at the access.

[92] In the report and in the 2017 decisions, the Council expressly held there were no persons who might have been adversely affected by the proposal such that they ought to have been limited notified. In the report they did not refer expressly to the effects on the Lake Tekapo playgroup, Lake Tekapo kindergarten and Lake Tekapo school. But it is apparent from the report and decision that the Council did consider whether there were persons or parties affected so as to require limited notification.

[93] In the introduction to the report, there was a map showing the location of the site in relation to neighbouring properties. There was specific mention of the site bordering land forming part of the Lake Tekapo school under the heading "the existing environment". There was reference to land to the east being within the residential one zone and containing residential accommodation and a community centre. In consideration of the traffic and parking proposals, there was specific mention in the Council report of parking spaces that would be provided on Aorangi Crescent which would service both the hotel and the community hall opposite.

[94] The 2017 decisions referred to Transport Policy 1A in the district plan:

> To protect the efficiency, safety and amenity of various activity areas, the state highway network and the road hierarchy in the District by ensuring adequate on-site parking, loading and access provisions exist.
>
> Comment: These various aspects of the development have been assessed with the conclusion that the safety, efficiency and amenity of the area and its roading is not expected to be compromised. However as noted this will in part depend on how the hotel is operated. It is therefore recommended that a review clause be included in the conditions to enable the conditions of consent to be reviewed if traffic related issues arise.
>
> In my opinion the application is consistent with the above and all other relevant objectives and policies in the District Plan, as the proposal will maintain the character and amenity of the Tourist zone and will not adversely impact the nearby residential environment.

[95] There was another section in the 2017 decisions which indicates the Council had regard to adjoining areas:

> **Business Policy 2A – Impact On Business And Adjoining Areas**
>
> To avoid or minimise the adverse effects of activities in business areas so as to ensure these areas and adjoining areas remain pleasant, attractive and safe.
>
> Comment: The adverse effects of the hotel activity on this site are expected to be limited to traffic generation. However if the site is well managed the traffic movements to and from the site, including the on-street parking, should not create road safety or any noise issues. The creation of an additional 5 car spaces opposite the community centre will also benefit users of the centre.

[96] There was mention of the community hall at 7 Aorangi Crescent in the Council landscape architect's peer review of the applicant's landscape assessment.

[97] On 9 June 2017, TSHL, through its planner, emailed the Council offering to pay for 10 additional angle parks on Aorangi Crescent close to or outside the Lake Tekapo school for use/by (in conjunction with) the school. The offer was made with the assertion that parking, as proposed in the application, was sufficient to meet demand generated by the proposal and was conditional on a consent coming through promptly. That condition was not met and the provision of these 10 parks was not a condition of the consent ultimately granted. Nevertheless, the correspondence was consistent with the Council and TSHL being conscious of the proximity of Lake Tekapo school and of the way parking and traffic movements arising out of the development could impact on the nearby school.

[98] The Council was aware of the early childhood centre. On 15 December 2016, it issued a resource consent for the operation of that centre on a residential site but it was for a maximum of 19 children at any one time, a maximum of two full-time staff members and hours of operation limited to between 9.00 am and 3.00 pm. It was a condition of the consent that there be nine carparking spaces on the site with a 1.5 metre wide footpath providing foot access from the carpark to the site entrance.

[99] The s 42A report, adopted as reasons for the Council decision, was prepared and reviewed by consultant planners engaged by the Mackenzie District Council including Ms Harte.

[100] Ms Harte explained she had worked with the Mackenzie District Council for in excess of 25 years. She said she was very familiar with the site of the proposed hotel on Aorangi Crescent and the surrounding area, having processed a number of resource applications for hotels and accommodation at Lake Tekapo, accommodation and residential activities on D'Archiac Drive. Ms Harte confirmed her familiarity with the area, in particular the primary school, community hall and early childhood facility.

[101] Ms Harte's familiarity with these matters was within the category of the "extensive relevant knowledge" referred to by the Supreme Court in *Discount Brands*, knowledge that the Council could properly draw on in making its decision on notification and the granting of a consent.[24]

[102] Between 11 May 2017 and 31 May 2017, Ms Harte was copied into all emails between the senior planner for the Council who was then initially processing the application and the applicant's agent. Those emails related to confirmation of receipt of plans and peer reviews.

