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Better Urban Planning Enquiry

NZ Productivity Commission

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SUBMISSION TO THE DRAFT REPORT ON BETTER URBAN PLANNING

Thank you for the opportunity to respond to the above draft report. My submission is attached.

It takes the form of a case study which seeks to highlight many of the areas of concern listed in the Report, in particular points made in Sections 5, 7, 12 and 13.

This experience of one community explicates at micro level the inconsistency, lack of transparency, and significant time and expense for communities engaging with the urban planning and regulatory framework.

Having the opportunity to look at the case through the lens of "productivity" is welcome. Those involved in the current system would probably view both the process and the outcome of this case as quite acceptable and usual.

While not aiming to overstate our case, from the community's view not only was it an expensive, time-consuming and, on occasions, stressful experience, but one which I believe had suboptimal outcomes at both macro (city) and micro (community) levels.

The case is about a Residential 1 corner dairy site in Grey/Lynn Westmere which was sold to a business operator who wished to set up a large scale café on the site. The community opposed this - for a number of reasons (that were not as NIMBY as might be assumed). On obtaining Notification from the Council 60 submissions were received and the case went to Independent Commissioners. They ruled against the café but it was subsequently appealed successfully – albeit with some modifications - in the Environment Court.

It is the story of one community's efforts, over two and a half years, and at a cost of $200,000, to keep a Residential-zoned site "residential" at a time when, ironically, the city is desperate for housing. I don't think it should ever have come to this and hope that as the result of the Productivity Commission's report improvements will be made.

Mattie Wall

Personal Statement

I am a committee member of the Grey Lynn and Westmere Residents Society Incorporated (GLWRSI), but this is a personal submission.

I am not involved in urban planning/design or any of the disciplines involved, nor am I a lawyer. My comments and suggestions should be read in that context.

Along with others in my community I have been caught up in a two and a half year process which, although in itself has not been unsatisfactory, has dismayed me in terms of the waste in time and resources for all concerned. I am keen to see an improvement in the system so that this situation – which is likely being replicated all over Auckland and NZ - is obviated in future.

I am familiar with some urban design principles, having previously worked for a council which had strong sustainability principles and am a supporter of intensification, including some additional height to buildings in suburban areas and "mixed use" urban design, in order to avoid urban sprawl on to productive rural land and to facilitate better public transport options. I strongly support growth in public transport use and also a more proactive engagement between councils and Maori. I also believe that, with the current pressure on Auckland, greater flexibility in urban design is needed, together with simpler, more open and transparent processes and better communication, in order to make changes that do not alienate communities or pit them against their councils unnecessarily.

Above all, I would like to see a more efficient and less expensive way of resolving council/community disputes and believe that the best way of doing this is to aim for resolution before legal processes are involved.

The Aim of this Submission

This submission is based on a very recent small case in Grey Lynn, Auckland, as outlined below. It does not aim to produce a litany of complaint about the case, nor about its outcome (which could have been a great deal worse from the community's point of view). Rather, it aims to show, without too much detail, how the application to set up a small business in a residential zone unfolded and, as far as possible, to explicate what this "minnow" of a case involved in terms of time and resources for those concerned. It is alarming that so much time and money (especially for residents and the Council) went into a single business application in a residential area.

There is probably nothing exceptional about this case, but seeing it through a productivity lens may be useful as there may well be many such small but expensive and time-consuming applications in the system which could and should be handled differently.

Background to the Case

The case centred on a building on the corner of Richmond Rd, Peel and Kingsley streets which is pre-1940s and therefore has "heritage" status. It is set among many older villas and bungalows, including two very fine old concrete houses in the vicinity. However, it is now very run-down. The building has had many incarnations, functioning mainly as a corner dairy in recent years, operated by an Indian family. In about 2010 the building was sold. A tenant moved in with her daughter and applied for a resource consent to run a small café (The Little Grocer). The Council approved this with very strict limits: no seating was allowed and no cooking of food to order. Immediate neighbours agreed to the consent because the proposal was small-scale, likely to have minimal effects and also because it was thought that having a small takeaway coffee facility would probably be welcomed by the neighbourhood.

The Little Grocer traded successfully for about five or six years and became something of a community hub e.g. for notices, sale of local produce etc.

