BEFORE THE PROPOSED MARLBOROUGH ENVIRONMENT PLAN HEARINGS PANEL AT BLENHEIM

UNDER	the Resource Management Act 1991 (the Act)
IN THE MATTER	of a change to Marlborough's policy statement and plans under the First Schedule to the Act

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MEMORANDUM OF COUNSEL FOR THE MARLBOROUGH AERO CLUB INC.
Dated this 29th day of May 2018

GASCOIGNE WICKS
LAWYERS
BLENHEIM

Solicitors: Quentin A M Davies / Savannah D Carter
(qdavies@gwlaw.co.nz / scarter@gwlaw.co.nz)

Submitter's Solicitors
79 High Street
P O Box 2
BLENHEIM 7240
Tel: (03) 578-4229
Fax: (03) 578-4080

MAY IT PLEASE THE PANEL:

1. During the Marlborough Aero Club Inc's presentation to the Panel on 23 May 2018, there was some discussion as to the jurisdiction of a territorial authority to control the activities of aircraft in relation to noise.

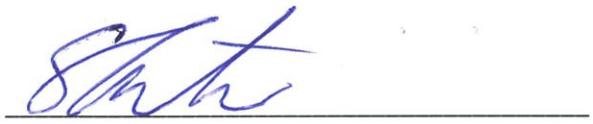
2. Included at **Appendix 1** is the High Court's decision in *Dome Valley District Residents Society Inc v Rodney District Council* [2008] 3 NZLR 821. The discussion at [42]-[43] and [58]-[67] is particularly relevant.

3. Priestley J at [66] held that:

> "...after take-off or landing, and in particular where an aircraft is operating above 500 feet over a rural area or above a thousand feet over a congested area, such aircraft and its effects, in my judgment lie outside the ambit of the [Resource Management] Act ..."

4. We note that *Dome Valley* largely concerns s 9(8) of the Resource Management Act ("the Act"), a provision which was repealed on 30 September 2009.[1] However, s 9(5) of the Act, included on 1 October 2009, is for the current purpose materially the same as the former s 9(8). Therefore, we submit that Priestley J's reasoning and conclusions in *Dome Valley* remain valid and apply to this case.

5. The Council has jurisdiction to control noise from aircraft only in airspace below 500 feet over rural areas, or below 1000 feet over congested areas.[2] While the Council cannot regulate aircraft noise outside of those limits, it is certainly proper for the Council to warn future residents that, in time, they may be subject to aircraft noise which some may consider to be annoying.



Quentin A M Davies / Savannah D Carter

Solicitors for the Marlborough Aero Club Inc.

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[1] Section 9(8) provided: "The application of this section to overflying by aircraft shall be limited to any noise emission controls that may be prescribed by a territorial authority in relation to the use of airports."

[2] Regulation and control of airspace above those limits is the subject of the Civil Aviation Act 1990 and related regulations and rules, per *Dome Valley* at [59].

Appendix 1

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2008-404-000587

UNDER	the Resource Management Act 1981 ("the RMA")
IN THE MATTER OF	an appeal against a decision of the Environment Court under section 299 of the RMA
BETWEEN	THE DOME VALLEY DISTRICT RESIDENTS SOCIETY INCORPORATED Appellant
AND	RODNEY DISTRICT COUNCIL First Respondent
AND	SKYWORK HELICOPTERS LIMITED Second Respondent
AND	Continued on page 2

Hearing: 10 & 11 June 2008

Appearances: MJE Williams for the appellant
W S Loutit & D K Hartley for the first respondent
D A Kirkpatrick for the second respondent
C J Somerville for Transit New Zealand (First intervening party)
R Gardner for Federated Farmers of New Zealand Incorporated (Second intervening party)

Judgment: 1 August 2008

RESERVED JUDGMENT OF PRIESTLEY J

This judgment was delivered by me on 1 August 2008 at 12.00 pm pursuant to Rule 540(4) of the High Court Rules.

Registrar/Deputy Registrar

Date: ……

AND	TRANSIT NEW ZEALAND First Party Intervener
AND	FEDERATED FARMERS OF NEW ZEALAND INCORPORATED Second Party Intervener

Counsel/Solicitors:
MJE Williams, P O Box 106215, Auckland 1143 Email: williams@quaychambers.co.nz
W S Loutit & D K Hartley, Simpson Grierson, Private Bag 92518, Wellesley Street, Auckland 1141
D A Kirkpatrick, p o Box 5844, Wellesley Street, Auckland1001.
Email: david.kirkpatrick@parkchambersd.co.nz.
C J Somerville, Chapman Tripp, P O Box 2206, Auckland 1140. Email: info@chapmantripp.com
R Gardner, Private Bag 92066, Auckland Mail Centre. Email: Rgardner@fedfarm.org.nz

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Introduction

[1] The appellant, the Dome Valley District Residents Society Inc (the Society), is an incorporated society formed to represent and protect the interests of residents in the Dome Valley region north of Warkworth.

[2] The second respondent, Skywork Helicopters Limited (Skywork), currently operates a base at Baddeleys Beach Road on the Takatu Peninsula approximately 12 kms east of Warkworth. For reasons related to a previous resource consent and ensuing litigation in the late 1990s, which do not need to be traversed, Skywork needed to relocate its base.

[3] Skywork, as its name suggests, runs a helicopter business which includes servicing the agricultural industry, transporting passengers, running trips to offshore islands, and the inevitable emergency flights.

[4] Skywork's search for a new base culminated in its purchase of 33.26 hectares of land on the intersection of Goatley Road and State Highway One approximately 3 km north west of Warkworth. It applied to the first respondent, Rodney District Council (RDC), for the necessary resource consent to operate a commercial helicopter base on the new Goatley Road site. RDC granted the application subject to various unexceptional conditions.

[5] The Society was aggrieved by this decision and appealed to the Environment Court. The Court, presided over by Judge Sheppard sitting with two Environment Commissioners, embarked on a five day hearing in September 2007. The main ground for the Society's appeal focused on noise and safety aspects of helicopter operations and the availability of alternative sites. The evidence was that the proposed helicopter base would generate up to a maximum of 60 aircraft movements a day. There would be seasonal variations.

[6] In the Environment Court, RDC supported the grant of the resource consent, as did Federated Farmers of New Zealand and a group called Rodney Economic

Development Trust. Issues of concern to Transit New Zealand were resolved as a result of negotiated revised conditions. Transit New Zealand in any event did not oppose the granting of a consent.

