BEFORE THE WAIKATO REGIONAL

COUNCIL HEARING COMMISSIONERS

IN THE MATTER	of the Resource Management Act 1991
AND	
IN THE MATTER	Proposed Plan Change 1 to the Waikato Regional Plan and Variation 1 to that Proposed Plan Change: Waikato and Waipā River Catchments

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Legal Submissions on behalf of the Director-General of Conservation

Dated: 25 June 2019

Block 2 Hearings

Submission Number: 71759

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MAY IT PLEASE THE COUNCIL HEARING COMMISSIONERS:

Introduction

1. For the Block 2 Hearings and Part C Topics the following evidence has been lodged in relation to the Director-General's (the **Director-General**) submission:
   a. In terms of rivers and streams, Ms McArthur's evidence focuses on diffuse discharge management, point source discharges, new policies and rules for īnanga spawning habitat, stock exclusion and setback widths.
   b. In terms of wetlands, Dr Robertson's evidence covers management of diffuse nutrients to protect and restore wetland ecosystem health, farm environmental plans (**FEP**), stock exclusion and prioritisation implementation.
   c. In terms of lakes, Dr Stewart's evidence discusses FEP, stock exclusion rules, best practice management of peat lake catchments, nutrient reduction for 75th percentile, data deficient lakes, riparian buffer setback widths and measures to prevent loss of aquatic vegetation.
   d. Ms Kissick' s planning evidence covers the Topics for Block 2 as they related to the Director-General's submission.

2. My legal submissions will focus on the following legal issues:
   a. With reference to relevant case law and the Vision and Strategy, whether the Director-General's Submission, or rather parts of it, is 'on' the Proposed Waikato Regional Plan Change 1 (the **Plan Change 1)** for the purpose of clause 6(1) of Schedule 1 of the Resource Management Act 1991 (the **RMA**),
   b. Further evaluation of relief sought under s 32AA of the RMA,
   c. Waterbody setbacks proposed by the experts called by the Director-General,
   d. Inanga Spawning Habitat,
   e. 75th percentile Nitrogen Leaching Value,
   f. Biodiversity Offset provisions proposed in Policy 16 of the Plan Change,
   g. Tangata Whenua Ancestral Lands definition proposed in the Plan Change,

h. The Plan Change's Rule framework, and

i. Joint Witness Statement on Table 3.11-1 – seeking clarification regarding hearing process going forward.

Is the Director-General's Submission 'on' Plan Change 1?

Schedule 1 RMA

3. A change (to a plan) means a change proposed by a local authority to a plan under clause 2 of Schedule 1.[1] Under clause 2, the change to a plan commences through the preparation of a plan change by, in this instance, Waikato Regional Council (**WRC**).

4. Relevantly, once WRC prepares a proposed plan change, it must give public (or limited) notice of the proposed plan change.[2] The public notice, and such further information as the WRC thinks fit relating to the Plan Change, must be sent to all ratepayers and other persons likely to be directly affected by the change[3]. Clause 5(2) requires WRC to give public (or limited) notice that any person may make a submission 'on' the proposed plan change. Once notified, any person may make a submission 'on it'.[4]

What is Plan Change 1 'on'?

5. The Explanatory Statement in the Plan Change 1 document states[5]:

> *'This document is a change to the Operative Waikato Regional Plan (WRP), to restore and protect water quality in the Waikato and Waipā Rivers by managing discharges of nitrogen, phosphorus, sediment and microbial pathogens to land in the catchment, where it may enter surface water or ground water and subsequently enter the rivers, or directly in to a water body.'*

[1] Refer s 43AA RMA
[2] Refer cl 5(1)(b) Schedule 1.
[3] Refer cl 5(1A) and (1B) Schedule 1.
[4] Refer clause 6(1) & (3) Schedule 1 RMA. And subject to the limitations set out in cl 6(4)
[5] Refer page 8 Plan Change 1 document - 3 December 2016.

6. In my submission, the Explanatory Statement and what Plan Change 1 is on must be considered in the context of the River Act[6] and the Vision and Strategy. Not only is the Vision and Strategy intended by Parliament to be the primary direction-setting document for the Waikato and Waipā Rivers (the **Rivers**)[7], and the management of activities within the catchments affecting the Rivers, Plan Change 1 must also give effect to the Vision and Strategy.[8] I submit the Vision and Strategy is the catalyst for Plan Change 1. I note the Explanatory Statement states the change to the WRP is to **restore** and **protect** the water quality in the Rivers. In order to realise the vision, the restoration and protection of the health and wellbeing of the Rivers is to be pursued.[9] 'Pursued' means to *'follow with intent, proceed in compliance with'*.[10]

7. Parts of Plan Change 1 are even more explicit. On page 13, for example, it is stated:

> *'The Vision and Strategy is being given effect to in Chapter 3.11 by …*
>
> *Ensuring that Waikato Regional Council continues to facilitate ongoing research, monitoring and tracking of changes on the land and in the water to provide for the application of Mātauranga Māori and latest scientific methods, as they become available.*
>
> *Preparing for future requirements on what can be undertaken on the land, with limits ensuring that the management of land use and activities is closely aligned with the biophysical capabilities of the land, the spatial location, and the likely effects of discharges on the lakes, rivers and wetlands in the catchment.'*