The building was sold in 2013 and the Little Grocer closed the following year.

The new owners (under the trade name Oddfellows) were a family firm from Christchurch whose stated aim was to position their brand of roasted coffee in the Auckland market. They were shown 311 Richmond Rd by a real estate agent and said its attraction was the old building which they wanted to restore, as they had done for their café – not

in a residential zone - in Christchurch. The building's location at the top of the main road in Grey Lynn, offered an excellent branding/signage opportunity. Initially the company intended to both roast and sell coffee commercially on site, holding tastings for café owners and selling bulk coffee commercially.

Many of the residents who had supported The Little Grocer resource application were those who opposed the Oddfellows application, on the basis that it went well beyond an appropriate scale for a residential area. There had been some adverse effects from The Little Grocer operation e.g. parking on the bus stop and across people's driveways. These were irritants rather than being a major issue, but they gave residents an indication of the likely negative effects of a larger-scale operation.

This Case outlines a community's recent experience of an Urban Planning issue in Auckland. It covers the two and a half years which involved a company's application to establish a large-scale café on a difficult corner on a Residential 1 site in a central Auckland suburb; the community's concerns and response to this; and the legal process which led to the decision that this should proceed.

2014

January 2014 – The community becomes aware, by accident, of a proposal for a licensed, 60-seat café, including a coffee roaster, on a Residential 1- zoned site at 311 Richmond Road. (Cafes and restaurants are currently non-compliant in residential zones in both the old and new Auckland plans, but no notification has been proposed by the Council.)

March - April 2014 – The community requests Council to publicly notify the application.

May - June 2014 – The Council agrees. Receives 60 submissions in opposition, plus one in support and one neutral. The opposition is primarily based on concern about the corner site; the vexed nature of the intersection in terms of known traffic behaviour and its lead-in to a narrow, one-way street which is used as a main thoroughfare at certain times of the day; the scale of the proposal (number of seats, a coffee roaster in such close proximity to houses); the lack of parking to support a venture on such a scale; and the over-riding fact that the application is non-compliant with the Auckland Plan. Residents also believed there was no need for another café in an area where there are already 16 cafes, bars and restaurants within 1.2kms i.e. no logical case to be made for an exception to the non-compliance status of the application.

September 2014 – The Applicant calls a Pre-Hearing: their intention is to reduce the proposal from 60 to 45 seats and remove the coffee roaster. However, concerns about other difficulties with the site means community views don't change, plus the application remains non-complying and non-residential. It becomes apparent that the Council supports the application, although it is not clear why.

October 2014 - The Grey Lynn and Westmere Residents' Society Incorporated (GLWRSI) is established, grows to 100 members, and engages independent experts.

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2015

June and July 2015 – The Council Hearing is held, with three independent Commissioners. The Council supports the application.

The Chairman of the Waitemata Local Board "in a rare move," speaks against the application, supporting community concerns re difficulties with the site and other aspects.

August 2015 - **Commissioners refuse the application**.

The full decision can be read here:
http://www.aucklandcouncil.govt.nz/EN/AboutCouncil/meetings_agendas/hearings/Documents/311richmondroadfinaldec05062015.pdf

(In paras 68 to 78 the Commissioners commented on the inappropriateness of the District Plan's noise permitted standards which relate to *levels* of noise, but not the *nature/quality* of the noise or its *frequency*. The Environment Court judge later agreed that the baseline concept was not helpful.)

September 2015 – The applicant appeals the Council's decision. The GLWRSI committee votes to retain its experts and make an S274 application to the Environment Court to ensure the Society can have a place in the appeal process.

November 2015 – The applicant requests Mediation to allow experts on both sides to caucus. Society and other S274 parties are invited, but only to listen.

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2016

Late May 2016 – The GLWRSI (on the advice of its lawyer) submits an alternative café proposal to take to the Environment Court. Seating is reduced from 45 to 29, plus the new design removes the back deck and the building retains a residential component. This is discussed with the Council (now obliged to support the community's position) and forwarded to the Court ahead of time. The Society believes the community could live with the revised proposal and, that while there would be some effects, at this scale these may be able to be kept less than minor.

