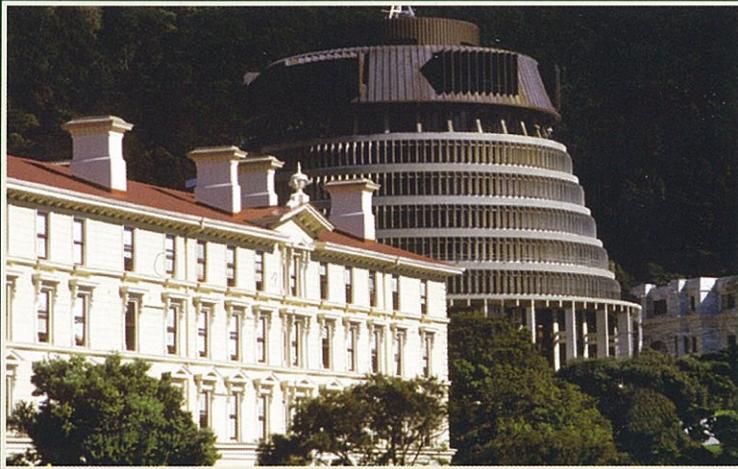


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*Te Whare Wānanga
o te Ūpoko o te Ika a Māui*



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CONTENTS

Human Rights: Interpretation, Declarations of Inconsistency and the Limits of Judicial Power <i>The Hon Sir Anthony Mason AC KBE</i>	1
Notes on Democracy and Constitution-Making <i>Joel Colón-Ríos</i>	17
Planning in Wonderland: The RMA, Local Democracy and the Rule of Law <i>Stephen Rivers-McCombs</i>	43
Which Legal Protection for Migrants in Sub-Saharan Africa <i>Cristiano d'Orsi</i>	83
The Malaysian Personal Data Protection Act 2010: A Legislation Note <i>Zuryati Mohamed Yusoff</i>	119

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PLANNING IN WONDERLAND: THE RMA, LOCAL DEMOCRACY AND THE RULE OF LAW

*Stephen Rivers-McCombs**

The Environment Court has unusually extensive powers when hearing appeals in respect of local plan and policy documents promulgated under the Resource Management Act 1991. However, there has, at least in published literature, been little discussion about the appropriateness or otherwise of the Environment Court's jurisdiction. This paper considers the relationship between the Environment Court and local government in light of New Zealand's constitutional values. The paper focuses exclusively on the Environment Court's role in respect of the planning and policy-making functions of local authorities. It argues that the Court's ability to step into the shoes of local authorities and make substantive planning and policy decisions itself is not in keeping with New Zealand's constitutional values, and that these sorts of matters should be determined by democratically elected local bodies through participatory processes.

I Introduction

I wonder if I shall fall right *through* the earth! How funny it'll seem to come out among the people that walk with their heads downwards! The Antipathies, I think ... but I shall have to ask them what the name of the country is, you know. Please, Ma'am, is this New Zealand[?]¹

It is fitting that Alice, in Lewis Carroll's tales of her adventures in Wonderland, speculated on the possibility that she might end up in New Zealand as she hurtled down the rabbit hole. New

* BA/LLB(Hons) (VUW). This is an amended version of a paper submitted as part of the LLB(Hons) programme at Victoria University of Wellington. Many thanks to my supervisor, Dean Knight. My thanks also to Dr Royden Somerville QC and Helen Atkins for their generous advice when I was first beginning my research, and to Associate Professor Ken Palmer and the anonymous reviewers for their comments on earlier versions of this paper. On a more personal note, I would like to thank Patrick, Mary-Jane, Eileen and Lenka for their love and support. All errors and omissions in this article are mine alone.

¹ Lewis Carroll *Alice's Adventures in Wonderland* (Hutchinson, London, 1989) at 12 [Carroll *Alice in Wonderland*].

Zealand is, of course, a very different wonderland to the one that Alice found, but it is a wonderland nonetheless: a place, according to its marketers, of unsurpassed natural beauty and environmental purity. Undoubtedly, the system of environmental management and planning in such a land is vitally important. However, our pioneering resource management regime has a problem which, coincidentally, reflects another aspect of what Alice found in her Wonderland. Like the Queen of Hearts, our Environment Court operates in a realm that shows no regard for the fundamental constitutional principle of the rule of law and its friend, the separation of powers.

Perhaps feeling a little like Alice, having tumbled into the experimental world of environmental planning in New Zealand, a visiting North American scholar commented, at the end of his 1998 tour of study, that he had been struck by the way in which:²

New Zealand's approach to environmental adjudication shifts substantial power from politically accountable government entities to the judiciary. [But that in] the New Zealand eye, the perceived benefits of an Environment Court both technically expert and experienced in making decisions about sustainability ... outweigh any concerns about fundamentally political decisions being made by a court that is not politically accountable in any direct way.

The comments make the apparent acceptance of the Environment Court's powers sound like a very deliberate decision. However, there has, at least in published literature, been little discussion about the appropriateness or otherwise of the Environment Court's role under the Resource Management Act 1991 (RMA).³ Even if this absence of debate simply reflects a silent, but widespread,

2 Bret Birdsong "Adjudicating Sustainability: New Zealand's Environment Court" (2002) 29 *Ecology Law Quarterly* 1 at 64. The full study completed in New Zealand is Bret Birdsong *Adjudicating Sustainability: New Zealand's Environment Court and the Resource Management Act* (Ian Axford Fellowship Office, Wellington, 1998) [Birdsong *Adjudicating Sustainability* (1998)] which makes the same points but not always in the same words.

3 It has occasionally been raised as an area of concern, but the treatment is always quite brief. Most recently, the Minister for the Environment's Technical Advisory Group strongly, though unsuccessfully, recommended to their Minister that the Court's jurisdiction be restricted for reasons similar to those advanced in this paper: see Minister for the Environment's Technical Advisory Group *Report of the Minister for the Environment's Technical Advisory Group* (Ministry for the Environment, Wellington, 2009) at 9–11 (see below n 195 and the associated text for further discussion of this report). In published literature, the issue has been raised most often and eloquently by Dr Royden Somerville QC. His fullest critique was very early on: Royden Somerville "Environment Law – The Resource Management Act" in *New Zealand Law Society Triennial Conference* (New Zealand Law Society, Wellington, 1993) 269 at 276–279 [Somerville "Environmental Law"]. See also Royden Somerville "A Public Law Response to Environmental Risk" (2004) 10 *Otago LR* 143 at 148 [Somerville "Public Law Response"]; Royden Somerville "Implications for local government of proposed changes to RMA" (1999) 3 *BRMB* 13 at 15–16 [Somerville "Implications for local government"] where Somerville discusses the unusual nature of the Environment Court's jurisdiction, although without explicitly criticising it.

contentment with the status quo, it must be worth giving the subject some focused attention given the Court's apparently unusual powers.

This paper considers the relationship between the Environment Court and local government, under the RMA, in light of New Zealand's constitutional values. The paper focuses exclusively on the Environment Court's role in respect of the planning and policy-making functions of local authorities. It argues that the Court's ability to step into the shoes of local authorities and make substantive planning and policy decisions itself is not in keeping with New Zealand's constitutional principles, and that these sorts of matters should be determined by democratically elected local bodies through participatory processes.

The paper has three parts. The first section outlines the planning and policy-making functions of local government, and the role of the Environment Court in the RMA framework. It aims to give the reader a feel for the policy-focused and quasi-legislative nature of local government planning documents and for the broad powers exercised by the Environment Court over those instruments. The second section heads down the rabbit hole. It looks to Queenstown and the notorious planning dispute between the district's mayor and the local Environment Court. It uses this, and the teachings of Lewis Carroll's fairytales, to examine the ways in which the Environment Court's operations appear, on their face, to be inconsistent with the values underlying the rule of law and the doctrine of the separation of powers.

The third section considers whether the Environment Court's extensive appellate jurisdiction is really a cause for concern. It concludes that it is for two reasons: (a) the RMA's guiding purpose of promoting "sustainable management" ultimately involves making political, rather than technical or scientific, decisions when it comes to plan and policy development; and (b) only democratically elected local authorities, who conduct their plan and policy development through participatory processes, have the legitimacy to make those decisions – not the Environment Court.

II Local Government and the Environment Court in the RMA Framework

This section first outlines the general scheme of the RMA and the substantial planning and policy-making functions assigned to local authorities within it. It then considers the significant powers held by the Environment Court when hearing appeals against the content of local RMA instruments. It suggests that the Court's ability to assume the role of local councils when exercising its appellate jurisdiction is unusual and raises the question of whether the Court should have such extensive powers.

Part 2 of the RMA outlines its overarching purpose, which guides the Act's constituent institutions – central government, local authorities and the Environment Court – in the execution of their respective RMA functions. Under s 5, the RMA's purpose is to "promote the sustainable

management of natural and physical resources".⁴ Section 5(2) defines the key phrase of "sustainable management" as:

... managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while –

- (a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations;
- (b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
- (c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.

This definition has faced frequent waves of attack for its ambiguity.⁵ However, it is at least intended to be a guiding standard with which the RMA's planning and policy instruments must comply.

The RMA instruments at local government level are four-fold and regional councils are responsible for preparing three of them: regional policy statements, regional coastal plans and regional plans. Territorial authorities are responsible for district plans and must have at least one in place at all times.⁶ The split between regional and district plans is based on the allocation of responsibilities for managing different resources.

Central government is able to guide local government by issuing national standards and policy statements.⁷ But, between their four planning and policy instruments, local authorities carry the main responsibility for filling out the Act's framework with policies and rules specific to their localities. Following amendments to the RMA in 2005, both regional and district plans must set out:⁸

- (a) the resource management objectives for the region;
- (b) the policies needed to implement those objectives; and
- (c) rules to implement the policies if the authority decides that they are needed.

4 Resource Management Act 1991, s 5(1).

5 See the discussion below at section IV, subsection B.

6 Resource Management Act 1991, s 73(1).

7 Regional policy statements and regional and district plans must give effect to national policy statements: Resource Management Act 1991, ss 62(3), 67(3)(a) and 75(3)(a). The rules contained in local authority plans must not be less stringent than national environmental standards: Resource Management Act 1991, s 43B(3).

8 Resource Management Act 1991, ss 67(1) and 75(1).

In practice, regional and territorial authorities' plans tend to expand beyond the minimum required by the Act to include a number of features, which had been necessary before the 2005 alterations but are now optional.⁹ They usually provide statements as to:¹⁰

- (a) the resource management issues facing the district or region;
- (b) the objectives that the authority has in relation to those issues;
- (c) the policies needed to implement the objectives;
- (d) the methods that will achieve the policies, which include, but often go beyond, rules;
- (e) reasons for, or explanations of, the objectives, policies and/or methods adopted; and
- (f) an outline of the environmental outcomes that the authority expects.

A regional or district plan therefore looks like a rather complete policy document.¹¹

The nature of the rules contained in regional and district plans gives them an additional quasi-legislative flavour. The rules are the practical means through which the RMA controls resource use and protects the environment. They work by organising specified activities according to a system of classification.¹² Essentially, the categories define an activity as: a "permitted" activity, for which a resource consent is not required; a "prohibited" activity, for which resource consents cannot be granted; or one of four other categories, all of which require a resource consent. Importantly, plan rules have the force of regulations, which is indicative of their legislative nature.¹³ This also gives them immunity from challenge on the ground of unreasonableness,¹⁴ although plan rules are subject to the Environment Court's extensive appellate powers discussed below.

9 Resource Management Act 1991, ss 67(2) and 75(2).

10 See Richard Hills "Structuring and organising regional and district plans" (2007) <www.qualityplanning.org.nz>.

11 See Claudia Scott and Karen Baehler *Adding Value to Policy Analysis and Advice* (University of New South Wales Press, Sydney, 2009) at 11: "[P]ublic policy may refer to specific programs or activities, each which contain a hypothesis about how a selected policy mechanism is expected to produce desired results, as well as the broader sense of policy as synoptic orientation, strategic direction, or master plan."