8. Furthermore, proposed Policy 17 is about considering the wider context of the Vision and Strategy and provides that *'When applying policies and methods in Chapter 3.11, seek opportunities to advance those matters in the Vision and*

[6] Waikato-Tainui Raupatu Claims (Waikato River) Act 2010. Also relevant are Ngāti Tuwharetoa, Raukawa, and Te Arawa Iwi Waikato River Act 2010, and Nga Wai o Maniapoto (Waipā River) Act 2012, noting these latter two Acts contain identical/similar provisions to those contained in the River Act.
[7] Note that, for the purpose of the River Act, the Waikato River includes lakes and wetlands. Refer s 6 River Act.
[8] Refer ss 5 and 13(4) of the River Act.
[9] Refer Vision and Strategy, Schedule 2 clause 1(3)(a) River Act
[10] *Concise Oxford Dictionary*, Clarendon Press, Oxford 1990 p.972

Strategy and the values for the Waikato and Waipā Rivers that fall outside the scope of Chapter 3.11, but could be considered secondary benefits of methods carried out under this Chapter, including but not limited to … opportunities to enhance biodiversity, wetland values and the functioning of ecosystems'.

9. In light of the above, I submit Plan Change 1 is concerned with the implementation of the Vision and Strategy. Plan Change 1 is about the restoration and protection of the health and wellbeing of the Rivers. As mentioned in the footnote 7, Rivers include Wetlands and Lakes.

10. I discuss below the parts of the Director-General's submission that other parties[11] have indicated that they consider is out of scope, or not 'on', Plan Change 1. I do wish to note at this stage that the relief sought in the Director-General's submission and detailed particularly in the Block 1 Evidence of Kathryn McArthur, seeks to restore and protect the ecosystem health of the Rivers which is consistent with the Vision and Strategy, and the restoration of water quality so that it is safe for people to swim in and take food from throughout. I note that under the definition of 'environment' in s 2 of the RMA 'ecosystems' includes their constituent parts, including people and communities.

Caselaw

11. The opening legal submissions on behalf of Mercury NZ Limited identifies the test for whether a submission is 'on' a plan by referring to the *Clearwater* High Court decision[12]. The approach taken in *Clearwater* identified a two-limb test[13], or perhaps better described as two matters for consideration. It is noted that this case involved a variation rather than a plan change.

[11] For example, refer para 10 legal submissions for Mercury NZ Ltd, para 2.21 legal submissions for Fonterra Co-Operative Group Ltd asserts there is no scope for targets/limits on temperature being part of the relief sought in the Director-General's submission,

[12] *Clearwater Resort Limited v Christchurch City Council* HC Christchurch AP34/02,

[13] *Ibid* at [66]

12. Firstly, the Court stated that: *'A submission can only fairly be regarded as 'on' a variation if it is addressed to the extent to which the variation changes the pre-existing status quo'.*[14]

13. Secondly, *'But if the effect of regarding a submission as 'on' a variation would be to permit a planning instrument to be appreciably amended without real opportunity for participation by those potentially affected, this is a powerful consideration against any argument that the submission is truly 'on' the plan variation'.*[15]

First Consideration

14. Dealing with the first consideration I note that in *Motor Machinist Limited*[16], a decision that adopted the approach taken in *Clearwater* and involved a plan change, the Court stated at para [80] – [81] that:

> *'[80] For a submission to be on a plan change, therefore, it must address the proposed plan change itself. That is, to the alteration of the status quo brought about by that change. The first limb in Clearwater serves as a filter, based on direct connection between the submission and the degree of notified change proposed to the extant plan. It is the dominant consideration. It involves itself two aspects: the breadth of alteration to the status quo entailed in the proposed plan change, and whether the submission then addresses the alteration*
>
> *[81] In other words, the submission must reasonably be said to fall within the ambit of the plan change'*

15. I submit this first consideration must be applied on the basis that Plan Change 1 encapsulates the objective of pursuing the restoration and protection of the health and wellbeing of the Rivers. In other words, the first consideration must be read in a way that recognises that Plan Change 1 seeks to give effect to the Vision and Strategy.

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[14] *ibid*
[15] *ibid*
[16] *Palmerston North City Council v Motor Machinist Limited* [2013] NZHC 1290 [31May 2013]

16. The RMA and the River Act, and the relevant provisions within each enactment, are complimentary. Both enactments ultimately seek the same outcome – the restoration and protection of the water quality, health and wellbeing of the Rivers.

17. The River Act goes further, and understandably so given it is the direction-setting document for the Rivers, by setting out specific objectives and strategies to realise and achieve the vision in the context of the Rivers.

18. There is an objective to pursue the adoption of a precautionary approach towards decisions that may result in significant effects on the Rivers that threaten serious or irreversible damage to the Rivers.

19. Also included are strategies; to ensure the highest level of recognition is given to the restoration and protection of the Rivers, to establish what the current health status of the Rivers are by utilising Mātauranga Māori and the latest available scientific methods, development of targets for improving the health and wellbeing of the Rivers by, again, using Mātauranga Māori and the latest available scientific methods, and the development and implementation of a programme of action to achieve the targets for improving the health and wellbeing of the Rivers.