June 2016 – The Environment Court Hearing is held over three days. The GLWRSI is an S274 party. At the end of the third day the applicant has backtracked on so many aspects of their proposal (e.g. exclusion of the basement, changes in proposed operating hours etc.) that the judge requests they go away and rewrite what is in it and what is not, so that the Court knows what it would be adjudicating on.

They are given two weeks to do so, later requesting an extension because of a misunderstanding between the lawyer and his client/ team.

23 August 2016 – The Environment Court Decision Allows the Appeal. Seating is retained at 45, but there is to be no back deck. There is some confusion about the hours which means there are two updates /amendments to the Decision, as below.

The Decision can be read here:

1. Oddfellows Holdings Limited v Auckland Council [2016] NZEnvC 167 (31 August 2016) [100%]
   (From Environment Court of New Zealand; 31 August 2016; 6 KB) LawCite
2. Oddfellows Holdings Limited v Auckland Council [2016] NZEnvC 158 (23 August 2016) [91%]
   (From Environment Court of New Zealand; 23 August 2016; 39 KB) LawCite
3. Oddfellows Holdings Limited v Auckland Council [2016] NZEnvC 182 (9 September 2016) [84%]
   (From Environment Court of New Zealand; 9 September 2016; 1 KB) LawCite

NOT A "NIMBY" CASE

As noted in the PC's report, "human beings are often resistant to change (F7.7 on Page 350) and that this can obstruct and delay change and development." I would argue that the case is not a usual NIMBY response against "change".

- While the community would have preferred that the site remain residential, they did not object to a café business being on the site per se – just to the size and scale of that proposed – especially since it was non-compliant in the city's widely consulted Plan;
- There was no objection to the proposal that the café be licensed;
- No-one was concerned to save the "heritage" building involved;
- The breadth of the concerned community was wider than just the immediate neighbours i.e. those most likely to be affected by possible noise and smell and parking issues from having a café in close proximity.
- The 60 submitters included those from a wide local area who were very familiar with the difficulties of the corner for traffic and pedestrians and who were therefore anxious about safety issues.

RESULTS OF THE CASE

Although, as noted, the process proceeded as usual and although the outcome could have been much worse from the community's point of view, the fact remains that this unexceptional, small case took over two and a half years to resolve and at a very significant cost to all concerned. If it is being replicated around Auckland or elsewhere in NZ, the waste of time and money would be iniquitous.

- At a time when the Auckland Council has huge new projects on hand and major planning issues to deal with, well over a dozen Council staff (and outside consultants) were involved for over two years on this "minnow case", the success of which benefitted just one business.
- The case will have cost the Council, in terms of staff time alone, a significant amount. (A LGOYMA enquiry has been made about this, with the result due on 14 October.)
- The case cost the community $200,000 and countless hours to try to keep a residential site residential
- A simple cafe business that could have been up and running in Auckland within a few months has been substantially delayed and at huge cost
- A prime residential site has been lost in an inner city suburb with existing infrastructure including a good bus route, at a time when Auckland is desperate for more residential accommodation
- The former dwelling is to be replaced by a facility which mirrors 16 other bars, cafes and restaurants within easy walking distance i.e. it is not providing a new amenity
- The time and money involved has been out of all proportion to the nature and size of the site and the value of the building.

ISSUES

1. Non-Compliance Status

Unlike an application for a Prohibited activity which is clear cut and which a Council can immediately decline**,** Councils are apparently obliged to process non-compliant applications.

If they believe for whatever reason – as in our case - that even while being deemed non-compliant (presumably for good reasons) the activity is appropriate and should proceed, it seems that is residents either have to "suck it up" or fight it out against their own Council and the applicant - at considerable cost.

"Non-compliance" would seem to be a vexed and problematic concept in the RMA – at least from a community's point of view.

Councils do need some flexibility around zoning, particularly in times of high growth, but how they manage this and how they prioritise competing needs at macro and micro levels needs very careful thought and handling if our experience is anything to go by.

Presumably, considerable thought goes into some activities being considered inappropriate in certain places. It seems odd then that this can be overridden by a Council without any public justification being required?

It was not clear to us why our Council chose to support an application which went against its own Plan. In effect the Council treated the Plan (and its community) with a lack of respect.

Under the current system it is not clear whether Councils have the option of telling a business applicant that they do not want a valuable residential site to be used for business when Auckland is so short of housing. If they can – then why did the Auckland Council not (a) consider this important and (b) do so in our case?