12 See Resource Management Act 1991, s 87A.

13 Resource Management Act 1991, ss 68(2) and 76(2).

14 See *Ashburton Borough v Clifford* [1969] NZLR 927 at 936 (CA) with respect to wording in the Town and Country Planning Act 1977, which had comparable provisions to the RMA. See also Kenneth Palmer "Resource Management Act 1991" in Derek Nolan (ed) *Environmental and Resource Management Law* (online looseleaf ed, LexisNexis) at [3.87] [K Palmer "Resource Management"].

Regional policy statements are, as their name indicates, higher-level policy documents. Unlike plans, the methods articulated in regional policy documents cannot include rules.¹⁵ Instead, the regional issues that they identify, and the policies which they articulate, guide district councils in their plan development and provide a general focus and approach that territorial authorities must give effect to.¹⁶ At the same time, regional policy documents set out processes aimed at promoting a coordinated approach to resource management between district authorities.¹⁷

While local authorities have an apparently wide degree of latitude in developing their RMA instruments, there are limits.¹⁸ The Environment Court's role is to ensure, via its appellate jurisdiction,¹⁹ that local government plans and policy statements comply with the statutory directions set out in the RMA. The documents must fulfil the functions of the regional or territorial authority outlined in the Act.²⁰ Territorial and regional councils must also have regard to environmental effects when writing their rules (although an effects-based rationale is not strictly required).²¹ But the anchor of the Environment Court's analysis is always whether a plan or policy realises the RMA's purpose of promoting "the sustainable management of natural and physical resources".²²

15 Resource Management Act 1991, s 62(1)(e).

16 Resource Management Act 1991, s 75(3)(c).

17 Resource Management Act 1991, s 62(1)(h).

18 For a fuller discussion of these constraints, based purely on the statutory language, see AP Randerson "The Exercise of Discretionary Powers under the Resource Management Act 1991" [1991] NZ Recent Law Review 444 at 455–459.

19 Resource Management Act 1991, sch 1, cl 14(1).

20 See *Nugent Consultants Ltd v Auckland City Council* [1996] NZRMA 481 at 484 (PT) with respect to the Court's assessment of district plans; see *North Shore City Council v Auckland Regional Council* (1996) 2 ELRNZ 305 at 319–320 (EC) [*Okura*] where the Environment Court endorsed the same approach for assessing regional policy statements.

21 See Resource Management Act 1991, ss 68(3) and 76(3) which state that local authorities must have regard to the environmental effects when writing their plan rules. See Resource Management Act 1991, ss 68 and 76 with respect to an effects-based rationale not being necessary. It should be noted, however, that the vast majority of rules that do lack an effects-based rationale are, in reality, struck down for failing to give effect to the RMA's purpose: see Ulrich Klein "Assessment of New Zealand's Environmental Planning Model" (2005) 9 NZJEL 287 at 292.

22 See for example *Contact Energy Ltd v Waikato Regional Council* (2007) 14 ELRNZ 128 at [73] (HC) regarding a challenge by Contact Energy to a rule in a regional plan on the ground that it was not effects-based: "If a rule can be said to have an underlying rationale, it is what is stipulated in s 63(1) [which provides that the purpose of regional plans is to assist a regional council to carry out its functions in order to achieve the RMA's purpose]. This takes the analysis to its most general – s 5 which sets out the purpose of the RMA[.] ... Plainly this requires consideration of a great deal more than effects on the environment, let alone effects on 'the receiving environment' as it was put in submissions for Contact."

When the Environment Court hears appeals in respect of the planning and policy instruments of local authorities, it exercises an extensive appellate jurisdiction. Under the RMA, the Court "has the same power, duty, and discretion in respect of a decision appealed against ... as the person against whose decision the appeal or inquiry is brought".²³ Section 290(2) then explicitly gives the Court the authority to affirm, amend or cancel provisions of an instrument that has been appealed against. If the Court elects to amend or cancel a provision in a proposed plan or policy statement, the RMA requires the local authority to give effect to the Court's decision.²⁴ The Environment Court is therefore entitled to step into the shoes of the local authority and to impose its views on what should or should not be included in local RMA documents. That includes its own conclusions under the s 32 evaluation regarding the extent to which plan or policy provisions are the "most appropriate" means of achieving the RMA's purpose. As a former Principal Environment Court Judge has commented, the Court's "function is not to decide whether the council's decision was right or wrong, but to give *its own* decision in place of the council's".²⁵

As the Supreme Court has noted, the breadth of the Environment Court's appellate jurisdiction is "not uncommon in relation to administrative appeals in specialist jurisdictions".²⁶ However, unlike the other specialist courts,²⁷ the Environment Court hears appeals regarding documents that are drafted by democratically elected bodies, deal with questions of (local) governmental policy and are "a sort of local law for their respective areas".²⁸ On its face then, it is not surprising that our American colleague was so surprised with the extent of the Environment Court's authority.²⁹ The following sections take up where he left off: they use a perspective rooted in the fundamentals of public law to consider whether the Court should really have the final say on local planning and policy matters under the RMA.

23 Resource Management Act 1991, s 290(1).

24 Resource Management Act 1991, sch 1, cl 15.

25 David Sheppard "The what, why and how of resource management appeals" (1996) 1 BRMB 194 at 196 (emphasis added).

26 *Waitakere City Council v Estate Homes Ltd* [2007] NZRMA 137 at [28] (SC). The Employment Court, for instance, is entitled to reach any decision that "in equity and good conscience it thinks fit" when hearing appeals: Employment Relations Act 2000, s 189.

27 Namely, the Employment Court and the Maori Land Court: RJ Bollard "Editorial" (2005) 6 BRMB 61 at 61.

28 Ian Williams "Interpreting resource management plans" [2004] NZLJ 324 at 324.

29 See above, I Introduction.

III Falling Down the Rabbit Hole with Mayor Cooper and Judge Jackson: The Rule of Law, the Environment Court and the Queen of Hearts

The process of developing local government plans and policy statements has been anything but smooth. As the then Principal Environment Judge observed in 2002:³⁰

[T]he high-minded statute that was introduced as a leader of its kind ... has become the source of widespread criticism stemming from the form in which RMA plans have emerged and their practical application.

Judge Bollard's main complaint centred around the poor drafting on local planning and policy documents,³¹ which has become a rather common theme in Environment Court decisions.³² However, local authorities have encountered more serious problems in the Environment Court than complaints about drafting style. The resulting back and forth between some councils and the Court has vividly highlighted the issue of which institution should be making which decisions. It is also where we can find some fairytales to help guide our way.

This section considers the propriety of the Environment Court's jurisdiction when hearing appeals against local policy and planning documents from a public law perspective. In particular, it draws on the experiences of Alice with Wonderland's Queen of Hearts to help explore the key constitutional values of the rule of law and the separation of powers. It then applies those principles to the judgment of Judge Jackson's Environment Court which controversially rewrote significant provisions in Queenstown's proposed district plan. The section argues that the Court's decision in that case plainly illustrates that the way in which the Environment Court has exercised its jurisdiction threatens the values underlying the rule of law and the separation of powers. The next section suggests that this is a real cause for concern.

Queenstown's Mayor and the Environment Court (presided over by Judge Jackson) were the principal actors in a series of judicial appeals regarding the development of Queenstown's RMA plan. The extent of the litigation was, perhaps, not surprising: the stakes are high when it comes to environmental planning in New Zealand's marquee natural wonderland. The conflict certainly

30 RJ Bollard "Plans under the RMA" (2002) 10(3) Resource Management Journal 2 at 4.

31 Ibid.

32 This has affected the approach that the Environment Court takes to the interpretation of local policy documents and planning instruments. As the Court held in *Central Otago District Council v Greenfield Rural Opportunities Ltd* EC Christchurch C128/09, 11 December 2009 at [76]: "In the case of a district plan I am less certain [that the common law rules of statutory interpretation apply]. It is trite law to say that district plans should not be interpreted as though they were examples of chancery drafting."

provoked high feeling in the community. That feeling generated a particularly entertaining editorial in *The Southland Times*, which helpfully also provides a nice introduction to the dispute:³³

Once upon a time ... there lived a mayor who loved fairy tales ...

Mayor Cooper ... directed that many more places [for travellers to stay] should be built because Queenstown was becoming famous throughout the entire world, and many thousands of people wanted to visit. ...

[S]ome citizens began to mutter that all the extra people made their hamlet crowded. ... [In time, they] appealed to a Higher Authority, known as the Environment Court[.] ...

The court said the citizens had a right to be consulted about who could build houses on the land around their village, and verily the mayor was not pleased. ... It was Alice in Wonderland stuff, Mayor Cooper said. It was impractical, arbitrary, ill-conceived and a nightmare of Orwellian proportions. ...

Like all good fairytales, the story of Mayor Cooper and Judge Jackson has a moral. It requires a little more explanation of course, but is hinted at by Cooper's exclamations of horror. The image of the Orwellian nightmare illuminates the issues that we spot when viewing the RMA framework through a public law lens. However, it is too dark and apocalyptic a backdrop for a discussion about environmental planning law – the subject is serious and important, but not quite *that* vital. Lewis Carroll's stories of Alice in Wonderland, on the other hand, are just as useful and a tad more cheerful. Perhaps this is "Alice in Wonderland stuff" indeed.

The recent portrayal of the Queen of Hearts in the 2010 film adaptation of Alice's adventures gives us a striking reminder of her shrieking, authoritarian persona.³⁴ Those personal traits of the story's royal star might seem more applicable to Mayor Cooper, who was apparently so full of verbal "fireballs",³⁵ but for our purposes Her Highness plays the role of the Environment Court. The Queen of Hearts is a comical tyrant who is incredibly fond "of stamping about, and shouting 'Off with his head!' or 'Off with her head!'" whenever she feels the slightest bit perturbed.³⁶ The Queen's penchant for beheadings is all the more worrying for Alice as the two become acquainted over a game of croquet involving flamingos and hedgehogs, but apparently lacking any rules whatsoever.³⁷

33 Editorial "Fireballs and fairy tales" *The Southland Times* (Invercargill, 7 June 2001) at 8 [Editorial "Fireballs"].

34 *Alice in Wonderland* (Walt Disney Pictures, Burbank (CA), 2010).

35 Editorial "Fireballs", above n 33, at 8.

36 Carroll *Alice in Wonderland*, above n 1, at 84.

37 *Ibid.*, at 85: "I don't think they play at all fairly,' Alice began, in a rather complaining tone, 'and they all quarrel so dreadfully one can't hear one's-self think and they don't seem to have any rules in particular; at least, if there are, nobody attends to them'".

Instead, the rights and wrongs of the game are settled by the Queen's orders which, while invariably resulting in execution, are rather random in themselves.

Although perhaps outside the usual realm of application, the Queen's croquet match is quite problematic if we look at it through a public law lens. For starters, that foundational concept, the rule of law, requires at least an absence of arbitrary power: the law should be, among other things, "neutral, certain and stable" and government should be conducted in accordance with that law.³⁸ The limitations on the exercise of governmental power envisaged by the rule of law demand, in turn, a number of conditions of varying complexity.

Among the more conceptually simple, but practically tricky, is the doctrine of the separation of powers. Underlying the doctrine is the idea that the rule of law is protected when governmental authority is shared between institutions because each can balance and act as a check on the others.³⁹ A concentration of power in a single institution or entity, by contrast, presents a potential threat to the rule of law because such a system of checks and balances cannot exist. Traditionally, the starting point has been that the three main functions of government are split between three institutions: the executive develops governmental and legislative policy, the legislature creates law, and the judiciary interprets and applies the law in individual cases.⁴⁰ As discussed more fully in the following section, the institutional separation does not need to be, and rarely is, quite that stark. However, as the Queen's confused croquet match shows us, it can be problematic when too much power is concentrated in a single entity.

