

BEFORE THE ENVIRONMENT COURT

Decision No. [2014] NZEnvC 23

IN THE MATTER of an appeal under Clause 29(6) of the First
Schedule of the Resource Management Act
1991 (the Act)

BETWEEN MILFORD CENTRE LIMITED
(ENV-2013-AKL-000030)
Appellant

AND AUCKLAND COUNCIL
Respondent

AND AUCKLAND TRANSPORT
NATIONAL TRADING COMPANY
MILFORD RESIDENTS' ASSOCIATION
LIMITED & ORS
CASTOR BAY RATEPAYERS' &
RESIDENTS' ASSOCIATION
INCORPORATED
P CARTER
W & P MARTIN
W MCCANDLESS
D OGILVIE
M RUSELL
C & M SANDHAM
Section 274 parties

Hearing: In Auckland, 12 - 13 and 19 - 22 November 2013

Court: Environment Judge J A Smith
Environment Commissioner A Sutherland
Environment Commissioner J Illingsworth

Appearances: Ms B Carruthers and Ms B Kelly for Milford Centre Limited (**MCL**)
Mr B Loutit and Ms D Hartley for the Auckland Council (**the
Council**)

Mr M Maclean for the Section 274 parties - Milford Residents' Association Incorporated and Ors (**the Residents**)

Ms M Batistich for Auckland Transport

Ms J van den Bergen for the National Trading Company

Mr W McCandless for himself

Mr P Carter for himself

No appearance for Castor Bay Ratepayers' & Residents' Association Incorporated

No appearance for W & P Martin

No appearance for D Ogilvie

No appearance for M Russell

No appearance for C & M Sandham

Date of Decision: 12 February 2014

Date of Issue: 12 February 2014

INTERIM DECISION OF THE ENVIRONMENT COURT

A. The parties are to file a Joint Memorandum within 20 working days of the date of this interim decision being issued setting out with respect to the final wording of Plan Change 34, based on Annexure C:

- a. Areas of agreement; and**
- b. Areas of remaining disagreement and reasons.**

The Court will then consider the Joint Memorandum and decide whether to finalise the decision on the papers or issue further directions.

B. Any applications for costs are to be filed within 20 working days of the issuing date; any replies within a further 10 working days; final reply, 5 working days thereafter.



REASONS FOR DECISION

INTRODUCTION

What maximum building height for the Milford Centre meets the need to provide for residential intensification while maintaining amenity and visual aspects?

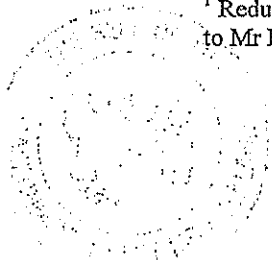
[1] The Operative Plan allows a building height of 9m with a 2m variation as a discretionary activity in the Business 2 zoned application site known as the Milford Centre. Height is to be measured from the average ground level along the highest road frontage. In this case it is Milford Road along which the ground elevation (Reduced Level – RL) varies from approximately 10m to approximately 13m.¹ All buildings constructed to their maximum height would have the same roof elevation.

[2] We assume the average ground level along Milford Road to be at RL11.5m, and thus buildings on this road could rise to between RL20.5 and RL22.5 (with variation). Sections of Omana Road are at an elevation of RL3m, implying a building of height 17.5m could be constructed there. This amounts to some 5 storeys when one allows extra height for a retail floor and for some roof articulation.

[3] The proposed Unitary Plan (the PUP) provides for a 16.5m height, four or possibly five storeys, along Milford Road and for a 24.5m height, six to seven storeys, over the rest of the site. These values are *rolling values* and thus buildings constructed to their maximum height would mirror the ground levels.

[4] Under the PUP buildings along Milford Road could have roof elevations ranging from RL26.5m at the junction with Ihumata Road to RL29.5m at the junction with Kitchener Road. Over the rest of the site roof elevations could range from RL27.5m on Omana Road to RL37m behind the Milford Road frontage buildings.

¹ Reduced Levels in this decision are derived from those shown on Drawing DP01, Rev A of Appendix A to Mr Brewer's EIC.



[5] Milford Centre Limited is seeking building provisions over the Milford Centre that maximise the potential for retail and residential activity. The issues are:

[a] To what height?

[b] Over what area or areas?

THE APPLICATION

[6] Milford Centre Limited (MLC) applied for a Plan Change (PC34) which was heard and declined by commissioners. The essence of the change was to allow increased building heights across the Milford Town Centre.

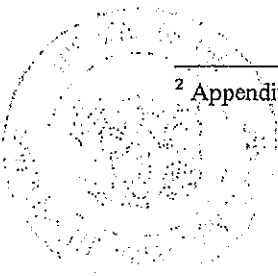
[7] The current proposal is for the same increases in building heights but contains more extensive plan change provisions. It is proposed to allow buildings to be constructed within Building Envelopes 1 – 9 up to the reference levels and in the positions shown on Annexure A² to this decision. Envelope 9 contains the existing Milford Town Centre buildings.