[7] The Environment Court issued its reserved judgment on 14 December 2007. The Society's appeal was disallowed. An appeal by Skywork relating to the storage and handling of aviation fuel was allowed, but this is no longer an issue.

[8] The Society challenges the Environment Court's decision by this appeal under s 299 of the Resource Management Act 1981. It is well settled that an appeal to the High Court can only involve points of law. This Court will not interfere with an Environment Court decision unless it is clear that the law has been misapplied or conclusions reached which are unsupported by the evidence.

[9] The Society no longer grounds its opposition on safety concerns arising out of Skywork's helicopter operations. Mr Williams's submissions for the Society fell into two categories:

a) The correct interpretation and application of ss 9(8) and 104(2) of the Act, the latter provision giving rise to permitted baseline issues.

b) The meaning, intention, and application of aviation zones in various RDC District Plans, linked in part to arguably relevant provisions of the Auckland Regional Policy Statement.

[10] Both RDC and Skywork defended the Environment Court's decision. The two intervening parties, Transit New Zealand and Federated Farmers of New Zealand, appeared through counsel but did not make submissions. Federated Farmers of New Zealand, as in the Environment Court, agreed and adopted the submissions of RDC and Skywork. Transit New Zealand's counsel fulfilled a watching brief. Her interest was to ensure that an imposed condition to RDC's consent, involving the upgrading of the intersections of State Highway One, Goatley Road, and Kaipara Flats Road, was not circumscribed. The Society did not attack the condition in which Transit New Zealand was interested.

The Environment Court's Decision

[11] The Court's decision is comprehensive. At the outset it reviewed the relevant portions of the three applicable planning instruments being the Auckland Regional Policy Statement, and the RDC's operative and proposed District Plans.

[12] It noted that the site for Skywork's proposed helicopter base was in a General Rural Activity Area which, in terms of the operative District Plan, mandated objectives of protection of soil and the general rural character of the area, and maintaining a level of amenity which enabled rural production.

[13] The plan included an infrastructure objective relevant to airfields, being to avoid conflicts between regionally and locally significant infrastructure and adjacent land uses. There was specific policy relating to airfields at Dairy Flat, Parakai, and Kaipara Flats. The Court noted that these provisions were specific to those airfields and did not apply to airfields or heliports generally.

[14] Permitted activities in a General Rural Activity Area, in addition to farm activities, included forestry, horticulture, horse breeding, outdoor recreation, child care, and primary produce sales. Farm airstrips were a permitted activity if more than 2 kms from an urban area.

[15] There was nothing of substantive difference so far as the RDC's proposed District Plan was concerned.

[16] In planning terms, as the Court recognised (at [54]), the proposed helicopter base was a non-complying activity, as was pilot accommodation. A proposed café at the heliport and earthworks were discretionary activities.

[17] The Court correctly stated (at [57]) that the disputes related to noise, safety, effects on landscaping, visual amenity values, effects on rural character, and the availability of alternative sites.

Aircraft Noise

[18] Given the legal issue raised by the Society grounded on s 9(8), I set out the Court's approach:

> [60] In having regard to noise effects of allowing the helicopter base, we need to define the scope of the source of noise to be considered. Is the Court confined to the noise of the activities on land of and associated with the helicopter base, or does the scope of consideration extend to the noise of flying helicopters approaching or departing from the heliport?
>
> [61] That question was not directly addressed in the cases of the parties. However we have to state our understanding of the position, so the parties are able to discern the basis for our findings on the issue of noise effects.
>
> [62] Skywork's resource-consent application is for a land-use activity. Section 9 is the principal provision in the Act governing land-use activities. Subsection (8) states that the application of that section to overflying of aircraft is limited to any noise emission controls prescribed by a territorial authority in relation to the use of airports.
>
> …
>
> [64] There is a general provision about unreasonable noise in section 16 of the Act. It imposes a duty to adopt the best practicable option to ensure that the emission of noise does not exceed a reasonable level. That duty is cast on every occupier of land, and on every person carrying out an activity in, on, or under a water body or the coastal marine area. It does not extend to a person operating a helicopter or other aircraft while it is airborne.
>
> [65] Another provision of the Act about noise is section 326, which deals with excessive noise. That section expressly excludes noise emitted by an aircraft being operated during, or immediately before or after, flight.
>
> [66] The principal provision in the Act about deciding resource-consent applications is section 104 which, by subsection (1) directs a consent authority considering such an application to have regard to any actual and potential effects on the environment of allowing the activity for which consent is sought. Unlike sections 9, 16, and 326, the general words "effects on the environment" are not expressly limited so as to exclude effects created by airborne or overflying aircraft. The meaning given by section 3 to the term 'effect' does not hint at excluding effects created by airborne or overflying aircraft from its intended scope.
>
> [67] Read on their own, the words of section 104(1) "actual and potential effects on the environment of allowing the activity" are capable of extending to the noise created by aircraft approaching or departing from a helicopter base that is the activity for which consent is sought.
>
> [68] However to give those words that scope would not be consistent with the context in which control of land-use activities does not apply to overflying or aircraft other than noise emission controls prescribed in

> relation to the use of airports; nor would it be consistent with excluding from the general duty to ensure that emission of noise does not exceed a reasonable level a person operating a helicopter or other aircraft while airborne; nor consistent with exempting from the control of excessive noise any noise emitted by an aircraft being operated during, or immediately before or after, flight.
>
> [69] So, reading section 104(1) in its context, we infer that the scope of effects of allowing a helicopter base activity to which consent authorities are to have regard includes the noise of helicopters in the course of landing at the base, on the ground, and in the course of departing from the base; but is not intended to extend to effects generated by helicopters (or other aircraft) while airborne or in flight. That is our understanding of how section 104(1) applies to Skywork's application.

[19] The Court then went on to consider evidence related to noise. In this area it had been assisted by the evidence of three acoustic experts. RDC's District Plans made no provision for helicopter noise control. On the basis of the experts' evidence the Court adopted as the acceptable noise limit in a rural land use area as that specified in New Zealand Standard NZS6807 (contained in *1994 Noise Management and Land Use Planning for Helicopter Landing Areas*). NZS6807 also specified maximum night-time sound limits.

[20] The Court went on to consider emergency helicopter operations (which would include helicopter rescues in life-threatening situations, medical emergencies, and police, fire, and civil defence emergencies). It referred to *MacIntyre v Christchurch City Council* [1996] NZRMA 289 as authority for the proposition that a New Zealand Standard was not binding or decisive for the purpose of deciding a Resource Management application, but was nonetheless, (at [104]), a guideline for limits of acceptable noise.