Soon after the RMA's enactment, Dr Royden Somerville QC (as he is now) voiced concern with the potential dominance of the Environment Court from a separation of powers perspective.⁴¹ He first observed that the RMA envisages the Court being engaged with "planning" in the sense that it "may be required to insert its own policies and provisions in a plan" and to "override and replace determinations of public policy promulgated by a local authority" as a result.⁴² He then concluded that:⁴³

38 Philip A Joseph *Constitutional and Administrative Law in New Zealand* (3rd ed, Thomson Brookers, Wellington, 2007) at 151 and 160 [Joseph *Constitutional Law*]. See also Brian Z Tamanaha *On the Rule of Law: History, Politics, Theory* (Cambridge University Press, Cambridge, 2004) at 102.

39 See *ibid*, at 52.

40 See Joseph *Constitutional Law*, above n 38, at 188–195. See also, for a more concise outline of the doctrine, Patrick M Garry "The Unannounced Revolution: How the Court Has Indirectly Effected a Shift in the Separation of Powers" (2006) 57 *Alabama Law Review* 689 at 694–696.

41 Somerville "Environmental Law", above n 3.

42 *Ibid*, at 278.

43 *Ibid*, at 278–279.

The Act therefore confers on the [Environment Court] effective control over all three types of governmental functions:

- (i) Legislative – control over the content of Regional Policy Statements, Regional Plans and District Plans.
- (ii) Administrative – control over policy ... in terms of [the] policy statements [in the Regional Policy Statements and expressed in local government Plans] ...
- (iii) Judicial – case by case consents, prosecutions, enforcement orders, declarations.

One wonders how a single judicial body can satisfactorily discharge all three functions using substantially the same procedure, resources and personnel in each instance.

The tale of Mayor Cooper, Judge Jackson and Queenstown's precious landscape shows us that the Environment Court has certainly been willing to insert its own policies and provisions in local government instruments. Whether that is "satisfactory" or, really, "appropriate" is addressed in the following section.

The ructions, which culminated in Queenstown's mayor deriding Judge Jackson's decision as "Alice in Wonderland stuff",⁴⁴ started with an appeal by the Wakatipu Environmental Society Inc (WESI) against a vast swath of provisions in the District Council's 1998 "revised proposed plan".⁴⁵ The issues considered in the 2001 case that provoked Cooper's verbal fireballs fell out of that initial judgment but were, nonetheless, still wide-ranging. They related to "the proposed objectives, policies and rules in the revised plan as they affect[ed] the rural general zone" which, as the Environment Court noted, included the "vast majority of rural land in the Queenstown District".⁴⁶ Judge Jackson's Court therefore had a broad scope for policy and rule writing in respect of the district's most environmentally and economically crucial natural landscapes. The Court certainly made use of it.

The main issue before the Court was whether rural residential activities were appropriate at all in the rural general zone and, if so, where within that zone they might be suited, given that there was

44 Warren Cooper quoted in Ian McCrone "Court breach 'unintended'" *The Press* (Christchurch, 7 June 2001) at 2.

45 *Wakatipu Environmental Society Inc v Queenstown Lakes District Council* [2000] NZRMA 59 (EC) [*WESI (No 1)*].

46 *Wakatipu Environmental Society Inc v Queenstown Lakes District Council* EC Christchurch C186/2000, 6 November 2000 at [1] [*WESI (No 2) – Interim*]. While, for our purposes, the majority of the substantive decisions were made in the interim decision in November 2000, the final decision was issued in May 2001: *Lakes District Rural Landowners Inc v Wakatipu Environmental Society Inc* EC Christchurch C75/2001, 21 May 2001 [*WESI (No 2) – Final*].

"severe pressure to create the rights to permit such activities".⁴⁷ The specific questions were therefore: how the plan's rules should classify residential development in the zone; and how the plan should control subdivision of the traditionally large farm blocks so as to prevent over-development of the landscape. The revised proposed plan had defined subdivision into lots less than 20 hectares in the rural general zone as a non-complying activity and residential use as a discretionary activity.^{48,49} Although it was not their first choice, the Court had the general support of both WESI and the Council in coming to the view that residential development and subdivision were better classified simply as discretionary activities.⁵⁰ The Court saw non-complying status as a rigid and crude control for preventing undesirable development. Instead, Judge Jackson preferred an ostensibly more flexible approach: the Court attached certain assessment criteria to the discretionary status, which it believed would allow appropriate residential development at suitable sites while also offering strong protection for the most sensitive landscapes.⁵¹

The Council's main complaint related to a density criterion. The criterion provided that where a proposed residential building was not situated inside existing development, the criterion required the consent authority to take into account "the suitability of all possible sites": within 500 metres of the proposed building platform in all cases; or within 1.1 kilometres if an owner or occupier of land within that radius wanted the authority to consider alternative sites within the area.⁵² Clearly the Court's density criterion did not require the Council to consult all land owners within a 1.1 kilometre radius of a proposed development as the Mayor and the media claimed.⁵³ But the provision could,

47 Ibid, at [4].

48 The test for non-complying activities is stringent: a consent authority can only *consider* whether to grant resource consent if the proposed activity's effects on the environment will not be more than "minor", or if the activity will not be contrary to the objectives and policies of the relevant plan: Resource Management Act 1991, s 104D. "Minor" is not defined in the RMA. Case law has also failed to offer any further guidance beyond the ordinary meaning of "minor" as it is "obviously a question of fact, depending on all the circumstances of the case": David Kirkpatrick "Land Use and Subdivision – Resource Consent Procedures, Designations and Appeals" in Derek Nolan (ed) *Environmental and Resource Management Law* (online looseleaf ed, LexisNexis) at [4.62].

49 Consent for discretionary activities is considered on a case by case basis against factors which the authority thinks relevant, although the decision is ultimately guided by part 2 of the RMA and superior regional and central government instruments: Resource Management Act 1991, s 104(1).

50 *WESI (No 2) – Interim*, above n 46, at [20] and [22].

51 See *ibid*, at [23].

52 *WESI (No 2) – Final*, above n 46, at [52].

53 See Editorial "Fireballs", above n 33, at 8; Sue Fea "Judge tells Cooper to explain" *The Southland Times* (Invercargill, 1 June 2001) at 1. The media also reported the criterion as being an even more stringent constraint, requiring "people wanting to build a home to get the *agreement* of everyone within a 1.1km radius": Ian McCrone "Judge asks for explanation of mayor's attack" *The Press* (Christchurch, 4 June 2001) at 7 [McCrone "Judge asks for explanation"] (emphasis added).

nevertheless, have a significant effect: the Council or, more likely, the Court in its appellate role could refuse consent for any proposal on the ground that a more landscape-friendly site existed, even if the applicant did not own the land underneath it and no one was proposing to develop it.⁵⁴ It would seem that the criterion could also substantially increase the costs for applicants and the Council by broadening the scope of the assessment and correspondingly increasing the time needed to conduct it.⁵⁵ The Council certainly seems justified in protesting, as it did in its appeal to the High Court, that the criterion could effectively "put an [absolute] stay on development".⁵⁶

For our purposes, the language used by the parties and the High Court hearing the Council's appeal is informative. The Council, for example, in criticising the potential impact of the assessment, argued that Judge Jackson and the Environment Court had responded to the mischief of spreading residential dwellings in rural landscapes by "over *legislating*".⁵⁷ The High Court then further recognised that "important *policy* decisions affecting rural lands within the Wakatipu Basin [had] been reached by the Environment Court".⁵⁸ The High Court's role, of course, did not extend to revisiting the substance of those decisions. They were within the Environment Court's broad appellate jurisdiction and the Court was also perfectly entitled to fill out the regulatory detail, even if the "assessment criteria ... could operate satisfactorily without the radius criterion" and the related compliance costs were high.⁵⁹

Mayor Cooper's characterisation of the Environment Court's decision as an "arbitrary decree" was a politician's hyperbole.⁶⁰ But the accusation draws us back to our image of the Queen of

54 The Court made a point of emphasising that the assessment under the criterion did not involve a comparison between the proposal and (an)other application(s) within the radius. See *Lakes District Rural Landowners Society Inc v Queenstown Lakes District Council* EC Christchurch C162/2001, 20 September 2001 at [76].

55 On this point the Court argued that the "proposed radius criterion would *reduce* the (proper) [compliance] costs" because it would limit the area in which alternative sites would have to be assessed: *ibid*, at [79]. That seems doubtful, however. Although the s 88(2) requirement for resource consent applicants to provide an outline of alternatives in their assessment of environmental effects, that assessment need only correspond "with the scale and significance of the effects that the activity may have on the environment": Resource Management Act 1991, s 88(2)(b). If the radius criterion did reduce the scope of the assessment below what would reasonably correspond with the "scale and significance" of a proposal's likely effects, the criterion could not really be expected to offer the increased protection for rural landscapes that the Court claimed it would.

56 *Queenstown Lakes District Council v Lakes District Rural Land Owners Society Inc* [2002] NZRMA 81 at [17] (HC).

57 *Ibid* (emphasis added).

58 *Ibid*, at [19] (emphasis added).

59 *Ibid*.

60 Warren Cooper quoted in McCrone "Judge asks for explanation", above n 53, at 7.

Hearts and her lawless croquet match. While the RMA regime devolves substantial planning and policy discretion to local government, the ultimate authority simultaneously granted to the Environment Court has offered it the ability to exercise all three governmental functions just as Her Highness does. As the debate over planning for Queenstown indicates, the Court has willingly accepted. On its face at least, the Environment Court's extensive appellate authority seems inconsistent with the idea that the concentration of power should be avoided. The Court *might* be well suited to its task. However, it does raise the question: is there in fact a problem with the Environment Court, being a judicial institution, also possessing such significant policy- and rule-making functions?

IV The Environment Court Through a (Magnified) Public Law Looking-Glass and the Problems We Find There

This section argues that the planning and policy-making functions of local authorities under the RMA are essentially political and that local government, not the Environment Court, should therefore have the final say on the substance of local planning and policy documents. The section has three parts. First, it briefly revisits the doctrine of the separation of powers and concludes that, while some overlap in the functions of the three branches of government is not necessarily problematic, the courts do not and should not engage in substantive decision-making when it comes to "political" questions with high public policy content. Second, it considers the extent to which the Environment Court's appellate jurisdiction, in respect of local RMA documents, involves "political" decision-making. The third part then examines whether the structure and workings of local authorities or of the Environment Court are better suited to making those sorts of decisions.

A Separating Powers and Drawing Constitutional Boundaries: A Closer Look

As alluded to earlier, the real value in the separation of powers doctrine lies in the idea the concentration of governmental power should be avoided and that a system of checks and balances used in order to protect against the exercise of arbitrary power.⁶¹ Indeed, total institutional and functional separation between the three branches of government has proved both practically impossible and undesirable.⁶² A modern interpretation of the doctrine does require that the system

61 See the paragraph accompanying above n 39.

62 See Cheryl Saunders "Separation of Powers and the Judicial Branch" [2006] *Judicial Review* 337 at [5]–[8]; Geoffrey Palmer and Matthew Palmer *Bridled Power: New Zealand's Constitution and Government* (4th ed, Oxford University Press, Auckland, 2004) at 7 [Palmer and Palmer *Bridled Power*]. See also Martin H Redish and Elizabeth J Cisar "If Angels Were to Govern": The Need for Pragmatic Formalism in Separation of Powers Theory" (1991) 41 *Duke Law Journal* 449 at 461 where the authors note that Montesquieu, the first theorist to fully articulate the concept, saw some functional overlap, at least, as necessary for restrained, lawful government.

include "a measure" of institutional and functional division so that governmental power is subjected to the necessary checks and balances.⁶³ However, as Palmer and Palmer have written, the "trick" is really "to get sufficient coordination to be workable but not so much as becomes oppressive and unresponsive to the wishes of the public".⁶⁴ That, as another scholar has noted, requires a system where "each institution impinges upon another and is in turn impinged upon", which invites some degree of (appropriate) overlap in function if not personnel as well.⁶⁵

With respect to the Environment Court's extensive appellate jurisdiction, the proper test is whether it is appropriate when viewed in light of the values used to draw the boundaries between New Zealand's governmental institutions. As the Environment Court is a member of the judicial branch, the limits attached to the role of the ordinary courts would seem particularly relevant.⁶⁶ First then, it is important to note that orthodox constitutional thinking currently sees the courts as performing a law-making function.⁶⁷ As Waldron has explained, this law-making role is not *legislative* function – that is held by institutions that are publicly identified as the site for making law and are deliberately designed for it, neither of which the courts can claim.⁶⁸ However, the courts still make law and, by extension, policy: in particular, the courts' responsibility for developing common law necessarily involves a degree of policy creation, while the courts are also required to fill gaps in policy where Parliament has "conferred jurisdiction requiring general policies

63 Saunders, above n 62, at [7].

64 Palmer and Palmer *Bridled Power*, above n 62, at 7.

65 Saunders, above n 62, at [6]–[8]. See also Garry, above n 40, at 696.

66 New Zealand's constitutional structure has historically included a significant overlap between the executive and legislature. Both are identifiable, but their powers are considerably fused as Cabinet members sit simultaneously in, and have traditionally controlled, the House of Representatives: see Joseph *Constitutional Law*, above n 38, at 195–196. Although the mixed member proportional electoral system now used in New Zealand has weakened Cabinet control of Parliament and the legislative process, the fusion still remains largely intact: see Palmer and Palmer *Bridled Power*, above n 62, at 13–18; Geoffrey Palmer "Deficiencies in New Zealand Delegated Legislation" (1999) 30 VUWLR 1 at 24.