[8] This approach focuses building height into particular parts of the Centre while retaining lower heights over other areas. Envelope 1 extends upwards to RL63m allowing around 17 storeys, Envelope 5 extends up to RL59m allowing around 13 or 14 storeys and Envelope 3 extends up to RL38m allowing 8 or 9 storeys.

[9] It is the heights of these three envelopes that are the principal areas of disagreement between the parties. Heights of the other envelopes were not contested. We also understand that this means the concept of focussing height in particular areas of the centre is agreed.

[10] The applicant acknowledges that to achieve these heights, in an appropriate way, high quality design is essential. PC34 provisions are intended to achieve that outcome. Whether they do so is a matter of significant dispute between the parties.

² Appendix 15P Milford Intensive Residential Overlay from Appendix D to Reaburn Rebuttal



Issues on Appeal

[11] Unusually, the applicant advanced very extensive evidence (hundreds of pages) on matters that did not seem to be in contention in the hearing. The applicant filed an appeal on particular aspects of the decisions of the Commissioners.

[12] It is clear from [1.6] of the Notice of Appeal MCL did not appeal that:

- [a] Milford Town Centre was an acceptable location for growth;
- [b] MCL's approach to rezoning its site is appropriate;
- [c] The current height limits are out-of-date, and not aligned with intensification; and
- [d] The plan change provides an appropriate amount of detail and control.

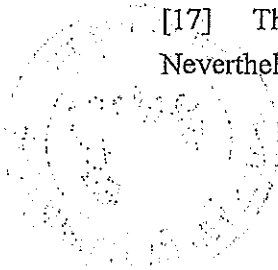
[13] Certain other matters may or may not be matters on which MCL did not seek to appeal, i.e. [1.6][n] and [o], but [1.7] notes "*MCL takes no exceptions to the finding of the panel outlined in [1.6] above.*"

[14] Whether that could pre-determine the grounds of appeal is not of particular moment before us, given that the parties subsequently held a series of caucusing meetings. We note for example that the transportation traffic engineers' caucus statement eventually, following further mediation and adjustment of the proposed plan provisions, led to a full agreement. No evidence was contested before the Court, nor did the Court have any questions relating to this matter.

[15] We note, however, that the traffic generation of 141 vehicles in the busiest hour between 7 – 9am and 4 – 6pm was based upon an agreement that this was an acceptable total number of 250 residences on the Milford Centre.

[16] Other experts then sought to resile from this limit on the number of residences on site and suggested more residences could be accommodated in the Centre.

[17] This would appear to undermine the agreement of the traffic engineers. Nevertheless, counsel for the applicant did not seek to remove this provision, and



accordingly we have assumed that the limitation on the total number of residences is still proposed and discounted the applicant's evidence to the contrary.

[18] Other joint statements were signed or were entered into as follows:

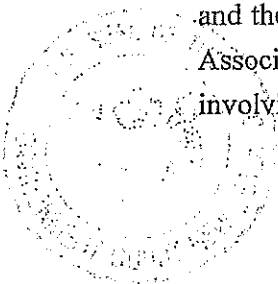
- [a] urban design;
- [b] landscape architecture;
- [c] economics/commercial space; and
- [d] planners;

[19] Annexed hereto and marked **B** are copies of the relevant caucusing statements.

[20] In addition, there was also an agreement of Statement of Issues, which noted that the key issues were:

- [a] Whether the built form provided for in the proposed PC34 is appropriate on the site, subject to the plan change given the;
 - [i] policy direction identified in the *Auckland Regional Growth Strategy*,
 - [ii] effects of Intensive Residential Development.
- [b] Whether the plan change provides adequate guidance and control at the resource consent stage; and
- [c] Whether the Plan Change satisfies the purpose of the Act.

[21] As suggested by the applicant, it appeared that the only matter for consideration before this Court was the applicant's proposed change. Comparisons would then be between the decision of the Council, which upheld the status quo and existing provisions, and the applicant's proposal. However, the Council, supported by the Milford Residents Association (MRA) and some other residents proposed a modified form of PC34 involving lower building heights for the three highest buildings within the applicant's



proposal. Extensive evidence was prepared and filed for the Council and other witnesses on this matter.

[22] On questioning from the Court, Ms Carruthers accepted that if the Court was not minded to adopt PC34, it should consider the intermediate position proposed by the Council.

[23] Mr McCandless and Mr Carter still supported the existing provisions and/or substitution by the height limits in the PUP as alternatives.

[24] The parties appear to agree that the Court is to seek the optimum planning solution among the options available.