[21] On the noise issue the Court concluded:

> [110] We collect together our findings on noise effects:
>
> (a) In considering actual and potential effects on the environment of allowing the activity, the Court is to have regard to the noise of helicopters in the course of landing at the base, on the ground, and in the course of departing from the base, but not effects generated by helicopters (or other aircraft) while airborne or in flight.
>
> (b) That NZS6807 should be used for assessing noise effects of the proposal.

(c) That the helicopter base could be operated within the daytime limits set by NZS6807.

(d) For emergency operations, Condition 15a proposed by Skywork should be imposed; and for night-time operations, Condition 20 should be imposed.

(e) That operation of the proposed helicopter base within the limits set by NZS6807 and in compliance with the consent conditions that Skywork proposed would not have significant adverse noise effects on the environment.

(f) That noise associated with the development of the proposed heliport would be a transient activity able to be undertaken within the noise limits recommended in *NZS 6803:1999 Acoustics-Construction Noise*, and would have only minor effect on the environment.

[22] The Court then approached the issue, of importance to the Society and central to its appeal, of noise generated by helicopters after take-off and before landing during flight phases governed by the Civil Aviation Rules. Such Rules, to the validity of which there is no challenge, are authorised under Part 3 of the Civil Aviation Act 1990. In particular an aircraft must not be operated under a height of 500 feet above the surface of an area which is not "congested", which would be the position with Skywork's proposed base (Civil Aviation Rule 91.311(a)(2)).

[23] The Court had before it evidence that helicopters using the proposed base would be able to achieve a 500-foot altitude above ground at the boundaries of the site if necessary, although Civil Aviation Administration Rules permitted altitudes below 500 feet at site boundaries for take-off and landing purposes.

[24] Additionally the Court had before it unchallenged evidence of a December 2005 determination of the Civil Aviation Administration which concluded that helicopter operation at the proposed heliport was in accordance with Rule 91 requirements and would not increase the risk to the public or property on the ground. On this aspect the Court referred to the High Court authority *Director of Civil Aviation v Planning Tribunal* [1997] NZRMA 513 to the effect that under the Resource Management Act, a decision maker was required to consider air safety, particularly as it affected communities. Although the Civil Aviation Act determination would normally satisfy a consent authority it was open to that authority to require a higher degree of safety.

[25] The Court, when considering the 500-foot altitude provision contained in the Civil Aviation Rules, was doing so in the context of safety rather than noise. The Society is not pursuing the safety issue on this appeal. Nonetheless the Civil Aviation Rule covering height requirements has relevance to the appellant's argument.

[26] After considering other effects of the proposed helicopter base, not relevant here, the Court considered the issue of alternative sites raised by the Society. The Society had submitted that because of significant adverse effects caused by the combination of commercial flights and emergency flights, alternative sites should be considered as a measure to avoid those adverse effects.

[27] The Society did not cite any authority for that proposition. Counsel for Skyworks and RDC in the Environment Court submitted, with authorities, that essentially the Court had to examine the merits of a specific proposal, undeflected by alternative sites. On this issue the Court resolved:

> [202] On our understanding of the law, it is not for us to make a finding about the availability or unavailability of alternative sites for Skywork's helicopter base. Accordingly we do not address the evidence on that topic; and leave for possibly another occasion the subsidiary question whether land the owner of which does not choose to have used for the activity in question can qualify as an available alternative site.

[28] Finally the Court turned to matters arising out of the RDC's operative District Plan and found Skywork's proposal was not contrary to the objectives and policies of the operative Plan and indeed would serve some of them (at [218]). The Court did not consider that the special zones for North Shore airfield at Dairy Flat and for Kaipara Flats airfield precluded the location of another airfield elsewhere, given RDC's District Plan. So far as RDC's proposed District Plan was concerned a heliport was not prohibited.

Permitted Baseline

[29] The Court next addressed s 104(2) and the so-called permitted baseline. The Court, with reference to two High Court decisions, *Rodney District Council v Eyres*

Eco-park Limited [2007] NZRMA 1 and *Tairua Marine v Waikato Regional Council* (HC AK CIV 2005-485-1490, 29 June 2006, Asher J) reminded itself (at [256]) that although the power to disregard baseline effects was discretionary, not mandatory, such power was not to be summarily neglected. A deliberate choice was required whether or not to exercise the power.

[30] I set out, because the Society is attacking the Court's approach, its reasoning in this area:

> The permitted activities
>
> [259] Earlier in this decision we identified the activities classified as permitted in the General Rural Activity Area by the operative district plan, and in the General Rural Zone by the proposed district plan. Relevantly, those common to both include farm activities, forestry, and child care for up to 10 children at a time; and farm airstrips that are more than 2 kilometres from an urban area.
>
> Adverse effects of permitted activities
>
> [260] Skywork's site being more than 2 kilometres from the Warkworth urban area, the effects of aircraft taking off and landing on a farm airstrip on the site qualify for consideration. When harvesting is undertaken, forestry activities have noise effects of harvesting machinery. Forestry, greenhouses and child-care activities can all generate multiple traffic movements.
>
> Effect of proposed activity
>
> [261] The proposed helicopter base would generate noise of helicopter engines when landing, when standing on the pad with engines idling, and when lifting off. Those engine noise effects would be generally similar in kind to those of forestry harvesting, and of a farm airstrip.
>
> [262] The proposed heliport would generate multiple vehicle movements, and those effects would be generally similar in kind to those generated by farm activities, forestry, and child care facilities. The heliport would also store agri-chemicals and fuel. Any effects of storing them would be generally similar in kind to those generated by storage of agri-chemicals and fuel in course of farm activities.
>
> Whether baseline effects should be disregarded
>
> [263] We have to exercise a discretion whether to disregard effects of the proposal that are effects of activity permitted by the plan.
>
> [264] Discretionary powers conferred by Parliament are to be exercised for the purpose for which the discretion was conferred. It is our understanding that the reason for the power to disregard the effects of permitted activities is that those effects are regarded as contributing to the character of environment. As the environment is treated as potentially including those

> effects, allowing the activity in question would not adversely impact on the environment.
>
> [265] We have identified effects of the proposal that would also be effects of permitted activities. Section 104(2) does not call for comparison of intensity and scale of effects, even though the preceding common-law permitted baseline practice did. Some effects of the proposal may differ in degree from those of baseline activities, but the evidence does not establish that the differences would be significant. In our opinion, exercising the power to disregard those effects would serve the purpose for which the power to do so is conferred (in that they are deemed to contribute to the character of the neighbourhood). To have regard to those effects, even though they are also effects of activities that the district plan permits on the site, would not serve the purpose for which the discretion was conferred.
>
> Finding on application of section 104(2)
>
> [266] In short, it is our judgement that in the circumstances we should exercise the power to disregard the effects of the activity that would be effects of activities on the site that the plan permits: namely, those of noise of helicopter engines, of multiple vehicle movements, and of storage of agri-chemicals, and of storage of fuel.