67 See Philip A Joseph "Constitutional Law" [2006] NZ L Rev 123 at 145 and the cases cited therein; Philip A Joseph "Parliament, the Courts, and the Collaborative Enterprise" (2004) 15 King's College Law Journal 321 at 334–335 [Joseph "Collaborative Enterprise"], although Joseph's thesis that Parliament does not possess legislative sovereignty, presented in that article, is still the subject of debate: see for example Jeffrey Goldsworthy "Is Parliament Sovereign? Recent Challenges to the Doctrine of Parliamentary Sovereignty" (2005) 3 NZJPL 7.

68 Jeremy Waldron "Representative Lawmaking" (2009) 89 Boston Law Review 335 at 336–340.

to be applied with little guidance".⁶⁹ The sort of policy decisions that the courts *should* make, however, is a different question.

In spite of the fact that the courts do engage in law and policy-making to some extent, they are usually careful to avoid delving too deeply into policy matters that are better left for the political – that is, the executive and legislative – branches of government.⁷⁰ The general thrust of the courts' position was outlined by the Court of Appeal in *Wellington City Council v Woolworths New Zealand Ltd (No 2) (Woolworths)*, a case concerning the reviewability of rates set by a local council.⁷¹ According to the Court:⁷²

[T]here are constitutional and democratic constraints on judicial involvement in wide public policy issues. There comes a point where public policies are so significant and appropriate for weighing by those elected by the community for that purpose that the courts should defer to their decision[.] ... The larger the policy content and the more the decision making is within the customary sphere of those entrusted with the decision, the less well equipped the courts are to reweigh considerations involved and the less inclined they must be to intervene.

Questions involving wide public policy issues, the Court intimated, are "political" questions demanding political judgment.⁷³

The following parts of this section use the Court of Appeal's comments in *Woolworths* as a framework for assessing the extent to which the Environment Court is the appropriate body to have ultimate control over the substantive content of local plans and policy statements. As alluded to in the introduction to this section, the questions are therefore: first, whether the nature of the decisions involved in creating those documents are rightly seen as "political"; and second, whether local government or the Environment Court is best suited to make them. Before embarking on that analysis, however, it is necessary to define what "political" questions are a little more closely.

69 Sian Elias "Transition, Stability and the New Zealand Legal System" (2004) 10 Otago LR 475 at 486. See also Geoffrey Palmer "Judicial Selection and Accountability: Can the New Zealand System Survive?" in BD Gray and RB McClintock (eds) *Courts and Policy: Checking the Balance* (Brookers, Wellington, 1995) 11 at 19.

70 See Joseph "Collaborative Enterprise", above n 67, at 336–337. See also Lord Hailsham (ed) *Halsbury's Laws of England* (4th ed, Butterworths, London, 1973–1984) vol 4 at [8]: "Only in one aspect of the constitution can it be said that the doctrine [of the separation of powers] is strictly adhered to, namely that by tradition, convention and law the judiciary is insulated from political matters."

71 *Wellington City Council v Woolworths New Zealand Ltd (No 2)* [1996] 2 NZLR 537 (CA) [*Woolworths*].

72 *Ibid*, at 546.

73 *Ibid*, at 553.

Sir Kenneth Keith QC has emphasised three factors as vital to deciding whether certain issues should fall for determination by the political branches.⁷⁴ In particular, the factors indicate that those branches should be responsible where:⁷⁵

- (a) there are perceivable differences of opinion in society (or the relevant community) regarding the values which underlie the decision;⁷⁶
- (b) the facts are particularly uncertain; and/or
- (c) there is a sense that major change is called for.

The first two points arise most often in the context of environmental planning and are interrelated in the sense that the more uncertain the evidence, the more decisions rest on our subjective values.⁷⁷ Nevertheless, the presence of any of the three matters, Sir Keith states, "may call for broad consultation, the development of public opinion, and the exercise of political responsibility".⁷⁸ We can see a similar approach in *Woolworths* where the Court ultimately decided that the decision was best left for the elected council because it was fundamentally based on the weighing of social and economic interests and values; these, the Court noted, should reflect community goals and not the views of a court.⁷⁹

Intuitively, the conclusions of Sir Kenneth and the Court of Appeal in *Woolworths* seem right. Communities and their representatives would appear best placed to decide problems that turn on the weighing of community values – whether they relate to the social, economic, environmental or cultural sphere – as opposed to the application of legal or other technical rules. They would appear especially well-placed where decision-makers do not have the option of reconciling values but are forced to attach different levels of importance to equally legitimate, but irreconcilable, values in order to make a decision.⁸⁰ The following subsection adopts the approach of Sir Keith and the Court

74 Kenneth Keith "Policy and Law: Politicians and Judges (and Poets)" in BD Gray and RB McClintock (eds) *Courts and Policy: Checking the Balance* (Brookers, Wellington, 1995) 117.

75 *Ibid.*, at 165.

76 See also on this point ILM Richardson "The role of judges as policy makers" (1985) 15 VUWLR 46 at 51–52 where the then Court of Appeal Justice discusses the need for judicial care when allowing perceptions of community values to influence decisions.

77 See Somerville "Public Law Response", above n 3, at 144–145.

78 Keith, above n 74, at 165. See also *R v Hines* [1997] 3 NZLR 529 at 542–543 (CA) where the Court outlined a similar process, which it held was necessary for proper policy development where the matter was one of wide public policy.

79 See *Woolworths*, above n 71, at 551 and 553.

80 See John Alder "Incommensurable Values and Judicial Review: The Case of Local Government" [2001] Public Law 717 at 717–718.

in *Woolworths* when it comes to defining the nature of "political" judgments which should, on their face, be the business of local authorities and their constituents; it proceeds on the premise that value-laden questions, that depend on decision-makers weighing competing understandings of the community interest, are properly political matters.

B The Riddle of "Sustainable Management" and the Myth of Bottom Lines – it is All Political, You Know

Arguably, the fact that the RMA treats the "essence of policy, usually an extra-legal expression of political objectives, ... as law" tempers the otherwise political nature of environmental and planning policy, making it more "legal", "specialist" and suitable to judicial assessment.⁸¹ This subsection argues, however, that the legal framework imposed by the RMA does *not*, in the end, alter the political nature of planning because it is inherent in the RMA's overarching goal of promoting sustainable management. The first part of this subsection suggests that the political nature of planning and policy-making decisions under the RMA is supported by three inter-related factors: the history of s 5 (the "sustainable management" section), the legislation's wording, and the way in which the courts have interpreted the Act. The second part provides some practical illustrations of the political decisions that the Environment Court is entitled to make in the place of local authorities.

1 Why s 5 does not say what it (apparently) means: the history, the language, and the law

The Hatter opened his eyes very wide ... but all he *said* was 'Why is a raven like a writing-desk?'

'Come, we shall have some fun now!' thought Alice. 'I'm glad they've begun asking riddles – I believe I can guess that,' she added aloud.

'Do you mean that you think you can find out the answer to it?' said the March Hare.

'Exactly so,' said Alice.

'Then you should say what you mean,' the March Hare went on.

'I do,' Alice hastily replied; '... at least I mean what I say – that's the same thing, you know.'

'Not the same thing a bit!' said the Hatter.⁸²

The approach of the various parties involved in the development of the RMA has much the same feel as Alice's riddled interrogation at the Hatter's tea party. Like Alice, those who had the final

81 The quote is from Somerville "Implications for local government", above n 3, at 16.

82 Carroll *Alice in Wonderland*, above n 1, at 69.

hand in drafting the RMA should have said what they meant. Because they did not, they enacted a statute that asked political questions where they believed that the issues were purely technical.

According to Simon Upton, the National Minister for the Environment responsible for seeing the Resource Management Bill passed, s 5 of the RMA "was crafted with great care".⁸³ He, apparently, knew exactly the thrust of the Act. Indeed, he attempted to spell that out at the Bill's third reading in an effort to helpfully guide the courts, local authorities and practitioners in their work with the legislation. As he said then:⁸⁴

Unlike the current law, the Bill was not designed or intended to be a comprehensive social planning statute. ... The Bill provides us with a framework to establish objectives with a biophysical bottom line that must not be compromised. Provided that those objectives are met, what people get up to is their affair.

After 10 years of experience with the RMA, two commentators succinctly encapsulated the problem with Upton's take on the Bill when they suggested that his belief that it "is possible to develop precise natural environmental standards, which are separated from political and value considerations ... [is] a questionable assumption".⁸⁵ The problem for those who support Upton's perspective is all the greater because the legislative proposal that they inherited had been explicitly based on broader considerations of political factors. Four years after the enactment of the RMA, Upton delivered a comprehensive paper outlining the RMA's development and attempting to clarify the meaning of "sustainable management".⁸⁶ Upton's history paints a picture of tireless efforts on the part of Treasury and himself to move away from the all-encompassing purpose for the RMA that had gained ascendancy during the Bill's early development under Labour. In Upton's words, he wanted to resist moves that would have "destabilised the notion of an environmental bottom line and replaced it with an indeterminate balancing exercise".⁸⁷ He, however, failed.

83 Simon Upton "Purpose and Principle in the Resource Management Act" (1995) 3 Waikato LR 17 at 24 [Upton "Purpose and Principle"]. On this point, contrast Cooke P: "Notable though the Resource Management Act is for the aspirations and principles embodied in it, their very generality seems to have led in the drafting to an accumulation of words verging in places on turgidity." *Auckland Regional Council v North Shore City Council* [1995] 3 NZLR 18 at 20 (CA); see also Williams with respect to s 5: "The legislature might almost as well have said that sustainable management means sugar and spice and all things nice." Ian Williams "The Resource Management Act 1991: Well Meant But Hardly Done" (2000) 9 Otago LR 673 at 682.

84 Hon Simon Upton MP (9 May 1991) 514 NZPD 1874–1875.

85 Harvey C Perkins and David C Thorns "A decade on: reflections on the Resource Management Act 1991 and the practice of urban planning in New Zealand" (2001) 28 *Environment and Planning B: Planning and Design* 639 at 642.

86 Upton "Purpose and Principle", above n 83.

87 *Ibid*, at 39.