20. In his relief, the Director-General's submission seeks the addition of targets for the following attributes for rivers; Periphyton biomass and cover (trophic state), Dissolved inorganic nitrogen, Dissolved reactive phosphorus, Cyanobacteria, fine deposited sediment, dissolved oxygen, temperature, pH range, toxicants/metals, and Macroinvertebrate community index. The Director-General's submission also seeks the refined attributes for protecting and restoring the ecosystem health of lakes, water quality attributes for protecting and restoring Whangamarino Wetland, and narrative targets for wetlands.

21. As confirmed in the expert evidence filed in relation to the Director-General's submission, targets for these attributes are necessary to ensure the ecosystem health of the Rivers, Lakes and Wetlands. In my submission, this relief is entirely consistent with the Vision and Strategy, and is 'on' Plan Change 1, as it not only pursues the objective of restoring and protecting the Rivers, but also relies on the latest available scientific methods, to develop targets and to implement a programme of action to achieve targets for improving the health and wellbeing of the Rivers. Furthermore, many of the additional targets sought are closely linked to the management of contamination by nitrogen, phosphorus, sediment and microbial pathogens via point source and diffuse discharges to water. Others are linked to providing for the values of ecosystems health, human health for recreation and the health and wellbeing of the Rivers.

22. To conclude my submission on the first consideration in *Clearwater*, the Director-General's submission is on Plan Change 1 because Plan Change 1 is not only about the restoration and protection of water quality in the Rivers by managing the discharge of the four identified contaminants, but because it must also, by virtue of the statutory obligations under the River Act, pursue the objective to restore and protect the health and wellbeing of the Rivers. I submit the scope of this pursuit encapsulates the additional targets and attributes sought in the Director-General's relief.

Second Consideration

23. Focusing now on the second consideration, the Court in *Clearwater* noted this consideration is consistent with the Environment Court's decision in *Halswater Holdings Ltd*[17]. In this case the Environment Court focused on the public notification process provided for in the RMA at the time that decision was made.

[17] *Halswater Holdings Ltd & Others v Selwyn District Council* (1999) 5 ELRNZ 192

24. The Court in *Clearwater* stated, in relation to the second consideration, that:

> *'It may be that the process of submissions and cross-submissions will be sufficient to ensure that all those likely to be affected by or interested in the alternative method suggested in the submission have an opportunity to participate. In a situation, however, where the proposition advanced by the submitter can be regarded as coming out of "left field", there may be little or no real scope for public participation'.*[18]

25. Accordingly, to determine whether the additional targets and attributes sought by the Director-General can be considered an appreciable amendment to Plan Change 1, **without real opportunity for participation by those affected**, the relevant public notification requirements in Schedule 1 of the RMA should be considered, alongside the actual Plan Change 1 public notification process undertaken by WRC.

Public Notification Process

26. Pursuant to clause 7 Schedule 1 of the RMA, a local authority must give public notice of:

a. the availability of a summary of decisions requested by persons making submissions on a proposed plan,
b. where the summary of decisions can be inspected,
c. the fact that no later than 10 working days after the day on which public notice is given, the persons described in clause 8(1) may make a further submission on the proposed plan. These persons include any person representing a relevant aspect of the public interest, any person that has an interest in the proposed plan greater than the interest that the general public has and the local authority itself.
d. the last day for making further submissions, and
e. the limitations on the content and form of a further submission

[18] *Clearwater* at [69]

27. The local authority must serve a copy of the public notice of submissions on all persons who made submissions.

28. Pursuant to clause 8A Schedule 1, a person who makes a further submission must serve a copy of it on the relevant local authority and the person who made the submission to which the further submission relates.

Plan Change 1 Public Notification Process

29. Plan Change 1 was first notified on 22 October 2016. The partial withdrawal, removing the north eastern portion of the Waikato River catchment to undertake consultation with Hauraki Iwi authorities, was notified on 3 December 2016. Submissions on Plan Change 1 closed in March 2017, and a summary of submissions (or decisions requested) on Plan Change 1 were made available on WRC website in October 2017.

30. Both the Director-General's submission and WRC summary of decisions requested, made available in October 2017, identified the fact that the Director-General sought in his relief limits, targets and methods for additional attributes.

31. WRC notified, for public submissions, Variation 1 to Plan Change 1 on 10 April 2018. Submissions on Variation 1 closed in late May 2018. On 20 August 2018 WRC released a summary of decisions requested from the 1084 submissions made on Plan Change 1 and Variation 1 Further submissions closed on 17 September 2018.

32. While a summary of decisions requested on Plan Change 1 and Variation 1 was released on 20 August 2018, being just under one month before further submissions closed, as noted above a summary of decision requested on Plan Change 1 was first made available on the WRC website in October 2017.

33. The key point here is that a summary of the Director-General's relief, seeking additional targets and attributes, was first made publicly available in October 2017 through WRC summary of decisions requested on Plan Change 1. Further submissions on Plan Change 1 (and Variation 1) did not close until September 2018. Any person affected by the Director-General's relief had 11 months, almost a year, to oppose or raise concerns with the relief sought. This time period to make further submissions is much longer than what a person is normally given under a schedule 1 process. I would anticipate that any persons affected have made a further submission on the Director-General's submission given the large total number of submissions made. If they have not done so, it is not through a lack of opportunity to do so.