[103] Ms Harte's company took over the processing of the TSHL application on 31 May 2017. She personally dealt with transportation issues as well as others and an assessment of the application against relevant provisions of the district plan. In her affidavit, she responded to the allegation in the Society's statement of claim that the Council failed to identify and consider the neighbourhood/receiving environment,

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[24] *Discount Brands Ltd v Westfield (New Zealand) Ltd*, above n 3, at [50].

including changes to and new activities introduced into the neighbourhood since the 2014 decision and/or changes or new activities planned for the future.

[104] I do not consider her evidence could be assessed as an ex-post facto justification for the Council's decisions. It was consistent with the documentary record of the process adopted by the Council in considering TSHL's application and the decision itself. Insofar as she referred to her knowledge of the area based on her work over a number of years for the Council, it was reasonable for the Council to take that knowledge and experience into account in making its decisions.

[105] Ms Harte's s 42A report described the general area and listed activities on neighbouring land. The s 42A report recommended the inclusion of a condition requiring TSHL to obtain approval of the specific plans for the proposed on-street parking and associated landscaping. This was consistent with the planner having a concern as to how TSHL's proposals for on-street parking and associated landscaping could limit visibility for both pedestrians and bus drivers in the vicinity of the access point for the hotel.

[106] I do not accept the submission for the Society that the Council failed to consider the owners and occupiers and adjacent land, including the Lake Tekapo playgroup, Lake Tekapo kindergarten and Lake Tekapo school.

[107] The Society also submits there was no relevant assessment of adverse effects on adjacent persons identified because the Council relied on the earlier assessment of effects as to the substantive application.

[108] The s 42A report was headed:

Report / Decision on a Non-notified
Resource Consent Application
(Sections 95A(3)(a), 95B(2), 104 and 104C)

[109] It was thus a report as to matters to be considered for decisions as to both notification and the substantive s 104 application. Both counsel for the Council and Ms Harte in her affidavit said that, at the time of the 2017 decisions, combined decisions were commonplace although that practice has now changed. I accept

however that there was and remains no statutory prohibition against the decisions being made in combination although dealing with the issues separately probably better ensures that the particular criteria for decisions as to notification as opposed to the issues for determination of the substantive application are properly addressed.

[110] In considering whether limited or public notification was required, the Council had to assess the effects of the proposal on the environment and people potentially affected but only in relation to the matters of non-compliance with the district plan or the basis on which the development was for a controlled activity. The report and decision included a detailed assessment of the effects on the environment and as to the matters of non-compliance and the way any potential consequences/effects of non-compliance were to be mitigated.

[111] I am satisfied that, in the s 42A report and the 2017 decisions, the Council did consider the effects on the environment and the adverse effects on adjacent persons for the purpose of the decision as to notification as well as for the purpose of deciding whether to grant the substantive application.

Failure to identify and consider receiving environment

[112] The Society's second challenge was that the Council failed to identify the receiving environment when undertaking the effects assessment. The Society submitted the Council ought to have undertaken a fresh assessment of effects on the existing and future receiving environment as though the 2014 resource consent had not been issued. The Society submitted the decision did not refer to relevant aspects of the receiving environment, namely the kindergarten consented on 15 November 2016, the playgroup, the use of Aorangi Crescent as a new alternative route for the Alps to Ocean cycle trail which opened on 27 January 2016 and residential growth in the vicinity of the site since 2014. The Society submitted the Council had limited its assessment to a comparison between what was allowed with the 2014 resource consent and the effects of the development proposed by the 2016 application.

[113] By reason of reference to various matters I have referred to at paras [81] to [105] I am satisfied the Council did identify and consider the neighbourhood/receiving

environment to the extent required for it to have adequate information on which to make decisions, first as to notification and then on the substantive application.

[114] In addition to those matters, it is apparent that the Council and its planners had before them a graphic supplement to the landscape assessment which featured not only an aerial view of the site and surroundings but a number of photographs which illustrated the level of residential growth and development in the surrounding area as at 2016/17.