The standard account of the RMA's legislative history identifies three somewhat competing philosophies that influenced its development.⁸⁸ On the one hand were those, like Upton, on the right of the political spectrum. Their main aim was to develop an economically efficient planning model that focussed on the effects of activities on the natural environment as opposed to the previous planning regime which was based on regulating types of activities.⁸⁹ The political left, on the other hand, were motivated by a strong desire to empower local communities and increase community influence on environmental decision-making.⁹⁰ The environmental lobby straddled the two positions: like the right-wingers, they wanted a system of rules that focused on the effects of activities on the natural environment; but they also wanted enough flexibility in the national framework to meet the environmental needs of specific localities and opposed the right's overriding desire to construct a development-friendly framework.⁹¹

Labour's left were the strongest advocates for the concept of "sustainable management" that eventually formed the central purpose of the RMA.⁹² The term had been developed as an environmental policy by two influential reports commissioned by the United Nations.⁹³ "Sustainable development", as the reports termed it, identifies the natural environment as a key element of societies' well-being; but it also recognises that environmental quality is *one part* of a broader well-being, which includes economic, social and cultural factors. The aim of sustainable development, therefore, is to manage the environment in a way that enables both environmental and other aspects of community well-being to be maintained across generations.⁹⁴ The notion of sustainable development melded well with the left's desire for strengthened local democracy, which

88 See for example Kim Bauer "Social Equity and the New Right: Internal Tensions in the New Zealand Planning System" (2006) 3 *Macquarie Journal of International and Comparative Environmental Law* 35; P Ali Memon and BJ Gleeson "Towards a New Planning Paradigm? Reflections on New Zealand's Resource Management Act" (1995) 22 *Environment and Planning B: Planning and Design* 109; P Ali Memon *Keeping New Zealand Green: Recent Environmental Reforms* (Otago University Press, Dunedin, 1993) [Memon *Keeping New Zealand Green*]; David Young *Values as Law: The History and Efficacy of the Resource Management Act* (Institute of Policy Studies, Wellington, 2001).

89 Bauer, above n 88, at 36.

90 Young, above n 88, at 15; Memon *Keeping New Zealand Green*, above n 88, at 71.

91 Memon and Gleeson, above n 88, at 113.

92 P Ali Memon "Reinstating the Purpose of Planning within New Zealand's Resource Management Act" (2002) 20(3) *Urban Policy and Research* 299 at 305 [Memon "Reinstating the Purpose"].

93 Namely, International Union for Nature and Natural Resources *World Conservation Strategy: Living Resource Conservation for Sustainable Development* (International Union for Nature and Natural Resources, New York, 1980); World Commission on Environment and Development *Our Common Future* (Oxford University Press, New York, 1987).

94 See *ibid*, at 65, for a summary of the concept of sustainability.

the report writers saw as vital for two reasons: first, they recognised that the natural and physical environment varies between regions; second, they believed that local communities were best placed to define their own concepts of well-being because of its value-laden nature.⁹⁵ Similarly, Labour began the reform process which led to the RMA intending to create a "system of policy and plan preparation ... that allow[ed] the balancing of a wide range of interests and values".⁹⁶

Groups on the right, especially Treasury, strongly opposed "sustainability" being a core element of the RMA's purpose. In Treasury's view, the purpose should have been limited to providing "an environmental effects management statute" based solely on a definition of minimum biophysical environmental standards. It did not want the legislation to act as a framework for "resolving diverse values disputes in a community as part of the wider local government democratic process".⁹⁷ The vague and uncertain nature of such a framework, Treasury argued, would stifle economic development.⁹⁸ Obviously, the National Government that enacted the RMA did see it as a framework for simply promulgating minimum environmental standards; it made a conscious decision to reject the notion of sustainable development and enact legislation with a more narrow focus.⁹⁹ However, the government still retained the promotion of "sustainable management" as the RMA's overarching purpose.

As alluded to a little earlier, Upton saw (and sees) the RMA's "sustainable management" as entirely consistent with his preference for a regime that establishes clear and limited rules based solely on the effects of activities on the natural environment. According to a lecture he gave in 1995:¹⁰⁰

95 See *ibid*, at 63 and 247. See also Memon *Keeping New Zealand Green*, above 85, at 98; Royden Somerville "Risk, Regulation and the Resource Management Act 1991: The Case of Electricity Generation and Transmission" (PhD Thesis, University of Otago, 2001) at 33 [Somerville "Risk and the Resource Management Act"] which discusses the emphasis that the international reports and various instruments of international law have placed on the link between sustainable development and community participation in decision-making.

96 Rt Hon Geoffrey Palmer MP (5 December 1989) 503 NZPD 14166.

97 Memon "Reinstating the Purpose", above n 92, at 304.

98 *Ibid*.

99 See Simon Upton, Helen Atkins and Gerard Willis "Section 5 re-visited: a critique of Skelton and Memon's analysis" (2002) 10(3) Resource Management Journal 10 at 11 and the sources cited therein.

100 Upton "Purpose and Principle", above n 83, at 40.

[W]hatever section 5(2) has to say about economic or social activities, the matters set out in subparagraphs (a), (b) and (c) must be secured.¹⁰¹ ... They constitute a non-negotiable bottom line. Unless it is a bottom line, sustainable management ceases to be a fixed point or pre-eminent principle and sinks back into being a mealy-mouthed manifesto whose meaning is whatever decision-makers on the day want it to be.

[T]he Act's purpose [is] not one that involve[s] inquiring into what constitutes people's social, economic and cultural well-being or how they should achieve it. Rather, it [is] about managing natural and physical resources. ... The Act makes no judgments about the well-being of people or communities ... nor does it invite administrators or judges to pronounce on [that matter].

That position, however, was undermined in the immediately following passage of his address.¹⁰² When justifying a consent decision made by himself as Minister for the Environment, Upton outlined the process that decision-makers under the RMA should follow. Decision-makers, he held, should not begin by considering whether the positive impacts on the social and economic environment justify a proposal by outweighing its negative effects on the natural environment; decision-makers should determine whether mitigation of the adverse effects of a proposal is acceptable before weighing its positive and negative effects on the environment. The approach might contain flaws of logic,¹⁰³ but for our purposes it is interesting that Upton was happy to include the social and economic effects of the proposal as part of the calculation. What these are, and whether they are positive or negative features, surely involves the sort of subjective judgments about what constitutes "community well-being" that Upton insists the RMA is unconcerned with.

While surprising when viewed in light of his rhetoric, Upton's approach makes sense in terms of the RMA's language. Although the language of "sustainable development" was replaced by "sustainable *management*" in the Act, the most logical reading of the RMA is consistent the

101 As a reminder, s 5(2) provides:

In this Act, sustainable management means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while –

- (a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations;
- (b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
- (c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.

102 This paragraph is based on Upton "Purpose and Principle", above n 83, at 42–43.

103 In particular, the assumption that a decision-maker can determine whether mitigation is appropriate before assessing a proposal's positive and adverse effects.

principle of "sustainable development".¹⁰⁴ The RMA's s 5 includes the various factors involved in "sustainable development" in its definition of "sustainable management": as s 5(2) states, sustainable management means managing the use of resources in a way that "enables people and communities to provide for their social, economic, and cultural well-being". Moreover, the definition of "environment" – the focus of the Act's effects-based regime – encompasses "people and their communities" in addition to the social, economic and cultural conditions which affect other aspects of the environment.¹⁰⁵ Therefore, RMA planning decisions should be expected to incorporate a wide range of subjective and value-laden factors, which are more moral and political than technical or scientific.

Some years after Upton's 1995 address, he and his co-authors published a further defence of his conception of the RMA's "sustainable management".¹⁰⁶ In it they make an observation which is perhaps more important for the argument advanced in this paper than what the history behind, and wording of, the RMA might tell us about the nature of the Act's purpose. As the authors note, despite the work of the 1991 National Government, the courts have developed an approach that sees sustainable management as involving all-encompassing, sustainable development-type, considerations.¹⁰⁷ That interpretation is the one which we must be most concerned with because it is the courts' approach to the purpose of the RMA that dictates the sorts of decisions that the Environment Court is willing to make in the place of locally elected authorities.

The Planning Tribunal (the predecessor of the Environment Court) began to give effect to the interpretation of s 5 advanced in this paper in 1997. In *Trio Holdings Ltd v Marlborough District Council (Trio)*, the Tribunal found (implicitly) that s 5 directed the Tribunal to weigh social and cultural benefits against adverse effects on the natural environment.¹⁰⁸ In *North Shore City Council v Auckland Regional Council (Okura)*, the Environment Court put a label on the Tribunal's approach. The Court announced that in cases where there are a range of issues and effects to consider, the "duty entrusted to those making decisions under the Act cannot be performed by simply deciding that ... one ... of the goals in [paras (a) to (c)] is not attained".¹⁰⁹ The proper

104 See also Peter Skelton and P Ali Memon "Adopting Sustainability as an Overarching Environmental Policy: a Review of section 5 of the RMA" (2002) 10(1) Resource Management Journal 1 at 4 where the authors make much the same point.

105 Resource Management Act 1991, s 2. Simon Upton and his co-authors seem to have conceded this point: "The reality is that the definition of environment as it currently stands does allow the full gamut of economic and social consequences to be considered." Upton, Atkins and Willis, above n 96, at 14.

106 Upton, Atkins and Willis, above n 99.

107 *Ibid*, at 16.

108 *Trio Holdings Ltd v Marlborough District Council* [1997] NZRMA 97 at 133–134 (PT).

109 *Okura*, above n 20, at 345.

approach, according to the Court, involved "an overall broad judgment of whether a proposal would promote the sustainable management of natural and physical resources".¹¹⁰ The "overall broad judgment" test has since become the standard applied in the Environment Court.¹¹¹ By directing decision-makers to determine and weigh the wider community values identified in s 5 together with impacts on the natural environment, the Environment Court evidently sees sustainable management as demanding the value-laden, political assessments inherent in the ideal of sustainable development.

2 *Making political plans and policies in the Environment Court*

This part of the subsection discusses two cases that illustrate RMA planning and policy issues that have a particularly political character but in respect of which the Environment Court has chosen to substitute its views for those local authorities. The issues demand that the Court engage in the exercise of attaching different levels of importance to equally legitimate but competing values which, it was suggested earlier, is especially well-suited to the political branches.¹¹² The first case returns us to New Zealand's natural wonderland, Queenstown, and the role of Judge Jackson's Court in planning for the protection of the district's landscape values. We then turn to look at a case concerned with determining the limits of urban development in Auckland and the related effects on amenity and social values.

As noted earlier, the 2001 judgment that imposed rules for residential activities in Queenstown's rural landscape followed a more wide-ranging decision previously issued by the Environment Court in 1999, *Wakatipu Environmental Society Inc v Queenstown Lakes District Council (WESI (No 1))*.¹¹³ In *WESI (No 1)*, the Court was faced with appeals against a range of objectives and policies in the Queenstown Lakes District Council's revised proposed district plan. The Court's task was essentially to determine objectives and policies for the management of the district's landscapes in a context of increasing pressure for development.¹¹⁴ The conflict that the Court's 2001 decision provoked perhaps reflected the significance of the political decisions that the Court had begun to

¹¹⁰ Ibid.

¹¹¹ See for example *Te Whakaruru Ltd v Thames Coromandel District Council* EC Wellington W086/08, 3 December 2008 at [159]; *Geotherm Group Ltd v Waikato Regional Council* EC Auckland A47-6, 13 April 2006, at [74]-[75] [*Geotherm*] and the cases cited therein. See also Skelton and Memon, above n 104, at 9; Upton, Atkins and Willis, above n 99, at 16.

¹¹² See above n 80 and the related discussion. See also *Long Bay-Okura Great Park Society Incorporated v North Shore City Council* EC Auckland A078/08, 16 July 2008 at [637] [*Long Bay*] where it was explicitly noted that the Environment Court is often required to make such assessments.

¹¹³ *WESI (No 1)*, above n 45.