It would be helpful if Councils worked to specified and transparent criteria /guidelines when working with non-compliant applications in residential areas e.g.

Does the applicant have "social licence to operate"?

Will this application provide a new facility/amenity not already available in the neighbourhood?

In the case of our community, the answer to both questions would have been No.

Had there not been 16 cafes/bars/restaurants already operating within 1.2 kms of the proposed café, the applicant may well have been able demonstrate that they did indeed have social licence to operate and that the community did want their café in the neighbourhood .In this case there would have been logic in the Council's supporting the application. And, because a new and desired amenity would benefit the wider community, like it or not, immediate residents affected might just have to "suck it up".

Working to such criteria may have some challenges, but this approach would at least have logic and transparency to it. Also, guidelines/criteria could perhaps be changed, as required, to reflect the dynamic change going on in the city – as long as they are transparent.

In our case it was very disappointing that the Council supported a large-scale café on that site, particularly when the community's concerns were not just from immediate neighbours with worries about noise and smell – but from a wide, geographic spread of residents who queried the wisdom of putting that size of business on what is well known as a difficult and very busy corner.

The fact that the Council supported a non-complying business application on a prime site in a Residential zone, when Auckland is currently crying out for new dwellings, defied logic.(The cynical view was that it was because the Council would get higher rates from a business than a dwelling.)

Recommendations

-That the Productivity Commission consider the way Councils currently handle non-compliant applications as the current system is opaque, lacks accountability and has the capacity to waste the time and money of all involved: applicants, communities and Councils;

-That all non-compliant applications be publicly-Notified, as a matter of course;

-That criteria be developed for non-compliant applications to be considered and used as a basis for discussion/mediation between the applicant and those in opposition immediately after the submissions period has closed.

Disagree with F7.2: "*Policies that discourage or prevent the development of commercial activity outside designated centres ……. can be barriers to productivity and growth".*

Good urban design has generally included the notion of "hubs" for various sorts of activity e.g. the current focus on technology hubs around NZ. In our area we have two very successful, well-patronised commercial hubs, with a mix of housing and shops and plenty of parking. There are occasional small-scale businesses outside these in residential areas which, like The Little Grocer, provide a beneficial service and create few negatives.

2 Inconsistency

The community found it incomprehensible that two café applications for the same site were treated so differently within the space of a few years. In c 2009 there were tight constraints e.g. not a single customer seat was allowed and no cooking of food to order. And yet in 2014, *without any change in zoning or non-compliance status*, the Council supported an application for a 60-seater, licensed café with a coffee roaster on that same site.

What made the Council adopt such different positions on two non-complying applications for cafe activities in such a short period of time? Whatever the reasons, these were not transparent to the community and the Council did not feel it owed the community any explanation.

There was a feeling that the Council staff were delighted to be free of their constraints (understandable perhaps) – but that they had no philosophical framework or pragmatic needs-based thinking to replace the old operating mode and guide their new freedom. How else to explain why they would support the use of a prime residential site for business at such a point in Auckland's growth? This did not seem to be part of their thinking.

4. Lack of Transparency

A legal person in the planning area recently observed that it used to be that Council planners saw themselves as "guardians of the Plan", but that in the new operating environment this was not the case, and so now it was a free for all. Our experience would suggest this is pretty accurate. We got the clear impression that the Council staff we dealt with were on the side of the business applicant and that we were being tiresome nimbies. This attitude seemed to carry more weight than the merits of the issues the community was concerned about and which were subsequently upheld by the Independent Commissioners.

No doubt the earlier approach produced a rigid and pedantically bureaucratic approach that delayed change and growth processes, cost a great deal and did not necessarily deliver expeditious and desirable outcomes.

But what seems now to be the hands-off approach has its own risks and - as in the case here – it does not necessarily create a cheaper, more efficient process.

If a more laissez faire approach to planning is taken (as opposed to a flexible but transparent one) the risk is in undermining the integrity of the city Plan. It also runs the risk of alienating the good will and good faith of communities.

Citizens who, in good faith, participate in (expensive) consultation in their city's plan may not get everything they want in the final result, but it is a reasonable expectation that what is finally in the Plan will be delivered on.