[31] Turning to the environmental effects of the heliport proposal as s 104(1)(a) required it to do, the Court held (at [273] and [290]) that the proposed activity would not have any significant actual or potential adverse effect on the environment. The Court was also satisfied, in terms of the s 104D(1)(a) requirement, that the adverse effects of the activity on the environment would be minor.

[32] Finally, the Court, turning to an evaluative judgment, decided:

> [308] The RMA has a single purpose, stated in section 5(1), of promoting the sustainable management of natural and physical resources. What is meant by sustainable management is explained in section 5(2).
>
> [309] On the basis of the findings stated in this document, we find that the proposed heliport would represent use, development and protection of resources in a way which enables people and communities to provide for their social and economic wellbeing and for their health and safety, while avoiding remedying and mitigating any adverse effects of the activities on the environment. We also find that it would not hinder the sustaining of the potential of resources to meet needs of future generations; nor would it hinder the safeguarding of the life-supporting capacity of air, water, soil or ecosystems.
>
> [310] In short, the proposal would serve the promoting of sustainable management of resources.

> [311] So we judge that the purpose of the RMA would be better served by granting resource consent for the heliport proposal, and imposing the proposed consent conditions, than by refusing it.

[33] Although I have devoted considerable space in this judgment to replicating relevant extracts from the Court's December 2007 decision, I do so deliberately and unashamedly. I consider the Court's judgment is comprehensive, clear, and compellingly reasoned. It is thus best to let the Court speak in its own words.

[34] That view is not, of course shared by the Society. I thus turn to the appellant's points of law.

Noise and s 9(8)

[35] Put in broad and simple terms, the grievance of the Society (and its members) is that Skywork's proposed heliport will inevitably generate air traffic. The Civil Aviation Rule 500-foot restriction, which led the Court to concerning itself solely with take off and landing noise, has resulted in the Court failing to consider the adverse effects on residents of helicopters tracking to and from the heliport at all points of the compass, thus inflicting the distinctive noise generated by helicopters' engines and blades on people living in the surrounding district.

[36] This concern underlies the Society's submissions in two areas. The first relates to the correct interpretation and application of s 9(8). The second relates to the correct interpretation and application of s 104(2) and the permitted baseline.

[37] Mr Williams submitted that this appeal was the first occasion the High Court had been asked to address the meaning and effect of s 9(8).

[38] Section 9 sits in Part 3 of the Act which is headed "Duties and restrictions under this Act". Sub-headings of that Part are land (s 9 being included under that sub-heading), coastal marine areas, river and lake beds, water, discharges, noise, adverse effects, recognised customary activities, emergencies, effect of certain changes to plans, and miscellaneous. Section 104 sits in Part 6 headed "Resource consents".

[39] Section 9 relevantly provides:

> **9 Restrictions on use of land**
>
> (1) No person may use any land in a manner that contravenes a rule in a district plan or proposed district plan unless the activity is—
>
> (a) Expressly allowed by a resource consent granted by the territorial authority responsible for the plan; or
>
> (b) An existing use allowed by [section 10 or section 10A].
>
> …
>
> (4) In this section, the word **use** in relation to any land means—
>
> (a) Any use, erection, reconstruction, placement, alteration, extension, removal, or demolition of any structure or part of any structure in, on, under, or over the land; or
>
> (b) Any excavation, drilling, tunnelling, or other disturbance of the land; or
>
> (c) Any destruction of, damage to, or disturbance of, the habitats of plants or animals in, on, or under the land; or
>
> (d) Any deposit of any substance in, on, or under the land; or
>
> [(da) Any entry on to, or passing across, the surface of water in any lake or river; or]
>
> (e) Any other use of land—
>
> and may use has a corresponding meaning.
>
> …
>
> [(8) The application of this section to overflying by aircraft shall be limited to any noise emission controls that may be prescribed by a territorial authority in relation to the use of airports.]

Section 9(8) was enacted by s 6(4) of the Resource Management Amendment Act 1993.

[40] There are clear conceptual difficulties which flow from s 9(8) being part of a section dealing generally with restrictions on land use. But a reading of s 9(8) suggests that a territorial authority's power to regulate or restrict overflying aircraft is solely limited to noise emission controls for airport use.

[41] Despite the arguably odd placement of s 9(8) in the statutory scheme, an identical provision, s 12(5), appears in s 12 relating to restrictions on the use of coastal marine areas sitting in a three section subpart headed "coastal marine area".

[42] Such a restriction on territorial authorities makes sense. The Resource Management Act does not empower local bodies to attempt to regulate the noise emitted by aircraft flying between two points within New Zealand or aircraft flying on international routes through New Zealand's air space. It would be a nonsense to suggest that local bodies lying underneath the route of an aircraft flying from Auckland to Christchurch or from Santiago to Melbourne were empowered to impose noise, or any other restrictions.

[43] It is also obvious that, for all practical purposes, an overflying aircraft has absolutely nothing to do with land use. Nor has a land owner or occupier any control over the random and momentary intrusion of an aircraft into his or her air space.

[44] Mr Williams correctly observed that ss 9(1) and 9(8) are differently worded and conceptually different. In Mr Williams's submission a purpose of s 9(8) was to ensure that overflying aircraft are not inadvertently caught by general noise standards of districts (other than in relation to airport use). Alternatively the provision could have the wider purpose of ensuring that District Plans do not attempt to regulate aircraft overflying as an activity. Counsel submitted that such interpretations were consistent with s 326(1)(a) which excluded from the defined term "excessive noise" noise emitted by aircraft during, or immediately before or after flight.

[45] The Parliamentary history of the 1993 amendment sheds no light on the topic. Mr Kirkpatrick submitted that the origins of s 9(8) stemmed from a September 1992 Environment Court decision, *Williams v Air New Zealand Limited*, Decision C88/92 which related to enforcement proceedings targeting aircraft noise in the Whakatipu Basin grounded on a previous version of s 373(3). The provision was amended by clause 2 of the Resource Management (Transitional Provisions) Regulations (No. 3). That amendment was itself repealed by s 169(2) of the Resource Management

Amendment Act 1993 which, by s 6(4), enacted what is now s 9(8). Mr Williams for his part accepted that legislative history.