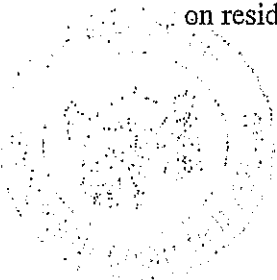
The evidence provided to this Court

[25] The Court received some 28 briefs; seven of the witnesses for the applicant filed both evidence-in-chief and rebuttal; only one provided a single statement – the traffic engineer.

[26] In over 600 pages of evidence for the applicant, that of the two urban designers totalled 177 pages: 110 pages plus 15 Appendices from Mr Munro, and a further 67 pages and two appendices from Mr McIndoe.

[27] Given that the issue of residential intensity had already been agreed, both as part of the appeal and as part of the witnessing statements, it is difficult to know why so much evidence was produced on an issue that was not relevant to the hearing. Although there were portions of this evidence that did bear relevance to the height, most appeared to be repetitious of the landscape architect's evidence in the case of Mr McIndoe, and consisted of assertions of the correctness of the applicant's building heights on the part of Mr Munro.

[28] More importantly, neither Mr Munro nor Mr McIndoe acknowledged that the appeal had been limited in the way we have described, or that there were joint witnessing statements entered into prior to the preparation of their evidence confirming agreement on residential intensity.



[29] The witnesses were given the opportunity by the Court to either retract or modify their evidence to points of relevance to the Court, but refused to do so. Given that the witnesses' evidence, particularly of Mr Munro, touched only marginally upon the issues before the Court, we consider that little if any weight should be given to this evidence, and that questions of costs be reserved in respect of the Court and parties' time involved in dealing with these irrelevant matters.

[30] Although Mr McIndoe's evidence did deal with privacy concerns, it is difficult to know what this added to the discussion of Mr Pryor. The Environment Court as a whole has discouraged the production of multiple witnesses on the same topic by the same party, and is unable to identify the failure in Mr Pryor's evidence that would lead to the production of further evidence on this same topic of privacy and visual matters by the same party.

[31] In fact, on all matters we would prefer the evidence of Mr Pryor over that of Mr Munro and Mr McIndoe.

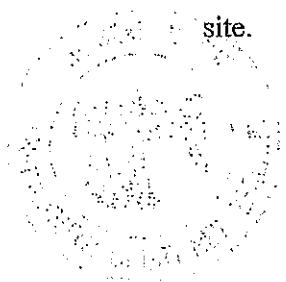
What is agreed?

[32] It is clear that residential intensification is appropriate in Milford, and that a mixed use, including residential intensification, is appropriate at the Milford Centre and on the Applicant's site.

[33] MCL do not wish to redevelop the whole site, but rather sleeve existing development by building on undeveloped portions of the site and then integrating the new buildings with existing buildings. The issue before the Court was what level of intensification is appropriate, having regard to its impact on amenity issues for nearby residents and community as a whole.

[34] All parties, with the possible exception of Mr McCandless, acknowledge the inadequacy of the current limit of 9m – 11m, but then there were differing opinions as to what increase in building height should or needs to be allowed.

[35] Mr Carter considers that the PUP provisions would be reasonable in the circumstances, but it is clear that those would allow increases in height over the entire site.



[36] The applicant's position is that, within Envelope 9 the elevation of the top of the buildings would be RL21m with building heights ranging from about 9m on Milford Road and Ihumata Road to about 18m on Omana Road.

[37] The Council, the Residents, and MCL recognise that height would be better concentrated on designated footprints. This would split up the bulking of the building. There appears to be agreement that the RL21m should apply to the balance of the site outside those footprints, namely within Envelope 9.

[38] It appears that the Council has then proceeded to seek to ameliorate impacts upon amenity, privacy and visual impact by adopting a design with the same number of apartments, but with three blocks reduced in height.

Distinction between towers and blocks

[39] We see a distinction between a tower as suggested by some witnesses, and the proposed envelopes for which the extra height is sought. A tower, we consider, is either near square or circular in plan.

[40] It is clear from examining the bulk and location diagrams that the envelopes are neither near square nor circular in plan, but are large rectangular blocks rising from various footprints throughout the site.

[41] Envelope 8 has plan dimensions of 54.5m x 23.1m and even Envelope 2 has plan dimensions of 27.9m x 21.0m. Although a tower might be built within these footprints, we have proceeded on the assumption that a building would maximise floor space within its envelope.

Development Envelope for Plan Change

[42] There was much discussion by the applicant during the hearing of towers and high-rise development on other sites with the thought that high rise towers would be erected on the subject site. However, the Plan Change actually seeks varying heights over defined footprints or within envelopes over its entire site.

[43] The majority of the site, Envelope 9, is to be limited to RL21m which is similar to that of the existing mall development over much of the site. Where there is space

available for further development, the applicant has sought varying heights for Envelopes 1 – 8 and a continuation of the RL21m elevation limit over the area currently covered by a townhouse consent soon to lapse.