34. Any persons affected, including any person with an interest in Plan Change 1 greater than the general public, I submit, had a real opportunity to participate in the Plan Change 1 process. Even if WRC had not given notice to all persons with a greater interest than the general public, the extent of information available about Plan Change 1, especially on WRC website, would or should have alerted affected persons to the fact that Plan Change 1 seeks to achieve the Vision and Strategy.

35. There is extensive information on the WRC website about the Vision and Strategy. Furthermore, the foreword at the beginning of the Plan Change 1 document from both the Healthy Rivers Wai Ora committee co-chairs, and from the WRC Chair at the time of public notification, makes it clear that the Vision and Strategy is the primary direction setting document for the Rivers, that it sets a higher bar than the NPS for Freshwater Management 2014 and requires the development of a plan for the Rivers to be swimmable and safe for food collection. Given this foreword, and the wider content of Plan Change 1 referencing the Vision and Strategy and the intent to implement or give effect to it, I submit it cannot be said that the relief sought by the Director-General comes out of 'left field' in terms of the use of that phrase in the *Clearwater* decision.

36. In my submission the information on the WRC website and in the Plan Change 1 document itself would have alerted any person affected to the fact that Plan Change 1 seeks to give effect to the Vision and Strategy, or should have at least put any person on notice to make inquiries to better inform themselves, including reviewing the summary of decisions requested.

37. To conclude my submission on the second consideration in *Clearwater*, the public notification process of Plan Change 1 provided real opportunity for participation by those potentially affected by the relief sought by the Director-General. Given the total number of submissions (1084), it is likely those affected are participating in this process.

Section 32AA RMA – Further Evaluation Reports

38. Section 32AA(1) RMA requires a further evaluation for any changes that have been made to, or proposed for, the proposal[19] since the evaluation report, required under s 32, for the proposal was completed.

39. Pursuant to s 32AA(1)(b), the further evaluation must be undertaken in accordance with s 32(1) to (4) and must, despite s 32AA(1)(b) and s 32(1)(c), be undertaken at a level of detail that corresponds to the scale and significance of the changes.

40. Relevantly, a further evaluation report must:

    a. Examine the extent to which the objectives[20] of the proposal being evaluated are the most appropriate way to achieve the purpose of the RMA,
    b. Examine whether the provisions[21] in the proposal are the most appropriate way to achieve the objectives by –

[19] Proposal means 'change' for which an evaluation report must be prepared
[20] Objectives means the purpose of the proposal
[21] Provisions mean the policies, rules, or other methods that implement, or give effect to, the objectives of the proposed change

i. Identifying other reasonably practicable options for achieving the objectives, and
ii. Assessing the efficiency and effectiveness of the provisions in achieving the objectives, and
iii. Summarise the reasons for deciding the provisions[22]

41. The efficiency and effectiveness assessment referred to above must identify and assess the benefits and costs of the environmental, economic, social and cultural effects that are anticipated from the implementation of the provisions, including the opportunities for economic growth and employment anticipated to be provided or reduced. And, if practicable, quantify the anticipated benefits and costs of these anticipated effects. An assessment of the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the provisions is also required.[23]

42. I understand in response to a question asked of Mr McCallum-Clarke during the Block 2 Hearings that costs of stock exclusion from water bodies had not been assessed, and that they had not been quantified by WRC. And Mr McCallum-Clarke was of the view that there was a gap if WRC were inclined to accept the recommendations for stock exclusions proposed by the Director-General and the Fish and Game Council.

43. Attached, as Appendix A to these legal submissions, is a Further Evaluation for the proposal or changes sought in the Director-General's submission that are not captured in the s 32 Evaluation Report prepared by WRC. This Further Evaluation was undertaken by Ms Kissick in accordance with s 32AA. It is noted that this Further Evaluation reflects the information to date at the time of filing these submissions, and may be further revised once additional evidence becomes available, -for example the outcome of expert conferencing and the joint witness statement on table 3.11-1.

[22] Refer s 32(1)(a) and (b)
[23] Refer s 32(2)

44. With respect I note, had WRC appropriately considered alternative options as required under s 32, much of Ms Kissick's analysis would not have been necessary.

Waterbody Setbacks

45. The Director-General's submission sought amendments to the stock exclusion provisions as follows:
    a. 10m setbacks for cultivation from permanent rivers, lakes and outstanding waterbodies,
    b. 5m cultivation setbacks from intermittent rivers and wetlands,
    c. 20m setback for cultivation from peat lakes, and
    d. 20m grazing and cultivation setbacks for sloping land of 20 degrees or more.