[46] I return to the ambit of s 9(8) in the context of this appeal later in this judgment (infra [53]).

Aircraft Noise and Permitted Baseline

[47] Section 104 relevantly provides:

> **104 Consideration of applications**
>
> (1) When considering an application for a resource consent and any submissions received, the consent authority must, subject to Part 2, have regard to -
>
> (a) any actual and potential effects on the environment of allowing the activity: and
>
> (b) any relevant provisions of –
>
> (i) a national policy statement:
>
> (ii) a New Zealand coastal policy statement:
>
> (iii) a regional policy statement or proposed regional policy statement
>
> (iv) a plan or proposed plan; and
>
> (c) any other matter the consent authority considers relevant and reasonably necessary to determine the application.
>
> (2) When forming an opinion for the purposes of subsection (1)(a), a consent authority may disregard an adverse effect of the activity on the environment if the plan permits an activity with that effect.

[48] Relevant too and linked to s 104(2) is the so-called gateway provision, s 104D:

> **104D Particular restrictions for non-complying activities**
>
> (1) Despite any decision made for the purpose of section 93 in relation to minor effects, a consent authority may grant a resource consent for a non-complying activity only if it is satisfied that either—
>
> (a) the adverse effects of the activity on the environment (other than any effect to which section 104(3)(b) applies) will be minor; or

(b) the application is for an activity that will not be contrary to the objectives and policies of—

(i) the relevant plan, if there is a plan but no proposed plan in respect of the activity; or

(ii) the relevant proposed plan, if there is a proposed plan but no relevant plan in respect of the activity; or

(iii) both the relevant plan and the relevant proposed plan, if there is both a plan and a proposed plan in respect of the activity.

(2) To avoid doubt, section 104(2) applies to the determination of an application for a non-complying activity.

[49] Section 104(2), in its current form, was enacted in August 2003 in the wake of the Court of Appeal's judgment *Arrigato v Auckland Regional Council* [2002] 1 NZLR 323. The Court of Appeal, referring to earlier judgments said:

> [29] Thus the permitted baseline in terms of *Bayley*, as supplemented by *Smith Chilcott Ltd*, is the existing environment overlaid with such relevant activity (not being a fanciful activity) as is permitted by the plan. Thus, if the activity permitted by the plan will create some adverse effect on the environment, that adverse effect does not count in the ss 104 and 105 assessments. It is part of the permitted baseline in the sense that it is deemed to be already affecting the environment or, if you like, it is not a relevant adverse effect. The consequence is that only other or further adverse effects emanating from the proposal under consideration are brought to account.

[50] As noted by Allan J in *Rodney District Council v Eyres Eco-park Limited* [2007] NZRMA 1 at [28], s 104(2) enacts a discretion where none formerly existed.

[51] Rather than embark on my own analysis of the permitted baseline concept and s 104(2), I adopt, with respect, the analysis of Asher J in *Tairua Marine Limited v Waikato Regional Council* (HC AK CIV 2005-485-1490, 29 June 2006), an appeal relating to a Marina zone.

> [37] The concept behind the phrase "permitted baseline" as used in resource management cases, is that the position against which actual and potential effects of proposed activity is judged, is that which has either been lawfully done on the land or could be lawfully done on the land under the relevant planning instruments. The principle has been applied for many years, and was articulated in this way by the Court of Appeal in *Bayley v Manukau City Council* at 576:
>
> > The appropriate comparison of the activity for which the consent is sought is with what either is being lawfully done on the land or

> could be done there as of right. In the present case the starting point is that business activities are permitted.

[38] It has been clarified since, that the comparison must not be to some purely hypothetical possibility that is "fanciful" (*Smith Chilcott Ltd v Auckland City Council* [2001] 3 NZLR 473.

…

[43] In urging a flexible approach [counsel] also relied on *Rodney District Council v Eyres Eco-Park Ltd* (High Court Auckland CIV-2005-485-33 13 March 2006 Allan J). It was noted in that case that s 104(2) was not intended to take effect in total substitution for the baseline principle as it had been developed by the Courts (para [28]). Section 104(2) appears to have as its purpose the introduction of a discretion as to the application of a permitted baseline. It was not clear to that point that the discretion formally existed. The Court did however note that the section did limit:

> … the permitted baseline to the effects of activities permitted by the plan. To that extent it has modified the common law approach …

…

[45] I do not accept that restricted discretion or discretionary activities can in any formal way be regarded as part of the permitted baseline. That is because they are not permitted. The concept behind restricted activities is different from that of a permitted activity. Rather than being allowed as of right, they are only allowed on certain terms. Those terms and criteria cannot be regarded as qualified or weakened by the existence of the underlying marina zoning. They must be given their full force and effect. To do otherwise would be to blur the distinction between a permitted activity and a discretionary activity. There can not be a "halfway house" baseline, placing underlying and specific zonings into a category of their own. The time for setting the rules and tests that are to apply, and to create permitted activities that can be considered as part of the baseline, is when the plan is created.

…

[47] This approach to the "permitted baseline" concept is consistent with the wording of s 104(2), which refers only to disregarding an adverse activity if the plan "permits" an activity with that effect. I accept that the Resource Management Act is not a code and that s 104(2) should not be seen as necessarily limiting the application of the permitted baseline concept. However, the subsection does confirm the essential limit which is referred to in the leading cases, which is that it is permitted activities and only permitted activities which form part of the baseline, and not other activities of a different category.

[52] The Environment Court's approach to the permitted baseline concept in the context of the proposed helicopter base is apparent at [261] – [266] of its judgment (supra [30]).

Discussion

Overflying aircraft noise s9(8), and permitted baseline

[53] I intend no disrespect to counsel's detailed and helpful submissions by dealing with the substantive points of the appeal in relatively short order.

[54] The Society's understandable opposition is to the creation of Skywork's helicopter base in its proposed location. The base obviously (and there can be no dispute about this) will be the focus of arriving and departing helicopters. Mr Kirkpatrick accepted that this feature of a heliport was undoubtedly a land use issue.

[55] The Society's concern is that up to 60 helicopter movements a day will create noise. Such noise is not just limited to take-offs and landings at the base. Importantly it is the generated noise of approaching and departing helicopters along whatever flight path they may be using. Additionally, night movements, including emergency helicopter flights, will disturb sleep.

[56] Mr Williams's argument was the Court had erred by seizing on s 9(8) to ignore the noise and effects of overflying aircraft, and had further ignored the noise and its effects for permitted baseline and s 104(2) purposes.