[44] New construction is intended within Envelopes 5, 6, 7 and 8 on the corner of Ihumata and Milford Roads. The intention is that a new retail floor will be installed with parking and residential above. In Envelopes 1, 2, 3, 4 and 9 the intention is that portions of land which have not been constructed on will have new residential complexes built onto them, integrating with the existing mall for purposes of parking and access.

The Environment of Milford

[45] It is quite clear from all the documents, including the Auckland Spatial Plan, the Unitary Plan and the current District Plan and Regional Policy Statements, that residential intensification is intended in and around Milford Town Centre.

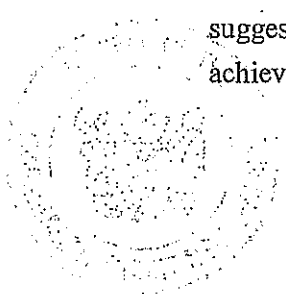
[46] For current purposes, we accept Dr Fairgray's suggestion of an area with a radius of 600m – 650m based upon the Milford Mall would be appropriate for the Town Centre. Within that, we accept that it is intended there be a significant change in the number of houses.

[47] We think that Dr Fairgray's suggestion of a further 1,500 residential units over the next 40 years is not unreasonable, although we acknowledge that the final extent of that change is not yet settled.

[48] We also consider the Dr Fairgray's evidence clearly demonstrates that such intensification could be accommodated within the existing residential areas, although involving significant change in the number of apartments per site.

[49] Currently there is an average of 1.85 dwellings per site i.e. 1,850 residential units on 1,002 sites, and intensification to the year 2041 would see around 3,350 on 1,002 sites.

[50] As part of the Town Centre, it is clear that the Business zone could accommodate some of that growth. Any proportion of that growth borne within the Business centre would reduce the average intensity required over the Residential zones to achieve the suggested increase. In practice, we suspect it would mean the target density would be achieved more quickly.



[51] Given that the Milford Town Centre represents about 1/3 of the Business land available and the largest single site, reasonable intensification within the Business zones might see in the order of 500 – 600 further houses constructed i.e. around 1/3 of the growth, which proportional share for the MCL would be between 160 and 200.

[52] Nevertheless, we accept the submissions of Mr Loutit that any reasonable contribution to residential intensification from the business zoned land would be envisaged as within the terms of the Plan. Thus intensification of 100-200 residential units in Milford Centre is consistent with the Policy Documents. A higher degree of development might still be contemplated, but the Objectives and Policies do not require, or even suggest, excessive intensification in Milford Centre

[53] We accept that any residential use in the Milford Town Centre should not compromise its primary purpose for business/retail uses. No precise information was given as to the residential yield that could be accommodated without:

[a] Comprising retail/business uses; or

[b] Exceeding an RL21m limit on the site or RL23m as a further discretion.

[54] We acknowledge that any further buildings would need to avoid interference with the existing Mall and could only be constructed around the periphery or above it.

[55] There is already consent for 18 townhouses along Milford Road/Ihumata Road, but that consent has not been implemented and expires in February 2014. Nevertheless, houses could be built there. The Council is suggesting up to 18 could be constructed. With the addition of apartments in Blocks 2, 3, and 4 to 21m there is likely to be 100 apartments available. Mr McCandless suggested that this was a reasonable level of intensification on the site.

[56] However, we accept that the current Plan provisions were not designed with residential intensification in the Town Centre in mind, and that it was intended that buildings on this site be occupied to the maximum extent possible for retail and commercial purposes while having maximum roof elevations at or below RL21m.



[57] Although buildings on Omana Road are likely to be best suited to residential accommodation above the ground floor, we acknowledge that there would not be sufficient yield from that to categorise the site as high-density.

The Proposed Unitary Plan (the PUP)

[58] The provisions of the PUP are at an early stage and are not yet in force. The PUP envisages a maximum building height on Ihumata/Milford Roads frontages on this site of 16.5m above rolling ground level and a maximum building height of 24.5m above rolling ground level for the remainder of the site.

[59] Given the desire to maintain an active commercial frontage at least on Omana Road, we suspect that the number of storeys envisaged over most of the site under the PUP is in the region of seven storeys. On Milford and Ihumata Roads the 16.5m height limit over ground level would yield close to five storeys.

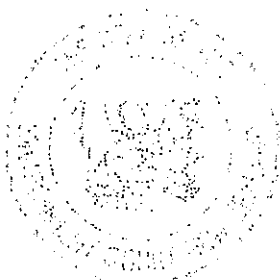
[60] We note however that the PUP is at a very early stage and cannot be regarded as binding on this Court. It does generate a significantly different outcome on Omana Road to that under the current Plan, which allows up to RL17.5m by allowing up to RL31.5m (since the RL at the northern portion of Omana Road is at least 7m).

[61] However, we are able to conclude from this that Mr McCandless' suggestion of maintaining the existing height on this site to accommodate high intensity residential is not appropriate, and that some change to the height limit over part of the site is justified.