46. In terms of animal exclusions, the Director-General sought exclusion of sheep from outstanding waterbodies and that cattle, horses, deer and pigs are excluded from all waterbodies, including ephemeral waterbodies as reflected in Schedule C of the submission.[24]

47. Riparian management, such as stock exclusions and setbacks, serve to protect water quality through measures such as nutrient and contaminant interception and processing and shading.[25]

48. Livestock access to waterbodies causes effects to freshwater ecosystems through the consumption of plant matter, trampling of riparian plants and fish habitat, pugging and consequential loss of sediment to water, nutrient inputs, microbial contamination and stream bank erosion[26] Cultivation of land

[24] Refer pp 94 – 95 and pp 98-99
[25] Ms McArthur's evidence [24]
[26] *ibid* [26]

adjacent to waterways can also impact on riparian spawning habitat through direct disturbance of spawning areas and removal of vegetation.[27]

49. For river and lake margins where īnanga and other large-bodied galaxiid are known or predicted to spawn, Ms McArthur recommends a 20 m setback distance to ensure available and functioning spawning habitat and sustainable riparian vegetation.[28] Outside of these areas, Ms McArthur recommends a minimum setback of 10m from permanent rivers and streams to ensure more effective buffering of contaminant transport, along with identification and management of critical source areas in FEPs. For intermittent, ephemeral or headwater rivers and streams Ms McArthur recommends 5m setbacks but notes wider setbacks would be more effective at reducing contaminant transport to water.[29]

50. In terms of wetlands, Dr Robertson recommends 10m setbacks apply to draining of wetlands and construction of drains near wetlands because the lowering and fluctuation of wetland water tables has a direct impact on the nutrient cycling in wetlands. Water table fluctuations contribute directly to the release of phosphorus.[30]

51. The Director-General's expert evidence recommends the exclusion of cattle, horses, pigs, sheep and goats from all water bodies, except for intermittent stream and rivers and permanent streams and rivers where the exclusion of cattle, horses, deer and pigs is recommended.[31]

52. Dr Stewart recommends 20m setbacks for particularly sensitive habitats such as peat lakes and riverine lakes.[32] As noted, the submission sought 10m setbacks for lakes.

[27] *ibid* [28]
[28] *ibid* [50]
[29] *Ibid* [51]
[30] Dr Robertson evidence [29]
[31] Ms Kissick evidence [79]
[32] Dr Stewart evidence [31]

53. While Dr Stewart is generally supportive of a 10m setback, he states that 20m setbacks should apply to lakes because larger buffers will ensure improved near-shore habitat noting that stock exclusion from riparian habitat is important in lower catchment riverine lakes. In terms of peat lakes, 20m riparian buffers are important to help maintain perennially saturated marginal wetlands and riparian habitat. Dr Stewart states that Waikato lakes and their specific habitat requirements to sustain biodiversity is largely unknown and so a precautionary approach is appropriate and that it is likely galaxiid spawning is occurring in lakes throughout the catchment.[33]

Īnanga Spawning Habitat

54. In terms of the values and uses section of Plan Change 1, the relief the Director-General sought was the expansion of the extant broadly defined ecosystem health value to effectively provide for ecological health, ecosystem processes and biological diversity at specific locations including, as a minimum, additional value to recognise īnanga spawning, native fish migration, threatened and at risk species and biodiversity hotspots, being areas that are particularly outstanding due to their high proportion of native species and their role as native species 'refuge'.[34] The Director-General's submission also sought new policies and rules to protect spawning habitat[35]

55. In his submission the Director-General discusses the fact that īnanga spawn in the lower Waikato River, among riparian vegetation at the upper tidal extent during high spring tides. Furthermore, early records suggest that this occurs on the Waikato River downstream of Tuakau.

56. As discussed by Ms McArthur, maintaining or restoring adequate and vegetated riparian margins is key to enabling successful spawning and

[33] Dr Stewart evidence [43]-[49]
[34] Refer pp 28 – 30
[35] Refer pp 47 -48

recruitment of galaxiid fish in the Waikato and Waipā catchments and thereby providing for ecosystem health.[36]

57. It is submitted that a new policy and rule framework is required to protect īnanga spawning habitat. The s 42A Report notes that such habitat is better left to the FEP process, and therefore does not recommend adopting the Director-General's submission on this issue. However, as Ms McArthur states, while Certified Farm Environment Planners may adequately identify issues with respect to farming operations and water quality effects, she notes that most are unlikely to be competent in identifying ecological and biodiversity values, including spawning habitats.[37]

58. As WRC have predicted spawning information available via GIS layers it would be preferable if riparian spawning areas are identified and protected more widely for all riparian spawning galaxiid fish across the Waikato and Waipā catchments.[38]

59. In order for Plan Change 1 to give effect to the relief sought in the Director-General's submission, Ms Kissick considers the identification and protection of īnanga habitat through mapping may be required[39], and Ms McArthur's evidence support this. As mentioned, the Director-General seeks an expansion of the ecosystem health value to provide for biological diversity at specific locations, including recognition of īnanga spawning and areas that play a role as a native species refuge.

60. While it is accepted that the relief sought does not specifically refer to mapping spawning habitat, it does seek recognition of this habitat. Ms Kissick evidence is that mapping will recognise spawning habitat. I submit there is scope in the Director-General's submission as mapping can be considered as a consequential amendment to the relief sought.

[36] Ms McArthur's evidence [18]
[37] *ibid* evidence [22]
[38] *ibid* [23]
[39] Ms Kissick evidence [92]

75th Percentile Nitrogen Leaching Value

61. The Director-General's submission supported the 75th percentile leaching value definition but at the same time sought clarity about how this approach would work. Ms Kissick is concerned the definition is not specific enough to improve water quality of lakes in the Waikato and Waipā catchments.[40]

62. Ms Kissick refers to Dr Phillips Block 1 evidence which Dr Stewart reiterates in that lakes are particularly vulnerable to the impact of nutrient enrichment and are more effective at converting nutrients into phytoplankton.[41]

63. Given this concern Dr Stewart recommends that the nitrogen targets be set at the 60th percentile within lakes FMUs. as it best reflects differences in nitrogen use efficiency between rivers/reservoirs and lakes and recognises and accounts for differences in nutrient impact between rivers and lakes. This approach also maintains Plan Change 1 current strategy of targeting the heaviest polluters first.[42]

Policy 11 – Application of Best Practicable Option and mitigation or offset of effects to point source discharges

64. The Director-General's submission[43] sought a hierarchy for the management of adverse effects associated with point source discharges, which the officers report considered was appropriate.