To a layperson "Non-compliant" means an activity is not desirable in that location and so the expectation is that the Council will work to see that this activity does not happen. To have a Council actively support a non-compliant application indicates that there is not much significance in the city Plan. In which case, why bother with a Plan at all?

5. Poor Communication

As well as operating to transparent criteria, Councils would do well to advise communities, as a matter of course, of all non-complying residential applications when they are received. This may seem risky, especially if Council intends supporting the application – but at least it would be treating communities fairly and with respect. It would also open the door to some informal, non-legal negotiation. This may seem a time-consuming but it would be a much better, proactive and positive use of Council staff time than the often defensive, rear-guard stance too often taken currently.

The PC Report suggests that only those directly affected be consulted in relation to resource consents. This sounds efficient, but would not have been fair or appropriate in our case. One immediate neighbour of the site was not directly affected as his property is rented out; while another was distracted by an issue on another of his properties in Auckland. As noted – community concerns on this case came from a wide area in the locale and centred on traffic and parking issues, as well as the general principle of non-compliance.

Agree with the PC's recommendations that "*Soft skills such as communication, mediation and facilitation skills will need strengthening".*

Do not agree that *"Only those directly affected be consulted*. "

This assumes that the Council knows who these people are. In our case the Council would probably have consulted only immediate neighbours, whereas it was the wider community that was concerned about the effects on transport and parking.

6. The Role of Local Boards

Local Boards are important conduits for communities to the Council and, as laypeople, they are in a very good position to act as intermediaries between communities and the Council. They are underutilised at present and could be involved much more actively in a range of interface activities. With training, they could not only help with communication, but perhaps also with facilitation and mediation.

Recommendation: Local Boards should be involved in consultation and assisting councils with contentious issues, as they not only know about local concerns and realities but should also have a grasp of the bigger city-wide picture.

7. Legal Time = Money

The costs involved to both applicant and opponents occurs the minute the process moves into legal mode. Urgently needed are better pre-legal processes to assist Councils and communities to discuss and resolve issues as, once the legal juggernaut gets underway, and costs spiral out of control. As lay people, our community found thought the Environment Court Hearing would have been completed inside a day and a half, or two days because there were two clear proposals on the table, which we hoped would have made for a simpler discussion and speedier resolution on key points.

Recommendation: that every effort be made to address and resolve conflicts without resorting to the law. The latter costs a huge amount for all involved and ties up council resources. Council staff need to see pre-legal resolution of issues as a hallmark of success.

8. Independent Hearing vs Environment Court

In our experience the benefit of the Independent Hearing was it enabled an understanding of the *context* in which the application was being made. The fact that Commissioners live in the same city means that they were able to appreciate the wider picture of city issues and could, if they wished, consider and factor in additional, non-legal aspects of the case e.g. balancing the importance of housing vis a vis cafes and restaurants in a local setting. Even if such aspects cannot provide the basis for their final decision, it is a much richer and more realistic/pragmatic process. It also feels "fairer" to all involved.

Commissioners can also judge the *tenor* of community concerns (is it pure NIMBYism?) and take account of the possible *"downstream effects"* i.e. the likelihood that an approved consent could open the door to a set of ongoing negative outcomes in future for a community (referred to as "the usual thin end of the wedge" argument by the applicant's lawyer in our case). Interestingly, the Commissioners specifically asked a submitter

to expand on this aspect. Put plainly, local Commissioners can bring local knowledge and an understanding of the context to an application, thus augmenting and enriching the legal basis for their decisions.

The Environment Court's narrower, RMA "effects" focus did not allow these broader considerations and, in that sense, it seems the Court's strictly legalistic determinations may underpin much of the rigidity in urban planning decisions that the approach outlined in the PC's document seeks to reduce.

Early on in our case a Council officer remarked that even if Independent Commissioners ruled against an application, more often than not this would be overturned in the Environment Court. If this is true, why would this be the case?

Involvement in the Environment Court is, of course, expensive. Councils and businesses are able to recoup the significant costs involved in this process: communities do not have the same ability to do so.

Recommendation: that more weight be given to Independent Commissioners' decisions – especially in non-compliant applications where the outcome being sought is outside the city Plan.