[62] We note that the majority of the site would continue to be controlled by the current provision, and thus confirm the maximum roof elevation for buildings in Envelope 9 to be RL21m. To that extent, we agree with Mr McCandless.

[63] In respect of the PUP heights sought to be in place by Mr Carter, we consider there are several problems with this argument:

- [a] Firstly, the existing mall is already in place, and the adoption of a rolling height approach would give an incongruous result. The current roof elevation of the building is a little under RL21m. The building height limit of 16.5m on Milford Road could result in a building reaching to



RL27.5m, a significant increase over current levels. Similarly, the PUP would allow a roof elevation of RL31.5m on Omana Road;

- [b] Portions of Blocks 6, 7 and 8 would be able to reach an RL of 35.5m under the PUP. Thus, we consider Mr Carter's submission essentially accords with the building heights intended for these blocks, namely: RL33m for Block 6; RL27m for Block 7; and RL33m for Block 8;
- [c] Envelopes 2 and 4 with proposed building heights of 20m and 16m respectively would also meet the PUP rolling height limits.

[64] We have concluded Mr Carter's suggestion of maintaining the heights as in the PUP should not be supported for the following reasons:

- [a] The heights at this stage have not been through any hearing process and may change as a result of that process;
- [b] Any exceedance of that height simply means that the application is considered as limited discretionary application; and
- [c] The heights in the PUP apply over the entire site, not just to the block footprints.

Height and Amenity

[65] Shadowing effects were extensively investigated by the applicant and used to settle on the building heights in the proposal before us. In the applicant's view the building heights proposed create only acceptable shadowing effects.

[66] This appears to have been confirmed by other witnesses as there was no argument before us that the shadowing effects by any of the buildings at the heights proposed by the applicant, were unacceptable.

[67] We accept that with the heights proposed by the applicant, there is no significant impact from shadowing.



[68] We do however have some concerns relating to privacy, particularly that of the residents to the north and east of the site, and accept that some blocks may need to be modified in terms of height to avoid adverse impacts from this, particularly Blocks 1, 3, 5, 6, 7 and 8.

[69] These concerns were shared by all parties with disagreements evident over privacy as well as other amenity issues including over-dominance and visual intrusion, blockage of views and changes to village character. We took these to be in general terms over all aspects of amenity and visual impact. But we acknowledge the challenges identified by Mr McIndoe at [4.5] of his evidence-in-chief. We conclude that his list represents aspects of amenity that cannot fully encapsulate those issues.

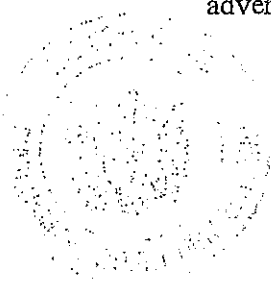
[70] Issues of amenity include concepts of reaction to, and awareness of, one's environment and of its visual coherence. Some described this as a *sense of place* or the *character of Milford*. Even for plan changes, questions of adverse effect on amenity are relevant in the broader sense. More particularly, they are relevant because of the way in which the growth issues, and in particular, questions of residential intensity, are addressed by encouraging residential intensity, provided local character and amenity is maintained or enhanced.

Can impacts on amenity be addressed through design rules in a Plan?

[71] Fundamental to the arguments for all the applicant's witnesses, including Mr Pryor, the landscape architect for the applicant, was the concept that adverse impacts upon amenity and visual matters, including overlooking, could be addressed at final design stage of the buildings.

[72] We did not understand the witnesses to be suggesting that that control was such as to be able to reduce either the bulk or the size of the development envelope or the height of the building.

[73] Nevertheless, we acknowledge that there are situations where no matter what the quality of design, the articulation of surfaces, materials, colourings adopted, the building can still be dominant, interfere with visual coherence, have adverse visual impacts and adverse impact on amenity.



[74] Mr Pryor himself acknowledged that in a number of agreed viewpoints, impacts of the applicant's envelopes ranged from low to moderate to high. His response however was to suggest that those adverse effects could be addressed by the design of the buildings. In our view, this is to assume that adverse effects of height, bulk and location permitted by the development envelope can effectively be undone at the design stage.

[75] Ms Carruthers suggested that Council could refuse consent if it considered a building too bulky or not appropriate. We conclude that the creation of an envelope at a certain height and dimensions must suggest that it is possible that some building could be constructed within those dimensions which would be acceptable.

[76] Ms Carruthers also suggested the current rules of the Plan permit an unlimited height in Takapuna subject to a limited discretionary consent. We note that Takapuna is a metropolitan centre and thus it is clear that Takapuna is intended to have high-rise development.

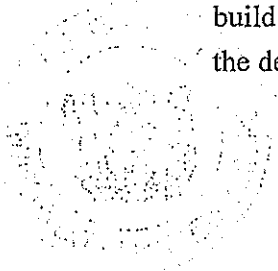
[77] Furthermore, it is not our place to judge whether provisions relating to metropolitan centres within the Plan would meet the tests of the Act. We examine the provisions before us on the basis that they relate to a Town Centre.