65. The Director-General also sought that waterbody values be considered when evaluating whether offsetting is an appropriate option given some waterbodies and their ecosystems and species are irreplaceable. This should

[40] *ibid* [107]
[41] *ibid* [108]
[42] Dr Stewart evidence [83] - [85]
[43] Refer pp 68

be a factor in considering whether offsetting is appropriate for point source discharges, as irreplaceability is one of the factors that indicates the inappropriateness of an offsetting approach. The Director-General's submission also referred to the Guidance on Good Practice Biodiversity Offsetting in New Zealand.

66. Ms McArthur notes the use of off-sets in resource management is usually applied to biodiversity off-setting, for which best-practice guidance and principles have been developed such as the Guidance on Good Practice Biodiversity Offsetting. Off-sets are a values-based approach whereby there is a need to generate a gain in values that are adequate to fully balance the losses in that same value. Ms McArthur concludes that proposed Policy 11 appears to be contaminant trading, rather than a true offset.[44]

67. Accordingly, Ms Kissick recommends amendments to Policy 11 to remove the ability for offsetting relating to point source discharges.[45]

Tangata whenua ancestral lands definition

68. Plan Change 1 defines 'Tangata whenua ancestral lands' to mean *'land that has been returned through settlement processes between the Crown and tangata whenua, or is, as at the date of notification (22 October 2016), Maori freehold land under the jurisdiction of Te Ture Whenua Maori Act 1993.*

69. While the Director-General did not submit on this definition, there is a legal issue with the wording of this definition. Caselaw holds that the term 'ancestral lands' as used in s 6(e) RMA is not limited to land held as Māori freehold land but includes land that has been owned by Māori ancestors.

70. *Royal Forest and Bird Protection Society Incorporated* v *W.A. Habgood Limited*[46] is a 1987 case, so decided under the jurisdiction of the Town and

[44] Ms McArthur evidence [12]
[45] Ms Kissick evidence [214]
[46] High Court, Wellington, 31/3/1987, Hollard J

Country Planning Act 1977. This was an appeal to the High Court that primarily concerned the meaning of the words 'ancestral land', which was declared to be of national importance in town planning matters under the Town and Country Planning Act 1977. – '*their culture and tradition with their ancestral land*'

71. Before reaching his decision, Holland J referred to an earlier Tribunal decision which held: *'First we hold as a matter of law that the land in question, not being Māori land or Māori freehold land, is no longer ancestral land of Māori…'* [47]

72. However, on this issue, Holland J held that[48]:

> *'I can see no logical or legal reason why section 3(1)(g) should be of no application solely because the land in question is no longer owned by Māori….Parliament put no limitation on the … nature of this relationship to the land and there is no jurisdiction for a judicial limitation being imposed. Each case will have to be considered on its merits and once the nature of the relationship has been established it will be necessary for the deciding body to consider in the circumstances the importance of that relationship to the overall consideration of the application before it. It accordingly follows that the Tribunal in the present case has erred as a matter of law in finding that section 3(1)(g) is of no application to the present case because the land is now owned by the Crown and not Māori'*

73. The approach in *Habgood* has been confirmed by the Court of Appeal in *Environmental Defence Society Inc v Mangonui County Council*[49] and now reflects the approach to application of s 6(e) RMA. "Ancestral land is land that has been owned by ancestors (there being no requirement for current Maori ownership)"[50].

74. The definition of Tangata whenua ancestral lands used in Plan Change 1 imposes limits on land that could be captured under this definition. For example, in practice this would exclude Maori or ancestral land taken under

[47] *Ibid* p 6
[48] *Ibid* p 9-10
[49] [1989] 3 NZLR 257 (CA)
[50] Environmental and Resource Management Law, 5th ed, Nolan, p 937.

the Public Works Act, for a public road or school or similar, and then later returned but not through a settlement process. It would also exclude land that is no longer in Maori ownership, but which Maori still have an ancestral connection to and are in a position to develop. It also has the potential to constrain the application of s 6(e) RMA in the Region.

Rule Framework

75. Section 70 RMA requires that, before a regional council includes in a regional plan a rule that allows as a permitted activity:

a. a discharge of a contaminant or water into water,

b. or a discharge of a contaminant onto or into land in circumstances which may result in that contaminant (or any other contaminant emanating as a result of natural processes form that contaminant) entering water,

the regional council shall be satisfied that none of the following[51] effect are likely to arise in the receiving water, after reasonable mixing, as a result of the discharge of the contaminant, either by itself or in combination with the same, similar, or other contaminants.