¹¹⁴ Ibid, at [1].

make in 1999. But even at the time the nature and extent of the changes being made by *a court* raised some eyebrows among practitioners working in the resource management field.¹¹⁵

Before looking specifically at the Environment Court's approach in *WESI (No 1)*, it is important to briefly comment on the nature of the concept of "landscape" more generally. As one academic has put it, "landscape" is "simultaneously physical reality and a social and cultural construct".¹¹⁶ What is a meaningful or even aesthetically pleasing landscape therefore varies between communities. Reflecting on that idea, Professor Fisher, an Australian expert in resource management law, has noted that when it comes to making decisions with respect to the treatment of landscape "the law [is no longer] concerned simply with a physical reality that can presumably be identified, assessed, [and] measured" – the law is also concerned with social and cultural values.¹¹⁷ As Fisher recognises, even the initial task of identifying and classifying landscapes for the purposes of their legal regulation is far from a technocratic exercise. It is not something that can be objectively judged right or wrong based only on scientific measurements; it is necessarily value-laden. As Fisher observes, the nature of "landscape" makes the reference in s 5(2) to the "social, economic and cultural" perspectives of communities the most important factor when it comes identifying and valuing landscapes for the purposes of their sustainable management.¹¹⁸

The Court in *WESI (No 1)* recognised the importance of community perspectives in determining the value of landscapes, drawing on both s 5(2) and the RMA's definition of "environment" which refers to social and cultural conditions as they relate to the physical environment.¹¹⁹ The resultant criteria therefore had a political flavour. They criteria required decision-makers to take into account:¹²⁰

- (a) what can broadly be called natural science factors – for example, geographic and ecological components of the landscape;

115 Email from Helen Atkins to the author regarding the Queenstown landscape decisions (14 September 2010).

116 M Jones "The elusive reality of landscape: concepts and approaches in research" in JM Fladmark (ed) *Heritage: Conservation, Interpretation and Enterprise* (Donhead Publishing, Aberdeen, 1993) 17 at 32.

117 DE Fisher "Can the Law Protect Landscape Values?" (2005) 9 NZJEL 1 at 2–3.

118 See *ibid*, at 28.

119 See *WESI (No 1)*, above n 45, at [76]–[78]. At [78], the Court wrote: "We ... regard 'landscape' as a link between individual (natural and physical) resources and the environment as a whole. It is a link in two ways: first, in that it considers a group of natural and physical resources together, perhaps in an arbitrary cultural lumping as a 'landscape' rather than in an ecologically significant way; and secondly it [emphasises] that our attitudes to those resources are affected by social, economic, aesthetic and cultural conditions."

120 *Ibid*, at [80].

- (b) other largely objective factors – for example, the presence of wildlife or the extent to which the formation process of the landscape is legible; and
- (c) most importantly, those factors that are rooted in community perspectives, particularly the social, cultural and aesthetic values that the community (or parts of it) attach to the landscape.

Based on that set of criteria, the Court set about drawing lines over the Queenstown district, defining areas as: "outstanding natural landscapes" (the most important and vulnerable to development); "visual amenity landscapes" (those that have amenity values but are less important);¹²¹ or as "other" landscapes, which failed to make it into either category.

The Environment Court used its classification of Queenstown's landscapes as the basis for substantive decisions regarding the policies in the Queenstown Lakes district plan. For example, the Council's proposed plan identified the "potential detractor of the open character of the rural landscape" as a resource management issue facing the district.¹²² The Court left the issue statement intact. However, after determining that, in its view, "open character is a quality that needs only be protected if it relates to important matters",¹²³ the Court rewrote the policies for addressing the issue. The Council had a general policy to maintain the open character of Queenstown's landscape by avoiding certain residential and commercial activities.¹²⁴ By contrast, the Court's replacement provision changed the policy to maintaining the open nature of "outstanding natural landscapes", but only the "natural character" of "visual amenity landscapes" and the "rural character" of "other" landscapes.¹²⁵ Those, of course, are very different things from maintaining their open character. As the Court noted, for instance, a "natural character" can be achieved by *filling in* the landscape with planting, which can in turn be used to disguise development,¹²⁶ and a "rural character" necessarily includes an element of built and other development.

With its changes to the landscapes policies in the Queenstown Lakes district plan the Court in *WESI (No 1)* entered into the realm of political decision-making, in which its decisions were based on a weighing of social and cultural values. The Court did not, for example, find that the RMA did

¹²¹ Ibid, at [93].

¹²² Ibid, at [152].

¹²³ Ibid, at [153].

¹²⁴ See *ibid*, at [133].

¹²⁵ Ibid, at [156].

¹²⁶ Ibid, at [154]. See also [163], where the Court indicated that a proposed large-scale retail development would likely be consistent with the policy of maintaining the natural character of the visual amenity landscape if appropriate mounding and planting was used. As the Court noted, that would not work under the Council's preferred policy because the "openness" of the landscape would be "compromised".

not permit a policy directed at protecting the open character of rural landscapes. Instead, it simply decided that the open character of all but those landscapes it identified as "outstanding natural" ones was not valuable enough to be the subject of a protective policy. As the Court itself identified, the valuation of Queenstown's landscapes for RMA purposes rested on those social, cultural and aesthetic values which are ultimately rooted in community perspectives.

The proceedings in our second case, *Okura*, resulted from an appeal by the North Shore City Council (NSCC) against a provision in the Auckland Regional Council's (ARC) proposed regional policy statement, which drew a line defining the metropolitan urban limit for the Auckland region. In particular, NSCC objected to that part of the line which, because of the need for district plans to not be inconsistent with regional policy statements,¹²⁷ would have required its district plan to preclude any urban development within a 700 hectare block that drained into two North Shore catchments – Long Bay and the Okura Estuary.¹²⁸

The NSCC's appeal required the Court to weigh a number of competing, value-laden factors in exercising its broad, policy-making, jurisdiction. The balancing task was especially delicate in *Okura* because the case related to land that was "the only remaining 'greenfields' area in the North Shore district for future urbanisation",¹²⁹ and was associated with high quality landscapes and especially sensitive water bodies.¹³⁰ Interestingly, for our purposes, the s 5(2) reference to enabling communities to provide for their social well-being, and the inclusion of amenity values in the RMA's definition of "environment",¹³¹ also made the effects of urbanisation on the social and amenity values of the Long Bay Regional Park relevant to the s 5 evaluation.

With respect to the relationship between the land, which the NSCC wished to have included within the metropolitan urban limit, and the regional park, the Court found as a matter of fact that:¹³²

Part of the subject land, in the Long Bay catchment, currently forms a rural backdrop to the park, being visible from various viewpoints within the park, including from the beach, ... from the middle section of the park ... and from coastal walkways on the northern section.

127 This was the way in which the statutory direction was phrased when *Okura* was heard. Since then, the RMA has been amended so that it now requires district plans to positively give effect to regional policy statements: Resource Management Act 1991, s 75(3)(c).

128 *Okura*, above n 20, at 321.

129 *Ibid*, at 322.

130 See *ibid*, at 333 for the Court's findings with respect of landscape values and 325–326 for its findings regarding the natural marine environment.

131 See Resource Management Act 1991, s 2(1).

132 *Okura*, above n 20, at 334.

The central thrust of the ARC's argument in favour of precluding urban development on the subject land was that there was an increasing desire of the region's city dwellers "to have alternative experiences available in regional parks around Auckland".¹³³ Long Bay, the ARC submitted, was "uniquely placed to provide a combined beach and rural experience because of its close proximity to Auckland and its easy accessibility by public transport".¹³⁴ A rural experience, the ARC's park manager submitted, requires "a perception by the visitor that they have left the urban environment behind", which would be near impossible if urbanised areas were visible.¹³⁵

The Court displayed its power to substitute its views on policy matters for those of local authorities. In applying the (then) s 32(1)(c)(i) requirement that the decision-maker be satisfied that the policy was necessary in achieving the RMA's purpose,¹³⁶ the Court determined that the line should not fall either where the ARC or the NSCC proposed, but should lie in between the two positions: although, the land draining into the Okura Estuary had to be outside the metropolitan urban limit, the Court determined, the Long Bay land did not.¹³⁷ Essentially, the Court concluded that the adverse impacts of urbanisation on the quality of estuary waters and the estuary's ecosystem outweighed the social and economic benefits of urban development in the Okura catchment.¹³⁸ By contrast, the Court found that development in the Long Bay catchment would not have such adverse effects on the natural marine environment.¹³⁹ With respect to the Long Bay Regional Park, the Court accepted "that the quality of the experience available in ... the park *would* be diminished by urbanisation" but held that such an outcome was not precluded by the s 5 goal of promoting sustainable management.¹⁴⁰

Evidently, the Court did not reach its decision by simply establishing that urban development would contravene concrete environmental standards, determined under paras (a) to (c) in s 5(2) by

133 Ibid.

134 Ibid.

135 Ibid.

136 Although s 32(1)(c)(i) of the RMA required decision-makers to be "satisfied" that the policy was "necessary in achieving the purpose of [the] Act", the courts had interpreted "necessary" as having "a meaning similar to expedient or desirable, rather than essential": *Okura*, above n 20, at 320. Following amendment to the RMA in 2003, decision-makers now only needed to "examine" whether "policies, rules, and other methods are the *most appropriate* for achieving the objectives": Resource Management Act 1991, s 32(3)(b) (emphasis added). See K Palmer "Resource Management", above n 14, at [3.91] for comment on the shift in emphasis from necessity to appropriateness.

137 See *Okura*, above n 20, at 348–349.

138 Ibid, at 348.

139 Ibid.

140 Ibid, at 337 (emphasis added).

the application of technical expertise.¹⁴¹ Instead, the Court weighed social and economic values in expanded urban development against: the resultant impacts on marine ecosystems and other aspects of the natural environment, on the one hand; and against the social and amenity values of a rurally situated, but easily accessible, regional park, on the other. As with the Environment Court's determinations in the Queenstown landscape decisions, the *Okura* court did not find that it could not consider the social and amenity values associated with the regional park. The Court considered those values but (implicitly) found that, despite the s 7(c) direction that decision-makers give particular regard to the maintenance and enhancement of amenity values, the amenity and social value of the park, as it was, to the wider Auckland community were outweighed by the social and economic benefits of development.

3 *"Then you should say what you mean": conclusions on the political nature of sustainable management*

The 1991 National Government that was ultimately responsible for enacting the RMA believed that their legislation simply established a framework for developing "biophysical bottom lines" through the use of scientific and other technical tools. They did not, however, say what they meant. The process of local plan and policy-making under the Act demands political decision-making. That is because the RMA's overarching purpose of promoting sustainable management, in conjunction with the Act's broad definition of "environment", requires decision-makers to weigh various community values when reaching their determinations. Such an approach is supported by the history behind the Act, by the Act's wording and by the courts' interpretation of it. As we have seen, this can lead the Environment Court to make fundamentally political decisions when hearing appeals against local authorities' planning and policy documents.

The Court of Appeal was seemingly spot on when it described the Environment Court's task as being to "weigh all the relevant competing considerations and ultimately make a value judgment on behalf of the community".¹⁴² However, viewed through a separation of powers lens, this looks more like the job of a democratically elected local government than the Environment Court. The following subsection takes a closer look at the processes involved in local government plan and policy-making, and at the nature of the Environment Court. It argues that local authorities and their processes, and not the Environment Court, are best suited to develop the substantive content of local plan and policy instruments under the RMA.

¹⁴¹ Contrast Upton, Atkins and Willis, above n 99, at 20 where the authors suggest that *Okura* was effectively decided on the effects of urban development on the natural environment.

¹⁴² *Watercare Services v Minihinnick* [1998] 1 NZLR 294 at 305 (CA). See also Somerville "Implications for local government", above n 3, at 14 where Somerville characterises the Environment Court's role in a similar way.

C "Sentence First – Verdict Afterwards": Local Democracy, Participatory Processes and Why the Environment Court Should Not Be Making Political Planning Decisions

The Environment Court is not incompetent in the ordinary sense: it does not do anything nearly equivalent to the Queen of Hearts attempting to impose a sentence before receiving a verdict, as she did when trying the Knave of Hearts for stealing her precious tarts.¹⁴³ To the contrary, the Court has developed a "fine reputation" for having quality judges.¹⁴⁴ However, like the Queen's Court, the Environment Court is, nonetheless, ill-suited to exercise the extensive jurisdiction it possesses. This subsection argues that, compared with democratically elected local authorities who develop their RMA instruments through participatory processes, the Environment Court lacks both the institutional legitimacy and capacity to make substantive decisions regarding the content of local planning and policy documents. The subsection looks first at why the nature of local government processes justifies local authorities having ultimate control over the content of local RMA instruments before turning to the relative shortcomings of the Environment Court. It then briefly suggests what functions the Court, when hearing appeals against the content of local government documents, is suited to.