[78] In that regard it is particularly telling that the Council did not suggest that the *Urban Design Guidelines* and the Plan provisions suggested here would achieve outcomes of high quality design. For our part, we conclude such aspirational statements to be difficult in either articulation or quantification in any real sense.

[79] It seems to us that we must assume that a building which met the design criteria guidelines could be constructed within the envelope. The applicant has suggested one building typography that it thinks would do so.

[80] Tellingly, no party was able to point to a building which had gone through the current guideline rules and was regarded as a high quality development, with the possible exception of the Trinity Apartments in Parnell. Other examples, such as the Metropolis and the Sentinel were designed and built some time prior to those requirements.

[81] We have concluded that the development controls assume that it is possible to build a building meeting the Plan criteria within the parameters of the envelope, and that the design is essentially to mitigate adverse effects.



[82] Our view is that the development envelope itself should address questions of avoiding adverse effects from height overlooking, visual impacts, and upon amenity generally, except to the extent that those might be subject to design improvements. The MCL Proposed Change 34 wording was amended by the end of the hearing and there was agreement at a broad level, except as to heights. That wording is annexed hereto as C, and we proceed on the basis that this is the general approach subject to final agreement.

The Two Large Blocks

[83] There are two key blocks on the site. Block 5 is adjacent to the new entry to the Mall from Milford Road; the other, Block 1 on Omana Road around 100m from the intersection of Omana and Kitchener Road.

[84] Firstly, we note that Ms Carruthers suggested that Block 1 would form something of an entry point to the shopping centre. With respect, this is not correct. Block 1 is sited 100m along Omana Road from Kitchener Road, and simply depicts the limit on Omana Road of the ownership of the business land of MCL. There is block of shops facing Kitchener Road.

[85] We have concluded that Block 1 does not form any marker role for MCL in demonstrating either the main entry to the mall or the centre of the town.

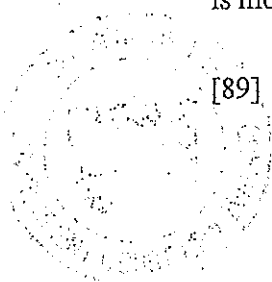
[86] On the other hand, Block 5 does approximate a marker position for the village.

The Height of Block 5

[87] The MCL proposes a maximum roof elevation of RL59m while the Council proposal suggests RL45m as the maximum. The difference of 14m represents some four storeys.

[88] We have considered very carefully the evidence of the witnesses in relation to the height of these two blocks. Taking into account our view that the envelope needs to control the general mass and height of the building within it so as to avoid the majority of visual and amenity impacts, we have concluded that RL45m as suggested by the Council is more appropriate.

[89] There are several reasons why this Court reached that view, as follows:



- [a] The nearby ridge and escarpment rises to around RL35m. A 9m high building on this ridge would reach to around RL44m, an elevation similar to that suggested for Block 5;
- [b] Views from the Forrest Hill Park do not show Milford Centre, while the Hospital, Lake Pupuke and Takapuna Towers are in clear view. To have a block floating over the top of the escarpment from this viewpoint would, in our view, lead to confusion in respect of the landmarks visible from this important viewpoint;
- [c] We keep in mind the residential properties on the opposite side of Milford Road, and what is a reasonable relationship with that building height to their properties and views. We agree with Mr Brown that that is the level at which the buildings would not appear too overpowering, while still constituting a clear statement in respect of the centre itself; and
- [d] We do not consider that the height at which shadowing effects are reduced is necessarily the point at which amenity effects cease. In fact, no evidence showing a correlation between shadowing and amenity was produced to us. All experts agreed that amenity went well beyond shadowing.

The Height of Block 1

[90] Block 1 constitutes a difficult proposition for the Court. On the one hand we recognise the significant visual impact this block would have on people coming to the Town Centre from the north on East Coast Road. As drivers approach the Kitchener Road intersection, they will see a large block 60m high to their left fronting onto Omana Road.

[91] Nevertheless, the view of the building would be oblique and height is not likely to be the overall impression once the overbearing and dominance is noted. That is likely to also result with a relatively low height, in the order of 30m, because of proximity to Omana Road. There are issues as to how much of the block would be constructed as residential.



[92] We note also that it was considered by some parties that the impacts on the views of those in Rangitoto and Prospect Terraces would be overpowered by the proposed buildings and in particular by the presence of a block rising to RL63m.

[93] The Mall already constitutes a large and relatively unattractive part of the views for people in this area. We think that the construction of good quality residential accommodation is likely to improve that aspect, and given that it is generally viewed from well over 100m, it is unlikely to overpower, at least with a height at less than 60m. Whilst we struggle to accept that the RL63m proposed by the applicant would not overpower these residents, we consider that the Council's proposed reduction in height to 35m serves no particular visual or amenity purpose.