76. Proposed Rule 3.11.5.8 Permitted Activity Rule – Authorised Diffuse Discharges states:

> *'The diffuse discharge of nitrogen, phosphorus, sediment and or microbial contaminants from farming onto or into land in circumstances that may result in a contaminant entering water that would otherwise contravene section 15(1) of the RMA is a permitted activity, provided the following conditions are met:*
>
> *1. The land use activity associated with the discharge is authorised under Rules 3.11.5.1 to 3.11.5.7; and*

[51] The effect are -The production of conspicuous oil or grease films, scums or foams, or floatable or suspended materials, any conspicuous change in the colour or visual clarity, any emissions of objectionable odour, the rendering of fresh water unsuitable for consumption by farm animals, any significant adverse effects on aquatic life

2. *The discharge of contaminant is managed to ensure that after reasonable mixing it does not give rise to any of the following effects on receiving waters….'*

77. The rule then goes on to list the effects listed in footnote 51 above. However, rule 3.11.5.8(2) fails to include the full test in s 70(1). This test not only refers to effects arising after reasonable mixing, it also refers to effects arising as a result of the discharge of the contaminant either by itself or in combination with the same, similar, or other contaminants. This is a crucial aspect of the test to be met under s 70 for a discharge activity to be permitted. Rule 3.11.5.8(2) should be amended so as to be fully consistent with s 70(1).

Joint Witness Statement (JWS) on Table 3.11-1

78. The Joint Witness Statement reflects a considerable amount of work by the experts involved in the expert conferencing. Given the number of pages, 202, Counsel has had very limited time in which to consider the JWS or discuss its contents with witnesses prior to filing these written submissions.

79. I acknowledge the panel's 31 May 2019 directions that no further evidence will be accepted on Table 3.11.1, other than the JWS, and that any legal submissions on the Table may be presented at the Block 3 hearings.

80. I seek clarification whether further evidence on the JWS and Table will be accepted at the Block 3 hearings? I seek this clarification because there is likely to be other experts, some of whom may not have attended all or only attended some of the expert conferencing sessions, who may need to consider and address any implications of the JWS for their evidence.

Conclusion

81. I submit the Director-General's submission, in its entirety, is on Plan Change 1 when reading the whole Plan Change document, and when considered in the statutory context of the Vision and Strategy.

82. I further submit that persons affected by the relief sought in the Director-General's submission has had the opportunity to participate in the Plan Change 1 process.

83. The relief sought in the Director-General submission is, in my submission, necessary to restore and protect the health and wellbeing of the Rivers.

Victoria Tumai

Legal counsel for the Director-General of Conservation

25 June 2019.

Appellant	**Halswater Holdings Ltd & Others; Applefields Ltd; Shaw, SJ & H**
Respondent	**Selwyn District Council**
Decision Number	C036/99
Court	Judge JR Jackson; R Grigg; RS Tasker
Judgment Date	25/3/1999
Counsel/Appearances	Hearn, A, QC; Dewar, A; Smith, K; Craw, J; Perpick, M; Yates, K
Quoted	Commissioner of Police v Ombudsman, [1988] 1 NZLR 385; Countdown Properties (Northlands) Ltd v Dunedin City Council, 3 NZPTD 147, 1B ELRNZ 150, [1994] NZRMA 145; Foodstuffs Ltd v Dunedin City Council, W053/93, 2 NZRMA 497, 1&2 NZPTD 808, 1A ELRNZ 454; Mullen v Parkbrook Holdings Ltd [1999] NZRMA 23, (1998) 5 ELRNZ 52; Nelson Pine Forest Ltd v Waimea County Council, (1988) 13 NZTPA 69; Re Queensland Nicholl Management Pty Ltd & Great Barrier Reef Park Authority, (No3) (1992) 28 ALD 368, ; Royal Forest and Bird Protection Society v Southland District Council, AP198/96, [1997] NZRMA 408, 2 NZED 575; Shield v Marlborough District Council, W073/94, 3 NZPTD 736; Striker Holdings (No3) Ltd v Paparua County Council, (1989) 13 NZTPA 420; Taylor v Manukau City Council, (1979) 8 NZTPA 71; Transpower NZ Ltd v Rodney District Council, A085/94, 4 NZPTD 35; Watercare Services Ltd v Minhinnick, [1998] NZRMA 113, 2 NZED 840, 3 ELRNZ 511; Wellington Club Inc v Carson & Wellington City, [1972] NZLR 698, 4 NZTPA (1971) 309; Yates v Selwyn District Council, C096/98, 3 NZED 868
Statutes	District Court Rules 1992, rule 3 "Interpretation"; Resource Management Act 1991, Part II, Part V, Part XI, s2 "local authority", s31, s32, s32(1)(c)(ii), s32(2)(c)(i), s32(2)(c)(ii), s41, s73(1), s73(1A), s74, s74(1), s75(2)(c)(i), s79, s247, s269, s271A, s274, s274(2), s276, s276(1), s278, s290(1), s293, s310, First Schedule cl 1(1), cl 5, cl 5(1), cl 5(3), cl 6, cl 7, cl 7(1), cl 8, cl 10(2), cl 14(1), cl 15, cl16A, cl 16A(2), cl 21; Town and Country Planning Act 1953, s30A, s30A(4)(b), s30A(4)(c); Town and Country Planning Act 1977, s45
Full text pages:	34

Keywords
district plan; reference; jurisdictional issues; rights of s274 parties

Significant in Law, s274 RMA

Consent order - agreement between principal parties - right of s274 parties to be heard. Scope of submissions on plan change - extent of amendment limited - question of degree requires pragmatic judgment.