9. One-Stop Shop for Business Applicants

In Chapter 2 of the PC's Report an assertion is made that **"***Policy and planning that facilitate people and firms making location choices based on their own information and judgement are likely to produce the greatest benefits."*

The question arises – benefits to whom?

As a former Cantabrian I would like to have seen the company do well in Auckland, but it was apparent that they had been badly advised from the very start about the potential of the site for their purpose - and it is doubtful that they were ever told of its non-compliant status. Coming from Christchurch they demonstrated a lack of understanding about how Auckland behave and, in their cross examinations, it was clear they had made a series of misassumptions about the local area and the values and norms of the residents. (Their situation reminded me of the top NZ businesses e.g. The Warehouse, Waste Management and Mainfreight which have tried to move across the Tasman thinking that the norms and behaviour would similar to New Zealand's – only to have a rude shock at the differences.)

In our case, the applicant did not know best. It would have been much more efficient if an out of town business or developer had a one-stop shop to go to such as ATEED, to give them some advice about where to locate their business in order to set it up with a minimum of delay. Zoning information could have been a key part of that.

Also, based on our case, the claim that "people and firms know best" would also seem to be at odds with the claim in *F11.1* that *'systemic weaknesses in the planning framework include: inadequate attention to the national and public interest; insufficient recognition of the needs of cities and housing."* Individuals and companies do not necessarily have the wider public interest at heart: that is the role of councils.

10. Role of Heritage

For our community, the fate of the pre-1940 "heritage" building was not uppermost among our concerns. Basically, it is a rundown old corner dairy and, while it would have been nice to see it restored, our community agreed that none of us would "die in a ditch" for it. We would have been delighted, however, if it had been restored as a dwelling, as there would have been no risk of negative effects on the community. (It would have been important, however, that any replacement building took into account of the heritage nature of the neighbourhood in its design.)

The irony is that, irrespective of community thinking on this issue, much time and money was spent in debating the finer points of heritage on design and streetscape. This would have had merit if the case were about a

replacement building for the site. It might have helped matters if the Council had talked with locals at the start of the process about their attitudes to the building in heritage terms.

Agree with PC Report that: "*Councils should tightly focus heritage and special character policies on specific structures or items with high, genuine and significant historical or cultural value.*"

11. Size of Residential Sections

The community would almost certainly have accepted some residential intensification on that site in preference to a business. An architect said this would be quite feasible but, ironically, apparently the size of the section at 450sq metres is judged under current regulations to be too small for two separate dwellings. (There is, however, already a sleep-out on the end of the section at present.)

A much more satisfactory outcome would have been a couple of well-designed townhouses:

-providing new accommodation for two households in an inner city suburb;

-supporting the Council's intensification aims;

-offering fewer traffic and parking issues on a vexed corner than a 40-seat café is likely to do – irrespective of the Environment Court's judgement on this.

Residents felt that if non-compliance was to be the order of the day on this site, common sense would suggest that it would be better that this help meet Auckland's pressing residential needs, rather than putting yet another café there.

How many other (corner dairy) sites of a similar size are there in Auckland either in residential areas or adjacent? The Council could usefully do an audit of these and mark them as potential for appropriate residential intensification rather than commercial development.

The PC's report notes that: *"The current planning system is slow to adapt and risk averse New Zealand's planning system is not well set up to deal with change. Processes for updating land use rules are slow and uncertain and that current processes for changing land controls takes considerable time to complete. Consequently, the system is unresponsive to changes in circumstances and preferences."* I would agree with this.

Recommendation: that the Auckland Council identify how many sites of this size there are in the city and look at changing this regulation in order to accommodate more small-scale intensification in areas where infrastructure already exists. This "nip and tuck" approach would not of course solve Auckland's housing crisis, but it might be a simple, speedy and uncontroversial way of intensifying on a small scale in existing neighbourhoods.

Conclusion

I support the general thrust of the PC's report and the need to loosen a somewhat sclerotic system to better reflect a fast-changing population and demographic needs. This needs to be balanced though, with retention of democratic aspects of the current system such as better use of Notifications with increased and improved communication methods. Overall clarity around basic city priorities e.g. keep space for residential dwellings in residential zones would, in the Auckland context at least, save wasted time and money on the kind of unnecessary battle outlined above.

M Wall

2 October 2016