[115] Mr Noon was the transportation manager at Abley who the Council relied on to peer review the integrated transport assessment undertaken by Avanzar for TSHL.

[116] In his affidavit, Mr Noon said Abley had been engaged by the Council to provide a range of transport, engineering and planning advice since 2016. This included the development and delivery of a transport strategy for the Mackenzie District Council and the development and delivery in 2016, the development and delivery of Tekapo parking demand surveys and analysis in 2017. He had provided support and advice to the Council regarding the development of a Tekapo transport plan, including running community/stakeholder engagement activities such as workshops, public information stands and analysing community feedback. He said he was familiar with land use matters that influenced transport planning for Tekapo including the growth in domestic and international tourism associated with, for example, the development of the Alps to Ocean cycle trail and also the district obtaining dark sky reserve status in 2012.

[117] I accept that Mr Noon had extensive relevant knowledge which was relied upon by Ms Harte in her s 42A report and then by Ms Aswegen in her 2017 consent decision.

[118] As already referred to, Abley was asked in a general way to advise the Council as to whether there were any safety issues the Council had to consider associated with the 2017 development. I am satisfied that the planners in making their recommendations on the 42A report, and Ms Aswegen in reaching her consent decision, did so with the benefit of knowledge as to relevant aspects of the receiving

environment with regard to actual and potential transport issues, as might arise for people in the neighbourhood of the development.

[119] The Society has also not established that the Council assessed the effects of the 2017 development by simply identifying and comparing the effects of the 2017 development with the 2014 consented development.

[120] TSHL had presented its application in 2016 with its assessment of environment effects as if the Council had to treat the 2014 consent as part of the receiving environment so that the effects of the 2016 development should be considered only to the extent they were different from those that would have resulted from the 2014 development.

[121] TSHL's initial assessment of transportation issues was made on that basis. When Avanzar provided its integrated transport assessment as required by the Council, they referred to the existing consented environment with reference to the 2014 proposed consented development. They concluded their summary by saying "overall the new proposed hotel development will have fewer traffic effects than the existing consented development and the effect of the changes will be less than minor".

[122] The Council, through its planner, indicated to TSHL's planner and agent that the Council required a peer review of both the Avanzar transport report and the Glasson landscape assessment. TSHL's planner asserted to the Council that the consented environment was highly relevant to the processing of the 2016 application and said that, "when the current proposal is compared to the consented environment, it is just the difference in effects that should be considered".

[123] The Council's planner said the Council did not agree to the terms of reference being restricted to a comparison between the previous consent and the 2017 development. In scrutinising TSHL's proposed terms of peer review for both the transport and landscape assessment, the Council deleted TSHL's proposed reference to the reviews having to be "only in terms of the differences between the consented environment and proposed activity". The reviews were then arranged without that limitation.

[124] The 2014 resource consent did not lapse until 25 September 2019.

[125] The Court of Appeal has held it is open to the Council to consider the effects of an unimplemented resource consent in assessing the effects of the instant proposal on the environment but whether or not and to what extent they would do so would depend on the facts of the particular situation they were dealing with.[25]

[126] In this case, the application was for a development to replace the 2014 consented proposal so that 2014 proposed development was not going to be part of the future environment if a resource consent was granted in terms of the later application.

[127] Nevertheless, it could not be said, to the extent there was any consideration of the 2014 resource consent, it was as to an irrelevant matter. The 2014 consent had been granted for a similar development on the same site by the same developer. Many of the effects that had to be considered with the 2017 development must also have been considered with the 2014 resource consent. In 2014 the Council had to assess the effects on the environment of the then proposed development, what steps should be taken to mitigate any effects that could have been to the detriment of the environment or people in the vicinity of the development and the conditions that should be attached to a consent. It was reasonable for the Council to have regard to such matters when assessing whether notification was required and whether a resource consent should issue for the 2017 development.[26]

[128] In the s 42A report, there was a reference to the 2014 consent under the heading "The Existing Environment" but only to state "an existing resource consent, RM140040, was granted in September 2014 for a 100 bedroom hotel on th[e] site with a different design, layout and parking arrangements". There were however brief comments as to ways in which the layout and design of the 2018 development were superior to the 2014 development. There was a comparison of the parking proposals but the references were incidental to the Council's decisions.