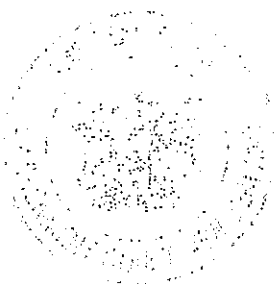
[94] Overall however, we conclude that a height of 60m has just too much impact on amenity and accordingly, the Court is reluctant to move too far away from the height of the Council of 35m. After considerable discussion, the maximum that can be agreed between the members of the Court is RL45m, the same elevation as that accepted for Block 5. The resultant building would thus be 42m in height.

[95] In reaching this maximum height, the Court's view was that the impact on the residents at Rangitoto and Prospect Terraces was less than suggested in the evidence of Mr Brown, and for the limited audience of pedestrians in the public reserve the impact was also over-estimated by the Council.

[96] Nevertheless, there was a point at which it was clear that the construction of dwellings so close to the road would begin to change the overall character of Milford and suggest a more metropolitan or central city aspect.

[97] Reaching an exact conclusion as to that range was difficult for the Court. In the end we concluded that it could go as high as Block 5, given that it would reinforce the pattern of that block and the limited and oblique views from public places. When viewed from a more distant position, it would simply appear at the same height as Block 5 and would appear more in relation to the roof of the Mall than in relation to road level.

[98] In reaching that conclusion, we also note an appropriate balance between the bulk of the other buildings and the overall height.



[99] It is not our intention to create a high-rise zone like Auckland Central or Takapuna, but rather to provide for intensification in a town centre by demarcating the difference in heights clearly.

[100] In doing so, we still recognise that there is significant room for intensification in local and suburban centres that does not achieve the type of heights that we have discussed in this case.

The Height of Block 3

[101] Block 3 is a sleeve on the curve of Omana Road, opposite the Wairau Estuary and Reserve.

[102] We understood Mr Brown's concept of stepping the building as it approached Ihumata Road, but in practical terms we were not convinced that there was any dominance or overlooking from Block 3 that would significantly affect residents' amenity on Omana Road. Envelope 2 is more directly related to those properties. Block 3 has an aspect looking more over the estuary and towards the marina.

[103] The applicant's roof elevation for this building was RL38m, and that suggested by the Council was RL26.6m.

[104] Again, there was a great deal of searching by the Court to find an elevation at which all members could be satisfied that the amenity and character of Milford was retained. We did not see the introduction of a residential building of this style to a reasonable height as detracting from the character or amenity of Milford. It would simply be the point at which the building moved from representing a modern contribution to Milford to an impediment on its visual quality and amenity.

[105] In the end, our view was again different to that of Mr Brown, and we reached the conclusion that Block 3 could reach a maximum elevation of RL33m giving a building height of 28m.

The Heights of Envelopes 2, 4, 6, 7, 8 and 9

[106] The applicant's proposal and the Council's proposal agreed on accepted heights for these envelopes, all of which are less than the 24.5m set out in the PUP. The MRA

supported the Council's proposal. The Court has no basis for departing from these agreed values, and thus endorses them.

Conclusion on Heights

[107] We acknowledge that the heights we have provided for will overall allow a greater level of residential intensity than that envisaged under the current Plan, or even under the PUP.

[108] We recognise that as a large site, there is the potential for greater integration of such construction than on smaller sites.

[109] However, the actual yield and the economy of the project cannot be the focus of the Court's consideration when it comes to height.

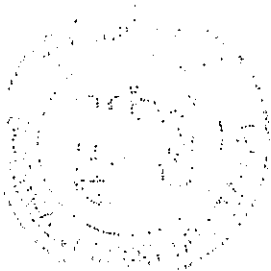
[110] We are satisfied that at these levels, the enabling provisions of the Act are met, and that beyond this point, controls are necessary or desirable to meet the purposes of the Council's obligations under its District Plan.

[111] We note that as a non-complying activity, excess height buildings could still be constructed if the Council or Court can be satisfied that they are warranted under the Plan.

[112] Given the Plan's push towards residential intensity, the key issue will be whether or not any higher buildings are able in their particular design to satisfy issues of amenity or visual impact.

[113] Accordingly, when the Court looks at issues under Section 32 of the Act as to which is most appropriate, it must keep in mind that which is most appropriate would be that which meets the objectives of residential intensification and of maintaining or enhancing the amenity and character of Milford.

[114] It is that balance or integration which the Court needs to achieve in this decision. In doing so, it has considered both the proposal of the applicant and that of the Council.



[115] In the end, we have decided that the modifications which it proposes (which are between the positions of the applicant and the Council) represent the optimum planning outcome in this situation.