[57] Although I have every sympathy with the concerns of the residents the Society represents, I do not consider the Court has erred. Accordingly I reject Mr Williams's submissions in that regard.

[58] My reasons for doing so follow. First I do not consider that the discrete activity of overflying aircraft fits easily inside the s 5 purpose of the Resource Management Act, being the promotion of sustainable management of natural and physical resources.

[59] Next, as a matter of legislative commonsense, it seems to me that the entire field of overflying aircraft, its regulation and control, is properly the subject of the Civil Aviation Act 1990 and related regulations and rules.

[60] Next, once airborne and lawfully flying above land owned by a person or under a territorial authority's jurisdiction, it is a nonsense to suggest the aircraft is somehow engaged in a s 9(1) "use of land". In particular the action of an overflying aircraft is clearly not caught by the s 9(4) definition of "use" which is terrestrially based.

[61] Such an approach is consistent with the manner in which the law has, for many years, regarded overflying aircraft. The technical trespass to land which might flow from an intrusion into the airspace of an individual owner arising out of the *cuius est solum, eius usque ad coelum et ad inferos* maxim is long gone so far as overflying aircraft are concerned. (See generally s 97(2) Civil Aviation Act 1990; *Pickering v Rudd* (1815) 4 Camp 219 for a balloon; *Bernstein of Leigh (Baron) v Skyviews & General Ltd* [1978] 1 QB 479; *Commissioner for Railways v Valuer-General* [1974] AC 328 (PC) per Lord Wilberforce at 351; and the rejection by the United States Supreme Court of the maxim as having no place in the modern world, the air being a public highway, *United States and Causby* (1946) 328 US 256 at 260 – 261.)

[62] There is, despite its somewhat odd placement in Part 3 of the Act, a clear expression of Parliamentary intention in s 9(8). Although, for the reasons I have just stated, it is not easy to see how an overflying aircraft can be the subject of "restrictions on use of land", (the s 9 heading), nonetheless s (9) and particularly the prohibitions enacted by ss 9(1), and (3) cannot, as a matter of statutory policy, extend to overflying aircraft *except* in the area of noise emission controls imposed in relation to airport use.

[63] I have not overlooked the s 2 definition of "land" which includes the air space above land. I do not consider, for the reasons already stated, that the ambit of "air space" for Resource Management Act purposes extends to air space into which an overflying aircraft intrudes.

[64] A considerable body of Environment Court jurisprudence is now in place which seems to accept that s 9(8) means what it says and that overflying aircraft cannot properly be the subject of resource consent and controls (see *Glenntanner*

Park (Mt Cook) Limited v MacKenzie District Council, Decision W50/94; *Aviation Activities Limited v MacKenzie District Council*, Decision C72/2000; *Re an Application by Kaikoura District Council*, Decision C119/02; *Hororata Concerned Citizens v Canterbury Gliding Club Inc*, Decision C185/2004).

[65] None of those judgments are binding on me. Nor has the ambit of s 9(8) been the subject to any appellate authority. Nonetheless, the pointers are all in the same direction. In my judgment it would be a novel proposition that a territorial authority or the granter of a resource consent was able to use Resource Management Act powers to limit in some way the activities of overflying aircraft lawfully exercising a right of passage under New Zealand's aviation law.

[66] As in so many areas of the law, arbitrary lines have to be drawn. The issue of whether land can be used for an airport, aerodrome, or heliport is a resource consent issue. So too, clearly in terms of s 9(8) and other provisions, is the issue of control of noise emission generated by an airport. But after take off or landing, and in particular where an aircraft is operating above 500 feet over a rural area or above a thousand feet over a congested area, such aircraft and its effects, in my judgment lie outside the ambit of the Act and the resource consent process.

[67] That conclusion, and in particular the drawn line, may be scant comfort to the Society and its members. There can be no disputing the proposition that Skywork's proposed helicopter base will attract overflying aircraft with the resulting helicopter noise and its occasional disturbance. It would be open to RDC to impose additional noise emission controls if it felt appropriate. It would be open to RDC, if it felt some useful social or demographic purpose was served thereby, to prohibit airfields and helicopter bases in certain areas under its relevant Plans. But none of these ameliorating possibilities are currently available to affected residents.

[68] The conclusion I have reached with regard to overflying aircraft must inevitably apply to s 104 and 104D assessments. The actual and potential environmental effects (s 104(1)(a)) of overflying aircraft, and the adverse effects (their noise) for s 104(2) and baseline purposes, have no relevance. Overflying

aircraft is not and cannot be an activity permitted by the Plan. Nor was the consent authority, for s 104D purposes, granting a resource consent to overflying aircraft.

[69] So my conclusion, for these reasons, is that the Court has not erred in the application of the law in these areas.

[70] Different considerations, of course, obviously apply to the noise generated by aircraft approaching and departing from the heliport under the 500-foot restriction. The Court has correctly and properly assessed that activity and its effects (supra [30]). On the basis of evidence before it, the Court was satisfied that NZS6807 provided appropriate and acceptable mitigation of the effects of noise. On the permitted baseline issue the Court turned its mind to other permitted activities under both RDC's operative District Plan and proposed District Plan, including forestry, farm activities, farm airstrips, and child care. It found that the effect of helicopter engine noise at the heliport would be generally similar to permitted noises of forestry harvesting and air strips.

[71] Section 104D(2) makes it clear that s 104(2) applies to applications (which Skywork's was) for consent to a non-complying activity. Section 104D(1)(a) stipulates that a consent authority may grant a non-complying resource consent only if it is satisfied the adverse effects will be minor.

[72] There is some discussion and criticism that the Judge (for instance at [265]) referred to effects as not being "significant" rather than "minor". I do not consider, given the context and reasoning of the Court, that the use of the words "not significant" constitutes an error of law. Particularly in the context of what the Court had to decide I would for my part regard "not significant", "insignificant", and "minor" as synonymous.

[73] All counsel referred me to a judgment of Frater J, binding at the time on the Environment Court, *Auckland Regional Council v Living Earth Limited* (HC AK CIV 2006-404-006659, 26 June 2007). Her Honour there (at [85]) opined that in a baseline assessment a comparison of scale, intensity, duration, and frequency was

irrelevant provided a consent authority was satisfied a permitted activity and a proposed activity produced adverse effects of the same type.

[74] I gather that judgment is subject to appeal to the Court of Appeal. I do not consider the judgment, whether it be right or wrong in the area of a comparison of effects, is determinative here. I accept the Court's assessment that the adverse effects of permitted activities which are considered for s 104(2) purposes, such as aircraft noise from farm air strips, and the noise of agricultural, and forestry machinery were qualitatively similar to the adverse effects of which the Society complained. The difference in noises of this type would not be significant.