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25 *Arrigato Investments Ltd v Auckland Regional Council* [2002] 1 NZLR 323 at [35]–[36]; and *Queenstown Lakes District Council v Hawthorn Estates* (2006) 12 ELRNZ 299 (CA) at [57] and [63]; and *Far North District Council v Te Tunanga-A-Iwi O Ngati Kahu*, above n 2, at [93].

26 Consistent with the determination of Venning J in *Duggan v Auckland Council*, above n 18, at [87]–[90].

[129] In her affidavit, Ms Harte said she had not considered it appropriate to use the 2014 consent as a de facto baseline for the assessment of the effects of the 2017 proposal. She said the primary bases for the assessment were the effects of non-compliance with the district plan standards and the degree to which the proposal conformed with the objectives and policies of the plan. While those statements in her affidavit might be considered as an ex post justification for the Council's decision so as to be irrelevant, it is apparent from the report itself that this was her approach.

[130] I accordingly reject the submission the Council failed to identify and describe the receiving environment or that it wrongly limited its assessment to a comparison of the effects of the 2014 consented activity with those of the 2018 development.

Failure to assess safety issues

[131] In her submissions for the Society, Ms Steven QC (as she was then) drew the Court's attention to statements from the Supreme Court in *Discount Brands Ltd v Westfield (New Zealand) Ltd* to the effect that policies and objectives contained in a plan or proposed plan are to be taken into account in making both the substantive decision on a resource consent application and in considering whether a person is affected by the application so as to require limited notification to that person.[27]

[132] The Society submitted that, as a consequence of not doing this, the Council failed to assess the adverse effects of the increased volume of traffic from a safety perspective for visitors and pupils at the adjacent school, kindergarten and playgroup, including the potential for conflict associated with drop-off and pick-up times. The Society submitted that, through this omission, the Council failed to identify potentially adversely affected persons.

[133] The criticisms reflect the concerns of Dr Zuleta as expressed in her letter, written as the Lake Tekapo playgroup president, on 19 March 2017 where she said the school and the playgroup were the hub of the community and having high density tourist accommodation in such close proximity is poor planning and simply dangerous.

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[27] *Discount Brands Ltd v Westfield (New Zealand) Ltd*, above n 3, at [82].

[134] In applying the plan, in particular as to matters in r 5, chapter 15, the Council however had a discretion only as to the way the proposed parking and loading provisions did not meet the standards in the plan. The Council's assessment of effects could not take into account the effects which would have been generated by a proposed development which would have met those standards. In its peer review of the Avanzar report, Abley discussed the extent to which there was a difference between the standards and what was proposed by TSHL. The difference was outlined in the s 42A report and referred to in the reasons for the Council's decision.

[135] In the s 42A report and the 2017 decisions, the Council referred to r 5, chapter 15 of the district plan as to the standards for parking or loading spaces [28] for the proposed development and matters which it was required to consider:

(a) whether a significant adverse effect on the character and amenity of the surrounding area would occur as a result of not providing all the required parking or loading space;[29]

(b) the extent to which the safety and efficiency of the surrounding roading network would be adversely affected by parked and manoeuvring vehicles on the roads;[30] and

(c) any cumulative effect of the lack of on-site parking and loading spaces on conjunction with other activities in the vicinity not providing the required number of parking or loading spaces.[31]

[136] It was apparent from the s 42A report that the Council did consider the supply of parking in the vicinity. It noted there was to be a combination of contribution to the upgrade and enlargement of the community hall carpark opposite the development and the creation of an additional on-street parking area adjoining the hotel. As to the possible adverse impact on amenity and character of the areas around the development, through the provision of some of the required parking on the street, the s 42A report

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28 Rule 5, chapter 15(a), (b), (c) and (d).
29 Rule 5, chapter 15(f).
30 Rule 5, chapter 15(g).
31 Rule 5, chapter 15(h).

assessed that impact to be limited due to the design of the parking bay with incorporated landscape elements tying it to the streetscape in the area.