1 Legitimising local government: local democracy and participatory processes

Logically, the most suitable process for developing plan provisions that, under s 5, should give effect to community values is one which encourages community input and is ultimately arrived at by elected community representatives. Fittingly, the RMA provides procedures "for developing policies and plans at the ... [which] allow for participatory democracy so as to incorporate societal values into environmental policy, rule and decision-making".¹⁴⁵ In particular, the RMA-mandated process for developing (or changing) plans and policy statements require local authorities to:

- (a) publicly notify a proposed document;¹⁴⁶
- (b) receive public submissions with respect to the document's content and provisions;¹⁴⁷

143 See Carroll *Alice in Wonderland*, above n 1, at 123.

144 The quoted phrase is from Somerville "Implications for local government", above n 3, at 15, but the latter part of the comment is drawn from Trevor Daya-Winterbottom "Specialist Courts and Tribunals" (2004) 12 Waikato LR 21 at 40 [Daya-Winterbottom "Specialist Courts"].

145 Somerville "Implications for local government", above n 3, at 17.

146 Resource Management Act 1991, sch 1, cl 5.

147 Resource Management Act 1991, sch 1, cl 6(3). A submission, however, cannot be based on the effects of trade competition: Resource Management Act 1991, sch 1, cl 6(4).

- (c) compile a summary of submissions and make it available to the public;¹⁴⁸
- (d) receive further submissions, in respect of the submissions already made, from any person who represents "a relevant aspect of the public interest" or who "has an interest in the proposed [document] ... greater than the interest that the general public has";¹⁴⁹
- (e) hold a hearing for submitters to present oral submissions to the authority;¹⁵⁰
- (f) give a decision outlining the authority's reasons for accepting or rejecting the submissions received;¹⁵¹ and
- (g) publicly notify its final decision regarding the plan or policy statement.¹⁵²

The participatory plan and policy design process is not triggered where the Environment Court, after hearing an appeal, directs a local authority to amend a plan or policy statement.¹⁵³

Because the RMA provides little substantive guidance as to what exactly sustainable management requires in individual cases, Janet McLean observed in her "prophetic" 1992 article,¹⁵⁴ "it could be argued that participation saves the otherwise vague ... delegations of power in the Act from illegitimacy and that the process can become a purpose".¹⁵⁵ Such an argument is supported by scholars of "institutional legitimacy" who generally distinguish between legitimacy that arises from institutions reaching "good" decisions, on the one hand, and legitimacy that comes "from citizen input and direction", on the other.¹⁵⁶ Attributing legitimacy on the basis that institutions reach "good" decisions, one commentator has noted, only makes sense where "value or goal consensus is

148 Resource Management Act 1991, sch 1, cl 7(1).

149 Resource Management Act 1991, sch 1, cl 8(1).

150 Resource Management Act 1991, sch 1, cl 8B.

151 Resource Management Act 1991, sch 1, cl 10.

152 Resource Management Act 1991, sch 1, cl 11.

153 Resource Management Act 1991, sch 1, cl 16(1).

154 See Peter Fuller "The Resource Management Act 1991: An Overall Broad Judgment" (2003) 7 NZJEL 243 at 251: "I cite McLean's article at some length because I believe it to be somewhat 'prophetic' in terms of the problems she anticipated would occur in the functioning of the Act."

155 Janet McLean "New Zealand's Resource Management Act 1991: Process with Purpose?" (1992) 7 Otago LR 538 at 543. See also, for much the same sentiment, Stephen McKenzie "The Resource Management Act 1991 and the Practice of Environmental Governance in New Zealand: The Example of Lake Taupo" (2004) 60(1) New Zealand Geographer 18 at 23.

156 Jeffrey Karl McNeill "The Public Value of Regional Government: how New Zealand's regional councils manage the environment" (PhD Thesis, Massey University, 2008) at 35.

high and where effective resolution of ... problems is highly dependent on expert knowledge".¹⁵⁷ Not only does the RMA not outline substantive goals against which to test the application of s 5, but its purpose demands that decision-makers engage in the political, as opposed to expert, task of weighing competing community values. Facilitating community input in the development of local instruments is, therefore, both a fundamental part of achieving the Act's purpose and necessary to give legitimacy to the content of those instruments.

Our conclusion that the process of local plan and policy formulation under the RMA requires political decision-making goes a long way to neutralising the argument that local government lacks the necessary technical expertise to apply s 5.¹⁵⁸ That contention *might* apply to authorities' ability to deal with the biophysical assessments involved in the Act's application,¹⁵⁹ but it cannot apply to the value-laden assessments that are fundamental to the exercise. There might be more in the argument that, in spite of the participatory procedures provided for in the RMA, public apathy undermines the legitimacy that local authorities would otherwise gain.¹⁶⁰ Admittedly, the vast majority of individuals never make submissions on proposed plans or policy statements,¹⁶¹ and the average turn out in local elections hovers around 50 per cent, a substantially lower figure than for national elections.¹⁶²

However, with respect to the limited nature of actual public participation, we need to recognise that a variety of viewpoints can be expressed without hearing from large numbers of individuals.¹⁶³ Crucially, councils also often "spend years researching [and] consulting [on] ... plans prior to their

157 Fritz W Scharpf *Games Real Actors Play: Actor-Centered Institutionalism in Policy Research* (Westview Press, Boulder (CO), 1997) at 153. See McNeill, above n 156, at 35–37 for further discussion of academic literature dealing with institutional legitimacy.

158 See for example Hon Jim Bolger MP (5 December 1989) 503 NZPD 14173 where Bolger made such an argument when the Labour Government first introduced the Resource Management Bill. See also Mairi Jay "Does Practice Make Perfect? Debate about Principles versus Practice in New Zealand Local Government Planning" (1999) 14 *Planning Practice and Research* 467 at 475–477.

159 See *ibid.*

160 See McNeill, above n 156, at 145–147.

161 See Ministry for the Environment *Awareness and Attitude Survey into the Resource Management Act* (Ministry for the Environment, Wellington, 2000) at 26. The survey, commissioned when the majority of local authorities had either finalised or were finalising the first generation of local plans and policy statements found that 90 per cent of respondents had never made a submission on any proposed document.

162 McNeill, above n 156, at 145–146 provides figures for the period 1989–2004.

163 See David Robinson "Public Participation in Environmental Decision-Making" (1993) 10 *Environmental and Planning Law Journal* 320 at 324.

notification".¹⁶⁴ With respect to electoral turn out, the relevant point is that the councillors, who ultimately approve a plan or policy statement, do represent their community in the sense that they *are* elected and can be held to account at the ballot box. It is, moreover, important to keep in mind that the point of comparison is the Environment Court, whose members are unelected and where participation is limited to the litigants.¹⁶⁵ As McLean suggested in 1992, it is the Environment Court's institutional legitimacy that we need to "reconsider" since community representation and participation are central to fulfilling the purpose of the RMA and to legitimising the decisions of those responsible for plan and policy formation.¹⁶⁶

2 *The Environment Court: lacking legitimacy and capacity*

The Environment Court is distinguished from the ordinary courts by its "specialist" nature. Although Environment Judges are barristers and must, for the purposes of appointment, hold warrants as Judges of the District Court,¹⁶⁷ they have a deep interest in, and experience with, resource management issues.¹⁶⁸ Environment Judges usually also sit with two lay Environment Commissioners who are selected on the basis of their background in "relevant specialist areas" related to resource management.^{169,170} However, this part argues, the Environment Court still lacks both the necessary legitimacy and practical capacity to make decisions regarding the substantive content of local RMA instruments.

Proponents of the Environment Court's position fail to satisfactorily ground the Court's extensive powers in a legitimating foundation. As has been argued, the institutional legitimacy of a

164 Ministry for the Environment *Proposed Plan Submission Analysis: a report and good practice guide on the assessment and management of those submissions made under the Resource Management Act leaving significant environmental effects* (Ministry for the Environment, Wellington, 2000) at 16.

165 See Somerville "Risk and the Resource Management Act", above n 95, at 356–357 and the discussion below with respect to the limited ability of court processes to expose all of the information needed to make policy decisions under the RMA.

166 McLean, above n 155, at 543.

167 Resource Management Act 1991, ss 249 and 278.

168 Sheppard, above n 25, at 195.

169 The RMA provides that quorum for Environment Court sittings is, except in a set of narrowly defined circumstances, one Environment Judge and one Environment Commissioner Resource Management Act 1991, s 265(1). But two Commissioners normally sit with a Judge: Daya-Winterbottom "Specialist Courts", above n 144, at 38.

170 Marlene Oliver "Implementing Sustainability – New Zealand's Environment Court-Annexed Mediation" (paper presented to the Indian Society of International Law Fifth International Conference on International Environmental Law, New Delhi, 8–9 December 2007) at 13. See also *Whangamata Marina Society Inc v Attorney-General* [2007] 1 NZLR 252 at [5] (HC); Resource Management Act 1991, s 253.

body responsible for plan and policy development under the RMA rests on community input and representation. But according to former Principal Environment Judge Sheppard, the Environment Court:¹⁷¹

... derives its legitimacy, as do Courts generally, from its independence, its objectivity, and its impartiality. Like other Courts, it is accountable by holding hearings in public, by making public reasoned decisions, by being open to correction of errors of law by the superior Courts, and by being open to criticism[.]

The problem with such an analysis is that it is impossible to argue that the Environment Court's legal skill and judicial objectivity justifies its ability to make decisions which are ultimately about the expression of community values

Sheppard does note that "the opinions of the Commissioners, as informed members of the community, add ... legitimacy to the [Court's] decisions" when it is making value judgments.¹⁷² The Commissioners do have a significant position: they are equally responsible for the Court's decisions and can outvote the Judge.¹⁷³ However, Commissioners are appointed (not elected) for their technical expertise and lack any explicit community mandate.¹⁷⁴ The difference between providing a technically expert view and representing a community perspective is perhaps best illustrated by the comments of one Commissioner, who, on his appointment in 2004, stated his intention to design "practical" solutions for the management of Canterbury's waterways based on his background in hydraulic engineering.¹⁷⁵ He, rightly, in terms of the RMA's wording, did not see representing community values as part of his job description.¹⁷⁶

¹⁷¹ Sheppard, above n 25, at 196. See also RJ Bollard "Politics and planning: the independence of the Environment Court" (2008) 7 BRMB 149 at 150–152 [Bollard "Politics and planning"].

¹⁷² Sheppard, above n 25, at 195.

¹⁷³ See, for example, *Save the Point Inc v Wellington City Council* EC Wellington W087/07, 20 September 2007 where Commissioners Howie and Edmonds went against the opinion of Judge Thompson and refused to grant the necessary resource consents for a marine education centre off Wellington's South Coast. Traditionally, however, the practice has been that the Judge will draft the Court's judgment and have the most dominant voice among the Court's panel. See Birdsong *Adjudicating Sustainability* (1998), above n 2, at 21; Bollard "Politics and planning", above n 171, at 149.

¹⁷⁴ See, for the rules for appointing Environment Commissioners, Resource Management Act 1991, s 254.

¹⁷⁵ Kristi Gray "Pragmatic approach promised for RMA applications, appeals" *The Press* (Christchurch, 6 October 2004) at 6.

¹⁷⁶ The criteria for selecting Environment Commissioners almost exclusively deal with knowledge and experience in specific technical areas (although knowledge of "community affairs" is one factor that the Attorney-General shall have regard to). See Resource Management Act 1991, s 253.

The High Court summed up nicely the effect of locating the Environment Court's legitimacy in its legal and technical expertise when it held that the Court is entitled to impose its views "[in spite of] what the local community thinks or values".¹⁷⁷ The approach fits the Upton-style interpretation of the RMA's purpose, but it is inconsistent with how the Environment Court has actually applied the Act. Section 5 requires decision-makers to weigh, and give effect to, community values. Because the task is a political one, as opposed to expert, the legitimacy of decision-making bodies rests on the extent to which they incorporate and represent community values. Clearly the Environment Court does not meet that test.