[75] On the issue of the discretion (at [264] and [266]) the Court considered that the effects of the heliport activity could be disregarded on the basis (at [265]) that any differences from other baseline activities were not significant and that other baseline activities contributed to the neighbourhood's character.

[76] In this area I consider an experienced Environment Court Judge has exercised a planning judgment on proper grounds. I see no basis at law to interfere with it.

Relevant Provisions of Rodney District Plans

[77] I now turn to other alleged areas of law raised by the Society's counsel.

[78] At [215] of its decision the Court stated there was no intention in RDC's Operative District Plan to provide for aviation activities by way of special zoning. Nor was there any such intention discernible in the Proposed District Plan (at [236]). The Court further stated (at [284]), rejecting the Society's submission before it, that it did not consider granting consent for a non-complying activity would set an adverse precedent or undermine public confidence in the integrity of the District Plan and its administration. The Court saw the case as one where the Plan made no provision for new activities of this kind (a heliport or airfield) in any zone. Thus, since the Act provided for resource consent applications for non-complying activities, it did not follow an undesirable precedent was being set.

[79] Mr Williams acknowledged that the Court had carefully analysed the objectives and policies of the operative and proposed District Plans. He also accepted that the Court's analysis had included discussion of the special zones relating to the Dairy Flat and Kaipara Flats' airfields. But in counsel's submission, in rejecting the submission made to it that the existence of special zones for two aerodromes evidenced a policy that aviation activities should generally be provided for by a special zone, the Court had erred.

[80] In particular it had ignored a previous High Court decision (involving Skywork as a party), *Heaney v Rodney District Council* (HC AK CIV 2003-404-3480, 16 March 2004, Gendall J). The Judge in *Heaney* held it to be an "inexplicable" error of law of material significance (at [48]) that provision of a base for commercial helicopter operations was a non-complying activity in all parts of the District and an arguably necessary activity, when in fact the relevant Plans would have permitted commercial helicopter operations as part of the special zonings. In Mr Williams's submission the Court had repeated the same error in this case.

[81] I accept the proposition that a total misinterpretation of the provisions of a District Plan may constitute an error of law. But, as Mr Williams accepted in his submissions, there has been no mis-statement here by the Court of RDC's relevant Plans. The Court was clearly aware that the proposed helicopter base of Skywork was a non-complying activity in the zone in question. It was also clearly aware of special zones which related to existing airfields (not farm air strips) which had been operating for many years.

[82] The legal relevance of District Plan objectives and policies has been succinctly stated by Cooper J in *Rodney District Council v Gould* [2006] NZRMA 217;

> [99] The Resource Management Act itself makes no reference to the integrity of planning instruments. Neither does it refer to coherence, public confidence in the administration of the district plan or precedent. Those are all concepts which have been supplied by Court decisions endeavouring to articulate a principled approach to the consideration of district plan objectives and policies whether under s104(1)(d) or s105(2A)(b) and their predecessors. No doubt the concepts are useful for that purpose but their absence from the statute strongly suggests that their application in any given case is not mandatory. In my view, a reasoned decision which held that a

> particular non-complying activity proposal was not contrary to district plan objectives and policies could not be criticised for legal error simply on the basis that it had omitted reference to district plan coherence, integrity, public confidence in the plan's administration, or even precedent. Consequently, I am not prepared to hold that the Environment Court erred in any way by "fusing its consideration of plan integrity and precedent (failing to separately consider each doctrine)" as the Council alleges. Neither do I think that it was obliged to make a specific finding on plan integrity, or as to whether public confidence in the administration of the relevant planning instruments would be shaken or challenged, which are the subject of separate questions raised by the appeal under this heading.

[83] Nor, with respect, can I discern how the error of law articulated by Gendall J in *Heaney* had resulted in a wrong decision. My reservations, such as they are, are echoed in a respectful and cautious assessment of *Heaney* by Cooper J in *Rodney District Council v Gould* (op cit). The Judge's circumspection was doubtless attributable to the fact that he was unsuccessful counsel in *Heaney*:

> [47] …There, the High Court was able to conclude that the Environment Court had wrongly held in one part of its decision that there was no provision in the district plan for new helicopter operations of the kind proposed, when in other parts of its decision it had recognised that there were such provisions. Because the former conclusion was material to the Environment Court's reasoning and was held to be incorrect, Gendall J concluded that an error of law had "inexplicably" occurred, even though in other parts of the decision the Environment Court had referred to the correct position: see paragraphs [43] to [49] of the decision.

[84] I need not attack or revisit *Heaney* to decide this limb of the Society's case. The error identified by Gendall J in *Heaney* was, as the Judge said, repeated three times. In its decision before me the Court clearly set out the correct position so far as RDC's Operative and Proposed Plans were concerned and the special airfield zones.

[85] On the issue of the precedent effect of its decision the Court said:

> [284] We accept the possibility that if consent is granted to this proposal, in future another broadly similar application might be made for an airfield or heliport in the Rural General zone based on similar grounds. However in this case, the plan makes no provision for new activities of those kinds in any zone; and the Act provides for resource-consent applications to be made for non-complying activities. So we do not accept that the making of a hypothetical further application, and relying on consent for the Skywork heliport, would justify any lack of public confidence in the integrity of the district plan or in its consistent administration.

[86] At a superficial level it might be said that the words "in any zone" in the fifth line had (as in *Heaney*) read down the significance of the special zone. Mr Loutit submitted that [284] would have been clearer if the words "on new sites" had been added after the words "new activities". That is correct. However, for my part I do not consider that any reasonable reader of [267] to [285] of the Court's judgment, particularly given the careful and correct analysis of the relevant RDC plans contained between [210] and [252], could reach the conclusion the Court, at [284], had suddenly overlooked the aspect of permitted aviation activities in special zones and plunged into error.

[87] I thus reject the Society's submissions on this alleged error of law.

Alternative Location

[88] Although I have dealt briefly with the Court's treatment of this in an earlier passage of this judgment (supra [26] – [28]) I set out in full the reasons for the Court's rejection of the Society's submission.