[137] In terms of meeting varying parking demands, the assessment in the s 42A report was that the proposed on-street parking bay would generally be an asset for people living in or visiting the area as it was considered unlikely there would be substantial use of the parking area by hotel guests.

[138] Before me, the Council acknowledged that the Avanzar report for TSHL and the Council in the s 42A report and its decision did not expressly refer to safety issues in relation to the school, playgroup or kindergarten. The Council nevertheless did refer to the road environment, including the school and community hall, vehicle access and consider the impact on intersections and road safety. The conclusion in the Avanzar report was "there is no reason to expect the currently proposed development to create any road safety issues". Abley's peer review of the Avanzar report did not identify any safety issues.

[139] In considering whether the Council had adequate information as to safety issues in making its decisions it is appropriate to look at the way in which the proposed development and the provision for loading and parking spaces was a discretionary activity and did not meet the standards in the District Plan for a permitted activity.[32] Once account had been taken of the off-site parking on the road reserve which was to be paid for by TSHL, there were to be 55 carparks. This was more than the 53 required to be on-site but 15 were on road reserve adjacent to the site. The other non-compliance was as to the increased width of an accessway to the 2017 development. Safety risks as to the latter were to be mitigated through there being appropriate exit and entry signs and markings on the road.

[140] There was to be protection for the users of all nearby facilities and those who might be using roads in that vicinity through it being recommended in the s 42A report that a review clause be included to enable the conditions of the consent to be reviewed if traffic-related issues arise.

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[32] See *Speargrass Holdings Ltd v Van Brandenberg*, above n 9.

[141] I consider the Council had adequate information to assess the effect on the environment and on neighbours of the ways the 2017 development did not comply with standards in the district plan as to the provision for parking and loading spaces, and the width of accessways. Furthermore, it made the necessary assessment. The merits of its determination cannot be the subject of review.

Failure to assess parking demands

[142] The Society's further submission was that the Council overlooked the effects of allowing parking within the road reserve to be used in association with the hotel complex when there are other demands from these spaces from other adjoining activities. The Society submitted the Council had no evidence that the parking demand from nearby community and residential activities would still be met, simply rolled over the on-street arrangement first formulated in 2014 without any updated assessment of community parking demand, absent any consultation with the adjacent community. It was suggested, through submissions and opinions expressed by Dr Zuleta and Mr Norman, that the Council had failed to consider potential increased demand for parking spaces that might be associated with the development, for instance the use of the hotel by independent travellers with their own vehicles (as opposed to those who arrived in a bus).

[143] The Council did not however simply roll over the on-street arrangement first formulated in 2014 without any updated assessment of community parking demands. It engaged Abley to peer review the Avanzar report. As Ms Steven for the Society acknowledged, the terms of their engagement were not limited to consideration of the proposals in the 2017 development as compared to the 2014 development. Abley was asked to advise as to whether there were any issues arising out of the proposals as to transportation issues including provision for parking. Although their report included a comparison as to relevant features of the 2017 proposed hotel development against the 2014 consented development, Abley assessed the 2017 development "against the transportation rules of the Mackenzie District Plan". It identified the way the development would not comply with certain rules and recommended consent conditions to mitigate any consequences for people in the area who might have been adversely affected by the matters where there was non-compliance. Through Mr

Noon, the Council had the benefit of his knowledge as to both the current transport issues for the area and the potential for future increased demands.

[144] In her affidavit Dr Zuleta said the Council would have been better informed as to the demands if there had been consultation with people in the community. The RMA recognises that developments can proceed without such consultation either because the proposed development is a permitted activity in accordance with the district plan or because, with adequate information, the Council decides on its consideration of matters as required by the RMA that such consultation is not required.

[145] The Council decided, consistent with the s 42A report, that the effects on the environment and on people potentially affected by the proposed development, by reason of non-compliance with parking standards for a permitted activity, were not such as to require limited notification of the application. That assessment was made on the basis there would be conditions attached to the consent that would mitigate concerns that could arise through the matters of non-compliance.