[116] In that regard, the Court has carefully measured the costs, both in terms of the cost to the developer in having to accept lower buildings, but more particularly, the cost in planning terms in achieving the objectives of the Plan and the benefits to be achieved by maintaining and enhancing character and amenity.

[117] We note in particular that all of these blocks are ones that can be constructed without impacting the existing Mall. We note the evidence of Mr Carter that many developers are simply seeking to sleeve existing development without involving themselves in the cost and complications of higher blocks.

[118] Those decisions are entirely for the applicant, and this Court has decided this matter based upon achieving an appropriate integration of residential intensification and the maintenance and enhancement of residential amenity.

Amenity and Visual in Milford

[119] We see the environment against which this will be judged as not only the environment as it exists today, but as it will be modified by the further intensification around the Town Centre as envisaged by Dr Fairgray.

[120] For practical purposes, we can see no proper basis to draw a distinction between the environment for the purpose of resource consent and a Plan Change, and accordingly, adopt the approach of *Queenstown Lakes District Council v Hawthorn* in the Court of Appeal.³ In this regard we suspect Mr Brown may have retained the existing environment in mind for residential, rather than the more intensive residential environment that will eventually predominate.

[121] In discussing the question of character, we keep in mind that Milford has a character distinct from other town centres. Although not based upon heritage or historical matters to any particular degree, there are nevertheless a number of features that mark out Milford from other areas, including:

³[2006] NZRMA 424

- [a] Its coastal proximity;
- [b] The marina;
- [c] The Wairau Estuary;
- [d] The mix of ages of buildings and residents; and
- [e] The proximity of residential to the shopping areas.

[122] We do not see that character changing simply by intensification of residential activity, either within the existing housing around the Town Centre or by the introduction of these apartments within the Town Centre.

[123] Rather, we see the increase in Town Centre residential activity as anchoring Milford and increasing its resilience and vitality.

[124] Population increases will assist in maintaining the viability of the Town Centre and its shops and emphasise its role as a focal point for the local community.

Costs and Benefits

[125] We do not understand the costs and benefits of Section 32 of the Act to relate only to economic matters, but it is clear that a reasonable number of apartments can be constructed on this site as a result of the Court's decision. Whether this constitutes 100 or 200 apartments will depend on decisions made by the owner as to the balance between commercial, retail and residential, and the size of units. We consider that the changes that will occur to the character of Milford as a result are ones that are acceptable and overall, will reinforce the role of the Town Centre and the amenity of Milford itself.

Section 290A of the Act

[126] We have essentially reached the same decision as the Council Commissioners on the applicant's proposal for much the same reasons.

[127] The Council Commissioners had no developed alternative to consider which could have led to a different outcome as it has for our decision. We commend the

Council's leadership in developing an alternative. We have modified that with respect to the three highest buildings, but overall, we consider the Council sought an appropriate solution which the MRA was prepared to support. We generally support Annexure C, subject to heights and other changes identified.

The Plan Change

[128] The applicant's plan change included a proposal that the potential for intensified residential activity in other town centres be recognised and provided for more explicitly.

[129] Such provision is already implicit, but we have seen no reason, nor received any significant evidence to convince us that there should be special provisions made in this Plan Change for other town centres.

[130] Although plan changes are one method to achieve such change, there are others. The clear preference for Council and this Court is for centre plans to be promoted and for wide consultation to reach a common view for the future of the area.

[131] We consider this to be more effective than the current approach.

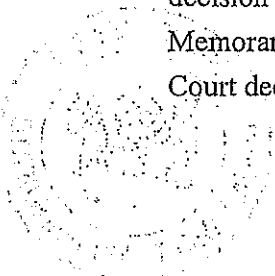
[132] Accordingly, we would not include those provisions. Given our view that we are considering now the general bulk, orientation and height issues, we consider that the extra provisions suggested by the Council are not necessary at the heights we have decided.

[133] That being the case, it appears to us that the Plan Change otherwise is generally appropriate, but needs to be reworded to make it clear its application is only to the current site.

OUTCOME

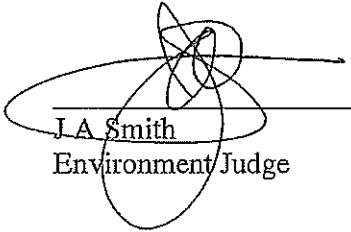
[134] Accordingly, we approve a modified Plan Change, as we have set out, in relation to heights, and changes to the Plan Change as sought by Ms Hardy in her evidence.

[135] Nevertheless, we wish to give the parties 20 working days from the issuing of this decision to discuss the final wording of the Plan Change, and either file a Joint Memorandum establishing agreement, or setting out the areas of difference for a final Court decision.



[136] Costs in this case are reserved. Any applications for costs are to be filed within 20 working days of the issuing date; any replies within a further 10 working days; final reply, 5 working days thereafter.

DATED at AUCKLAND this 12th day of February 2014



J.A. Smith
Environment Judge