> [196] The Society submitted that, given the potential significant adverse effects arising from emergency flights in combination with commercial flights, a consideration of alternative sites is relevant as a proper measure to avoid those potential effects. Counsel did not cite authority for that proposition.
>
> [197] Skywork submitted that the Society's case about alternative sites should be disregarded, contending that the resource-consent application is a specific proposal for a private heliport to be assessed on its merits against the relevant statutory and district plan provisions, and is not a case for consideration of alternatives in any general sense. Mr Kirkpatrick cited *Dumbar* v *Gore District Council*, *Te Kupenga O Ngati Hako* v *Hauraki District Council*, *Redvale Lime* v *Rodney District Council*, and *All Seasons Properties* v *Waitakere City Council.* He distinguished *Living Earth* v *Auckland Regional Counciz* (applying *TV3 Network Services* v *Waikato District Council)* on the basis that there is no issue in these appeals about any matter of national importance.
>
> [198] The Council submitted that consideration of alternative sites is not required in this case, which must be assessed on its own merits without regard to whether there might, or might not, be a better alternative site. Mr Loutit cited *Transpower* v *Rodney District Council* and *All Seasons Properties.*
>
> [199] On the authority of *TV3 Network Services*, we accept that where a proposal the subject of a resource-consent application would conflict with a

> matter identified in section 6 as being of national interest, the availability or unavailability of an alternative site may be relevant. In other cases, where conflict with matters of national interest does not arise, the cases for more than a decade are all consistent: in holding that availability of alternative sites is not a consideration.
>
> [200] Of course the Court is not obliged to follow those decisions. But the Society presented no argument analysing the reasoning in them, to demonstrate that they were wrongly decided. In the absence of such argument, we respectfully follow the reasoning, and hold that on these appeals a question of the availability or unavailability of alternative sites is not relevant or appropriate.
>
> [201] Skywork's application relates to a particular site. Mr Webb conceded that the Society's case does not establish that the proposal would conflict with any of the matters identified in section 6 as matters of national significance. So Skywork's application must stand or fall on our decision related to that site. If the application falls, then it would be for Skywork to identify an alternative site and make a fresh application in respect of it.
>
> [202] On our understanding of the law, it is not for us to make a finding about the availability or unavailability of alternative sites for Skywork's helicopter base. Accordingly we do not address the evidence on that topic; and leave for possibly another occasion the subsidiary question whether land the owner of which does not choose to have used for the activity in question can qualify as an available alternative site.

[89] I do not intend to analyse the authorities which counsel placed before the Environment Court (at [197]). I instead focus on Mr Williams's submission which was that the alternative location aspect really drew together the various disparate threads of the Society's submissions.

[90] Mr Williams submitted that although at [26] and [28] the Court had referred to the Auckland Regional Policy Statement, it did not really factor that Statement into its decision. The relevant aspect of the policy statement is 2.6.4 relating to rural areas and the need to avoid in rural areas in the Region significant adverse effects.

[91] The Court was alert to the Policy Statement. It is implicit in its findings that the proposed helicopter base would not bring about significant adverse effects (or cumulative adverse effects). I do not consider it necessary in the circumstances for the Court to have made additional reference to the Policy Statement beyond what it did. I accept counsel's submission that s 104(1)(b)(iii) renders the Regional Policy Statement a mandatory issue to consider. I do not consider that an experienced

court, having set out the Policy Statement as a relevant matter at the outset of its judgment, would have discarded or ignored it when reaching its conclusion.

[92] The same policy statement (2.6.17.1(e)(viii)) also stipulates as a strategic policy for rural areas

> (viii) consideration of alternative locations (including locations in urban areas) from activities which give rise to significant adverse effects on the environment.

[93] Again I reject the submission that this Policy Statement obliged the Court to consider alternative sites. Again "significant adverse effects" is the mischief the Policy Statements are directed to. None were identified here.

[94] In my judgment courts must guard against being carried away by submissions which raise as errors of law and omission a failure to consider some marginally relevant or even irrelevant point. An exhaustive catalogue of operative legal sources is seldom possible and certainly not required as a matter of course. To draw an analogy in an area with which I am more familiar, it would be a nonsense to suggest that a Family Court Judge had erred, when considering competing claims of parents to parenting and contact orders under the Care of Children Act 2004, because the Judge had omitted to weigh New Zealand's international law obligations set out in the United Nations Convention on the Rights of the Child.

[95] Returning to the alternative site issue, counsel then submitted that the Court had misconstrued *TV3 Network Services Limited v Waikato District Council* [1998] 1 NZLR 360. Mr Williams described that decision as "inclusive".

[96] The case involved the installation of a television transmitter on a hill overlooking Raglan Harbour. Maori cultural interests came into play. Hammond J stated (at 373):

> As a matter of common sense, a consideration of whether there are suitable alternatives strikes me as a fundamental planning concern. But, in response to the specific technical objection raised by Mr Brabant, I can see nothing in the Act which precludes the course taken by the Environment Court. I can understand Mr Brabant's practical concern that an applicant for a resource consent should not have to clear off all the possible alternatives. But I do not think that that is what the Court is suggesting. It is simply that, when an

> objection is raised as to a matter being of "national importance" on one site, the question of whether there are other viable alternative sites for the prospective activity is of relevance.

[97] Matters of "national importance" are stipulated in s 6 of the Act. The relationship between Maori culture and their culture and traditions with their ancestral lands (s 6(e)) is one such matter of national importance. Helicopter bases in the Rodney District does not fall inside the s 6 definition.

[98] Counsel saw the issue of an alternative site as linked with the whole issue of s 104(2) and the identified effects of sleep disturbance caused by emergency flights from the helicopter base. I do not discern in the Court's approach to these issues (supra [88]) an error of law. The approach which needs to be adopted to a resource consent application for a non-complying activity is well known. There is no authority, of which I am aware, which suggests, that as part and parcel of the consideration of a resource consent application, alternative sites have to be considered or cleared out.

[99] For these reasons in combination I reject the Society's submissions.

Result

[100] For the reasons which are apparent in earlier sections of this judgment the appeal must fail.

[101] I do not consider the Environment Court's 14 December 2007 judgment contains errors of law. The approach the Court adopted to s 9(8) is correct. It has not misdirected itself or erred in its application of the permitted baseline or the s 104(2) discretion. It has not erred in its assessment by excluding the effects of lawful overflying aircraft. It has correctly considered and applied the relevant provisions of the Rodney District Council's relevant Plans and the Auckland Regional Policy Statement. It has not erred in its approach in any relevant area.

[102] The appeal is thus dismissed.

Costs

[103] The respondents are entitled to costs. The calculation of costs in an appeal such as this ought to be a matter on which experienced members of the Resource Management bar can agree.

[104] I reserve costs if for some reason counsel cannot settle them.

.....…
Priestley J