[146] I am satisfied that the Council made that decision with adequate information as to the demand for parking that could result from both the proposed development and others needing to park or travel in that area.

[147] The Society has not established that there was any error of process in this regard.

Conflation of decisions

[148] The Society's final ground of appeal was that the Council wrongly conflated its substantive s 104 assessment and decision with the decision on notification. It argued that the decision whether to notify an application either publicly or on a limited notification, "must logically [precede] the decision on the application itself".[33]

[149] In *Seafield Farm (HB) Ltd and Taranui Company Ltd v Hastings District Council*, as here, the Council had engaged an independent planner to process the

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[33] *Tasti Products Ltd v Auckland Council*, above n 15, at [81].

application.[34] That planner provided a detailed report to the Council. As here, it dealt with both notification and substantive resource consent issues. As here, the delegated decisionmaker adopted the recommendations in those reports.

[150] Dobson J held the decisionmaker had made separate decisions as to both notification and the substantive application.

[151] Dobson J explained why it would be desirable for planners who had been engaged in that case to provide a separate report dealing with notification issues but he acknowledged the making of notification and substantive decisions at the same time was not prohibited by the RMA.

[152] In *Milla v Ashburton District Council*, an independent planner was commissioned to prepare a s 42A report.[35] His report included a recommendation as to non-notification and also as to the grant of the resource consent subject to conditions. The Council's district planning manager suggested he separate the combined report into two reports, one dealing with the recommendation as to notification and the other dealing with the substantive decision. He did this, but the content of the reports did not alter. The Council appointed an independent hearings Commissioner to make both the notification and substantive decisions.

[153] Dunningham J in the High Court found the Commissioner had made two separate decisions and, looking at the detail in the reports, there had been no error through conflating the notification and substantive decisions.

[154] The Society submitted that, in this case, there was not the duly required separate notification decision because the assessment of effects referred to in the s 42A report and adopted by the Council did not engage with the "finer grained"[36] notification test and that notification was undertaken in a most perfunctory manner.

[155] I do not accept those criticisms.

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34 *Seafield Farm (HB) Ltd and Taranui Company Ltd v Hastings District Council* [2018] NZHC 1980, (2018) 20 ELRNZ 746.

35 *Milla v Ashburton District Council* [2016] NZHC 3015.

36 At [77].

[156] As evidenced by the Council's requirement for a further detailed landscape assessment of the 2017 development and the requirement for the Avanzar transportation report to be peer reviewed by Abley, the Council had made a detailed and careful assessment of all relevant effects of the proposal insofar as they had to be considered by the Council in dealing with the proposal as a controlled activity or as a restricted discretionary activity.

[157] Through the engagement of Abley as well as the report provided by Avanzar, there was careful consideration of parking, traffic and safety issues with which the Society was concerned. As already referred to in the s 42A report, as adopted by the Council, there was separate consideration of the matters that had to be considered in deciding whether there should be limited notification of the application.[37] A separate decision was made as to such matters.

[158] The Society has accordingly not established there was an error in the Council's decision as to non-notification by reason of the report writer and then the decisionmaker conflating the substantive s 104 assessment with the decision on notification. The decision as to notification and the substantive application were made separately.

Overall conclusion

[159] The 2017 development is for a hotel on the site, with accommodation in 114 separate units. There will be a restaurant and bar but only for paid visitors to the hotel. The site is situated within the tourist zone, as provided for in the district plan. It could be expected that, with such a development, there would be increased bus and car traffic in the vicinity of the hotel and a need for parking. Those in the vicinity of the development could not have objected to such a development proceeding provided it met all the standards for a permitted activity.

[160] The 2017 development was a controlled activity as to design and landscaping issues. There is no challenge to the Council's conclusion that, as to those matters, the

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[37] Above at [81]–[106].

effects on the environment of the proposed development and on persons who might have been affected by the 2017 development would be less than minor.

[161] The 2017 development did not meet the standards as to the width of one vehicle crossing to the development and as to the requirement for a hard surface on a particular parking area. In terms of the consent which would be granted for the 2017 development and conditions attaching to that consent, the Council was ensuring the development would proceed in a way that mitigated the effects of those areas of non-compliance in a way that meant those effects on the environment, and on people in the vicinity, would be less than minor.