In addition to its lack of institutional legitimacy, the Environment Court encounters practical problems with respect to its ability to create robust environmental policy. Under s 32 of the RMA, local authorities (and, by extension, the Environment Court) must carry out an evaluation, considering the alternatives to, and the benefits and costs of, a proposed plan or policy statement. That necessarily calls for the sort of political judgments we have been discussing. But as Somerville has pointed out, courts generally are also ill-suited to undertake such an analysis because, while a robust assessment requires access to a wide range of information, courts "are largely dependent on the evidence and arguments which the parties put before them".¹⁷⁸ The Environment Court is entitled to call for any evidence which it believes will assist it to reach a decision.¹⁷⁹ However, the parties who come before the Court and the evidence they submit set the focus of the proceedings. The Court also lacks both the resources to commission substantial amounts of its own work and the time needed to properly conduct the evaluation due to its heavy caseload.¹⁸⁰

These issues regarding the capacity of the Environment Court, and the scope of its proceedings, are illustrated by the *Okura* and Queenstown landscape decisions that were discussed earlier.¹⁸¹ In *Okura*, for example, neither party elected to advance an argument based on the effect that the location of the metropolitan urban limit would have on property prices. The Court, as a result, did not turn its mind to the issue despite the fact that such effects can be considered because of the RMA's broad definition of "environment",¹⁸² and that the impact on property prices had been one of

177 *Gisborne District Council v Eldamos Investments Ltd* HC Gisborne CIV-2005-485-001241, 26 October 2005 at [42].

178 Somerville "Risk and the Resource Management Act", above n 95, at 356.

179 Resource Management Act 1991, s 276(1)(b).

180 See Somerville "Risk and the Resource Management Act", above n 95, at 356–357; Trevor Daya-Winterbottom "RMA Déjà Vu: Reviewing the Resource Management Act 1991" (2004) 8 NZJEL 209 at 232–233; Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, 2004) at [254]–[256].

181 *Okura*, above n 20; *WESI (No 1)*, above n 45.

182 See K Palmer "Resource Management", above n 14, at [3.29]. See also section IV, subsection B.

the community's main concerns.¹⁸³ In one of the later Queenstown landscape decisions, Judge Jackson, referring the RMA rule that restricts the scope of appeals to specific provisions in the proposed plan or policy statements,¹⁸⁴ reminded the Court of the need to:¹⁸⁵

... bear in mind that ... the hearing conducted by the Environment Court (closer to a common law adversarial hearing than to an inquiry) tends to lead to a disjointed approach to proposed plans rather than a holistic one. Unlike the experts who draft proposed plans for local authorities as a whole ... the Environment Court tends to have only separate parts in issue in any one set of proceedings.

The Environment Court therefore seems to lack both the institutional legitimacy to make substantive decisions regarding the content of local plans and policy statements, and to face significant practical issues that undermine its suitability for the task.

3 *Some suggestions for the Court*

The conclusion that the Environment Court lacks the institutional legitimacy and capacity to make the political judgments needed to write the substantive policy contained in local RMA documents raises the question of what role the Court is suited to when hearing appeals against the content of those instruments. With respect to this question, the ordinary courts' approach to the judicial review of decisions reached by public bodies outside of the RMA context provides some useful guidance.

In an important sense, ordinary courts engaged in the review of administrative decisions take a very different approach from that taken by the Environment Court when hearing appeals against local RMA documents. The Environment Court is free to consider the merits of a local rule or policy and to insert an alternative provision whenever it believes that there is a more appropriate means of achieving sustainable management of natural and physical resources.¹⁸⁶ The ordinary courts are much more restricted in their ability to consider the substantive merits of decisions facing judicial review. In particular, of the three traditional grounds for judicial review,¹⁸⁷ only unreasonableness gives any scope for assessing the substantive merits of the decision and that has

183 Greg Hill "The Effectiveness of the Auckland Metropolitan Urban Limit – Ring-Fencing Urban Development" (paper presented to the Environmental Defence Society Conference, 11–12 June, 2008) at 9–10.

184 A person may only appeal to the Environment Court against a proposed plan or policy statement if they made a submission to the council and may only appeal in respect of a provision to which their submission referred. Resource Management Act 1991, sch 1, cl 14.

185 *WESI (No 2) – Interim*, above n 46, at [25].

186 See Resource Management Act 1991, s 290(1) and the discussion at above n 23.

187 These are illegality, improper procedure and unreasonableness: see *Council of Civil Service Unions v Minister for the Civil Service* [1985] 1 AC 374 at 389 (HL).

historically been a very limited scope.¹⁸⁸ Nevertheless, this subsection suggests that the "sliding-scale" of reasonableness employed by the ordinary courts offers a useful lesson for how the Environment Court's appellate powers could be restricted (either through a change in law or practice).

Historically, the ordinary courts' approach to applying the unreasonableness ground has been highly deferential, only interfering where a decision is "so unreasonable that no reasonable authority could ever have come to it".¹⁸⁹ This approach, however, has been undermined as the courts have increasingly varied the intensity of their review.¹⁹⁰ Recently, the courts have begun "to conceptualise the departure from [the traditional approach] in terms of a sliding-scale of review".¹⁹¹ For the reasons given by the Court of Appeal in *Woolworths*,¹⁹² which were discussed earlier in this paper, the courts have rightly remained deferential where the subject matter of a decision is political or contains a high policy content.¹⁹³ On the other hand, the more "legal" the subject matter, the more willing the courts are to effectively step into the shoes of the original decision-maker and determine the "correctness" of their decision.¹⁹⁴ The analogy may not be totally apt but, as the ordinary courts justify the closer review on the basis that legal questions fall within their realm of expertise, the Environment Court may have an increasingly legitimate claim to decide the content of local government plans as the issues become more technical.

While this paper has focused on those cases of plan and policy design that are clearly political in nature, the Court is asked to decide such technical matters. The Court in *Geotherm Group Ltd v*

188 See Dean R Knight "A Murky Methodology: Standards of Review in Administrative Law" (2008) 6 NZJPI 117 at 120–121 [Knight "Murky Methodology"].

189 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 230 (CA). While seemingly highly deferential, the phrasing is still not as clear as it could be: see Robin Cooke "The Struggle for Simplicity in Administrative Law" in Michael Taggart (ed) *Judicial Review of Administrative Action in the 1980s: Problems and Prospects* (Oxford University Press, Auckland, 1986) 1 at 14–15 where Cooke bemoaned the doctrinal domination of this phrasing: "'So unreasonable that no reasonable authority could come to it' and similar phrases are distracting circumlocutions. Simple and straightforward 'unreasonable' is a strong term; Judges and counsel are not children requiring that to be hammered into them by minatory exaggeration."

190 See Knight "Murky Methodology", above n 188, at 121–122.

191 *Ibid*, at 127. See also Michael Taggart "Administrative Law" [2006] NZ L Rev 75 at 82.

192 See *Woolworths*, above n 71, at 546.

193 See Taggart, above n 191, at 82.

194 *Ibid*, at 84. The closer standards of review tend, in practice, to have been utilised almost solely in cases where fundamental human rights are under threat: see Knight "Murky Methodology", above n 188, at 133–134 and 137. See, for a discussion of the most important rights in this context, Robin Cooke "The Road Ahead for the Common Law" (2004) 53(2) *International and Comparative Law Quarterly* 173 at 176–177.

Waikato Regional Council (Geotherm), for example, faced appeals against policies and rules for managing the extraction of geothermal energy contained in the Waikato Regional Council's regional policy statement and proposed regional plan.¹⁹⁵ Although the Court did choose to amend one policy in the policy statement, it kept the thrust of the Council's policy intact. The Council had proposed a generally phrased policy to "prefer and encourage" reinjection.¹⁹⁶ Its proposed rules, however, had a stronger effect and it became apparent during the hearing that the Council had particularly significant concerns about the effects of energy generators not reinjecting left over fluid.¹⁹⁷ The Court therefore substituted, for the Council's generally worded policy, a policy that required energy producers to develop robust management plans and explicitly spelt out the adverse effects that the Council wished to avoid and which had to be addressed.¹⁹⁸

The Environment Court would obviously need to ensure that it did not stray into the world of political decision-making,¹⁹⁹ but allowing the Court to make the sorts of adjustments that it did in *Geotherm* would give suitable recognition to the expertise that it does have in how best to give practical effect to the political resource management decisions of local authorities. Such an approach is slightly more nuanced than the one unsuccessfully advocated for by the Minister for the Environment's Technical Advisory Group in 2009.²⁰⁰ Although the Group's report was essentially concerned with reducing costs and delays that have become associated with RMA processes, it argued for restrictions on the Environment Court's jurisdiction primarily on constitutional grounds similar to those advanced in this paper. However, the report's suggestion that Parliament restrict the right of appeal regarding the policy content of local government documents to questions of law only would run the risk of impinging on the Environment Court's legitimate functions.²⁰¹ As argued in this paper, the focus need only be on insuring that local authorities have control over the *political* policy decisions involved in the development of local RMA instruments.²⁰²

¹⁹⁵ See *Geotherm*, above n 111, at [1].

¹⁹⁶ *Ibid*, at [91].

¹⁹⁷ See *ibid* for the rules; see *ibid*, at [259] for a summary of the Council's concerns.

¹⁹⁸ *Ibid*, at [260]–[261].

¹⁹⁹ See, for example, the discussion regarding the effect of the Environment Court imposing its radius criterion for the assessment of residential development proposals in section III and section IV, subsection B.

²⁰⁰ Minister for the Environment's Technical Advisory Group, above n 3.

²⁰¹ See *ibid*, at 10.

²⁰² That is not to say that the approach argued for in this paper would be any less controversial and unpalatable to central government than the one advanced by the Minister's Technical Advisory Group: see *ibid* where the report noted that its suggested amendment not be included in the first 2009 RMA reforms as the Group "was conscious of the considerable extent to which the abolition of [the existing] right of appeal may be seen by many as a significant erosion of long held rights".

V Conclusion

Under the RMA's statutory framework, local government has primary responsibility for designing the district and regional plans, and regional policy statements, needed to give practical effect to the Act's overarching goal of promoting the sustainable development of natural and physical resources. These instruments are substantial policy documents. District and regional plans also have a distinctly legislative flavour due to the regulatory force of the rules they contain. The extent of the Environment Court's powers when hearing appeals against the content of local RMA documents is unusual: while other specialist courts have wide discretion when exercising their appellate jurisdiction, the Environment Court is empowered to assume the role of elected authorities and substitute its views on those bodies' policy and quasi-legislative decisions.

The Environment Court's ability to step into the shoes of local authorities and make substantive planning and policy decisions itself is not in keeping with New Zealand's constitutional principles of the rule of law and the separation of powers. At the very least, the rule of law requires an absence of arbitrary power. That is, in turn, facilitated by some form of separation between the functions and personnel of the three branches of government: the executive, the legislature and the judiciary. In tension with the idea that the concentration of power should be avoided, the Environment Court has been more than willing to exercise its extensive powers and to impose its views with respect to the content of rules and policies contained in local RMA documents.

The extent of the Environment Court's appellate jurisdiction is a cause for concern. The courts have always made law and policy through their decisions to some extent. However, questions that require decision-makers to weigh and choose between competing, but equally legitimate, values are political questions that should be left to democratically elected representatives. Those who had the final hand in drafting the RMA believed that its overarching purpose provision of promoting sustainable management established a scheme through which decision-makers were empowered only to establish biophysical bottom lines by applying scientific and other technical expertise. Based on the RMA's wording, the history behind the Act, and the way in which the courts have interpreted it, s 5, however, clearly requires the weighing and expression of community values. The development of local RMA documents, through which those values are primarily expressed, therefore involves political decision-making.

Sustainable management, as articulated in the RMA, does not provide one substantive goal against which compliance can be objectively measured. The legitimacy of those responsible for developing the content of local planning and policy instruments, therefore, rests on the extent to which community views are included in the development process. Only democratically elected local authorities, who formulate their documents through participatory processes can claim that legitimacy. The Environment Court cannot. It also lacks the capacity to make robust policy decisions and so is ill-suited to the task. Instead, the Environment Court's contribution to the substantive content of local plans and policy statements should be limited to the design of technical, as opposed to policy-oriented, provisions.