[162] The Society's concern is as to the way the proposed development could adversely impact on other users of the roads adjacent to the site. They could potentially have had a right to be heard in respect of such effects only to the extent those effects arose out of the ways the proposed development did not meet the relevant standards for a permitted activity.

[163] The standard at issue was a requirement that, with the development, there be a minimum of 53 on-site carparks. TSHL's plans provide for there to be 40 on-site carparks but a further 15 carparks on an area of road reserve on Aorangi Drive immediately adjacent to the hotel. Those carparks will be available for those in the vicinity to use when they are not being used by visitors to the hotel. That parking area is to be landscaped and formed in a way that ensures the location of the parking spaces does not compromise the safety of pedestrians and others travelling in the vicinity. The consent was subject to the Council's approval of just how that is done. It was also a condition of the consent that the Council would be able to review the conditions of the consent if any safety issues did emerge through the way the hotel is being managed.

[164] The Society's case is that the effects of the proposed development on the environment and on other people affected will or could be such that either public or limited notification was required. The Society's concern is all about the impact the development would have on other people using the road or footpaths in the vicinity of the proposed hotel. In making its assessment about these matters, the Council's

consideration was limited to considering what the effect would be of 15 carparks being on road reserve adjacent to the hotel rather than on-site.

[165] The Council required TSHL to provide both an environmental assessment and a transport assessment from independent consultants in support of TSHL's application. It had those assessments peer reviewed by appropriate consultants. With the benefit of their advice, the Council decided, to the extent there was a departure from the required standard for parking, the effects of that departure on the environment and on persons or activities who might otherwise have been affected would be less than minor.

[166] It was not submitted for the Society that there were aspects of the 2017 development consistent with a significantly increased density of scale beyond what would have been associated with an activity permitted by the district plan. It was not suggested that, with such a potential increased density, there would be increased bus or other traffic movements beyond what would be associated with an activity permitted by the district plan. The Society has not suggested that such information might have been available if the Council had looked for it. The Society's criticism is that the Council did not obtain information or have regard to other activities which were occurring or could occur in the vicinity of the development.

[167] There was no error in the Council considering traffic issues in relation to the development for which it was giving its consent and not the potential for a change in use of the site. The first condition of the resource consent required the development to proceed in accordance with the plans provided to the Council with the 2016 application and as updated through the consent process. The approved plans for the 2017 development directly reflect the general specifications summarised in the Council's decision document. They do not allow for any motel or independent traveller units to be part of the development. A change in the development from hotel to motel activity would be a significant change from the consented use. A resource consent would have to be obtained for such a change in use. It is a condition of the consent that the "consent authority may review the conditions of this resource consent to deal with adverse effects on the environment which may arise from the exercise of the consent …". Through that condition, the Council would also be able to review the consent if the 2017 development was to be used as a motel rather than a hotel.

[168] The applicant has not persuaded me that there was any error of process in the way the Council reached its decision. Accordingly, the applicant has not established there are grounds on which the decisions of the Council as to notification and in granting the resource consent should be quashed. On that basis, the Society's application for review must be dismissed.

The exercise of a discretion

[169] Because I have found there was no reviewable error in the Council's processes or decisions, it is not strictly necessary to consider this. Nevertheless, I do so.

[170] I have regard to the scale of the proposed development and the extent to which it was a permitted activity and complied with all the relevant standards for a permitted activity. There were matters as to which the Council had only, in effect, a restricted discretion. It was not suggested for the Society that notification was required because of the way in which the application was for a controlled activity. It was not suggested that the provision for parking spaces on road reserve was going to generate more traffic than would have been the case for the development as a fully permitted activity. It was not suggested that the Council had been unreasonable in deciding that the effects of non-compliance with required standards as to the accessways to the development were not going to be adequately mitigated through conditions attaching to the consent.

[171] It is not for the Court to review the merits of the Council's decision but, on the information available to it, the Council could reasonably conclude that the effects on the environment and on people potentially affected by non-compliance with relevant standards if the district plan would be less than minor.

[172] In *Speargrass Holdings Ltd*, the Court of Appeal said that the fact the Council's decision was as to a matter over which it had only restricted discretion should be weighed in the balance in exercising the discretion which the court would have if it found there were grounds for review.[38] Here, those matters were of limited consequence in the context of all the effects that would result from the 2017 development had it complied with all the standards for it as a permitted activity.

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[38] *Speargrass Holdings Ltd v van Brandenberg*, above n 9, at [71].

[173] There was also a significant delay in the Society bringing these proceedings. The Society was not incorporated until some two years and five months after the Council granted the resource consent.

[174] Following the grant of resource consent for the 2017 development, TSHL negotiated and entered into management and technical agreements with an international hotel chain. The evidence is that these were finalised in 2019.

[175] TSHL says it has lodged its application for a building consent. TSHL says it has entered contracts for the development in reliance on the 2017 consent (CB450). Dr Zuleta said in an affidavit that they did this only after the Society had lodged its application for review. Even if that is so, TSHL must have incurred considerable expense in having plans prepared sufficient to support such an application.

[176] I thus accept that TSHL has incurred significant costs in progressing the development as consented. I accept that, if the relief sought by the Society was granted, this would likely have considerable and significant implications for the agreements between TSHL and the hotel chain, and also such contracts as it has with consultants and contractors.

[177] The Lake Tekapo playgroup and Lake Tekapo school were aware of TSHL's application and the proposed 2017 development when they wrote to the Council in March 2017. It would seem from Dr Zuleta's affidavit that she, and presumably other residents who might have been opposed to the development of a hotel on the site, were content to rely on how they hoped the height restriction covenant over the site would prevent use of the site for a hotel rather than to enquire of the Council as to what was happening with what they had heard could be the Council's consideration of a new development proposal for the site.

[178] To a major extent, the 2016 application was for consent to a permitted activity. The matters over which the Council could, in its discretion, have refused consent were limited. It is by no means likely that, if the Council's 2017 decisions were quashed and the Council had to reconsider the matter, there would be public or limited notification of it.

[179] In that regard, I consider it also relevant that the nub of the Society's complaint is that, in its decisions, the Council did not obtain adequate information as to certain activities in the vicinity of the site. Even if there was no express reference in the s 42A report or the Council's decision to those matters, the evidence does establish that the planner responsible for the s 42A report and Mr Noon who peer reviewed the Avanzar transport assessment were aware of such matters when they made their recommendations and advised the Council as to relevant issues.

[180] The High Court in *Coro Mainstreet Inc v Thames-Coromandel District Council* stated:[39]

> It is generally accepted that standing in judicial review proceedings is established when the person applying has "a sufficient interest" in the matter to which the proceedings relate. In recent years, the trend has been to assess standing as a factor in the exercise of the Court's remedial discretion.

[181] The Society does not own any property or carry out any activity in the vicinity that could be directly impacted by the activity approved with the relevant consent. Operation of the hotel on the site will not affect the Society in any material way. While some of the Society's members, or all of them, may have a genuine and sufficient interest in the proceedings, the evidence suggests their concern was not as to there being 15 carparks on the Council reserve but that the development was for a hotel on the site. It appears their objection is as to a permitted activity under the district plan, a development which could, but for minor issues of non-compliance, have proceeded without their being able to have any say in the matter.

[182] In all the particular circumstances of this case, had I found there was a reviewable error, in the exercise of my discretion, I would have declined the Society the relief it sought.

Conclusion

[183] The Society's application fails.

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[39] *Coro Mainstreet Inc v Thames-Coromandel District Council*, above n 14, at [32] (footnotes omitted).

Costs

[184] The Council and TSHL have been successful in these proceedings. They will be entitled to costs. If no agreement can be reached over those, the respondents are to file memoranda as to the costs they seek by 2 July 2021. The Society can file a memorandum in reply by 23 July 2021. The respondents can file memoranda in reply to the Society's submissions by 16 August 2021. The memoranda are to be no longer than five pages. I will make a decision as to costs on the papers.

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