SYNOPSIS

Preliminary jurisdictional issues arising out of references to the Court. The first issue was whether s274 RMA persons could appear when a consent memorandum had been entered into between the appeal parties. The references related to minimum lot sizes within Christchurch City's "Green Belt". Canterbury Regional Council (CRC) had not filed a submission, but sought to appear pursuant to s274. The parties, not involving CRC, negotiated and reached a settlement. The parties maintained that CRC could not be heard under s274 in respect to a proposed consent order.

The Court, distinguishing Mullen v Parkbrook Holdings Ltd, held that even though the appellants and respondents had reached agreement between themselves, there was still a proceeding to be determined and the Court still had a discretion to grant or refuse consent, irrespective of the agreement of the parties [5 ELRNZ 200 @ 16]. Section 276 RMA provides that the Court can call for further evidence where it considers that necessary. Section 293 also gives the Court the power to provide for hearing interested parties. The Court held that s274 provides for the hearing of such a person, notwithstanding that there had been an agreement reached between the parties.

The Court considered whether the submissions went further than what was permissible in relation to a plan change. The Court held that a submission on a plan change cannot seek a rezoning allowing different activities and/or effects if the rezoning was not contemplated by the plan change [5 ELRNZ 209 @ 19]. The Court accepted that this was a question of degree to be dealt with in a pragmatic fashion. The Court held that the seeking of rezoning of the Halswater Group land to spot zones, as sought by the submission, was beyond the scope of plan change 25. However, the same criticism did not apply to the Applefields reference.

The Court also considered and accepted a challenge against one of the Court's Commissioners on the grounds that he had previously been a CRC Councillor and had written an article on elite soils in the Green Belt. The Commissioner disqualified himself from any part in the substantive proceeding [5 ELRNZ 196 @ 41].

FULL TEXT OF C036/99

Introduction

1. This decision is about two preliminary jurisdictional issues arising out of references to the Environment Court. They are, first, whether persons seeking to appear under section 274 of the Resource Management Act 1991 ("the Act" or "the RMA") can do so when a consent memorandum has been entered into between appellants and the Council in relation to the references, and secondly, as to whether some of the references go outside the scope of a plan change which they ostensibly relate to.

2. The background to these cases is that on or shortly after 22 August 1997 the Selwyn District Council (called "the SDC") notified plan change 25 in relation to its transitional district plan ("the district plan"). In summary, plan change 25 proposed:

(a) To lower minimum lot sizes on applications for subdivision in the "green belt", an area defined in the district plan and covering a semi-circle of land in the SDC's territorial area adjacent to the boundary with Christchurch City;

(b) That new rules constitute a regime in which:
- subdivision into allotments larger than 10ha is a controlled activity;
- subdivision down to 4 hectares is a discretionary activity;
- below 4 hectares minimum size subdivision is non-complying;

(c) To change the rules as to the building of houses in the green belt, by making the erection and use of houses on an approved allotment a permitted activity;

(d) Controlling changes in the objectives and policies, and various other consequential changes to the rules.

3. Submissions on plan change 25 were lodged by (inter alia) Applefields Limited ("Applefields") and by Halswater Holdings Limited and other companies (together called "the Halswater group"). Another submission was lodged by Mr and Mrs Shaw ("the Shaws"). The submission by Applefields dated 23 September 1997 sought (amongst other relief) a further lowering of minimum subdivision size down to a minimum of two hectares. The Shaws sought similar changes. Each of the six companies in the Halswater group sought to have a spot zoning applied to its farms. Each proposed spot zone rezoned a farm, in some cases Rural/Residential as in the SDC's adjacent zoning of the township of Prebbleton, or, in other cases, Rural Intensive Farming zoning, again as defined in the district plan. The individual submissions for the members of the Halswater group each gave a hierarchy of preferred relief, but all sought rezoning of one sort or another on a spot zone basis.

4. After a hearing the SDC in its decision decided not to grant the relief variously sought by Applefields, the Halswater group or the Shaws. Instead, it adopted its plan change 25 with some minor amendments. The

various appellants then referred plan change 25 to this Court seeking as relief that their submissions be adopted in total.

5. The Canterbury Regional Council ("the CRC") did not file a submission on plan change 25; nor did it file a cross-submission on the submissions by the appellants. It took no part in the hearing before the SDC. However, on 4 December 1998 after the references were filed in this Court, the CRC filed and served notice that it wished to appear and be heard by the Environment Court. In doing so it purported to act under section 274 of the Act.

6. Despite receiving notice from the CRC the various appellants negotiated with the SDC (ignoring the CRC) in an effort to negotiate a settlement of their references. In the end result they reached agreement with the SDC as to how to dispose of the references, although the SDC expressly reserved leave to argue the second jurisdictional point identified in paragraph 1 above.

7. The references were set down for hearing as a special two week fixture beginning on Monday 8 February 1999. Following an earlier indication by Applefields and the Halswater group that they might be seeking an adjournment, the Court adjourned the hearing of these references to later in the week on the grounds that the parties (excluding the CRC which is not a party) had reached agreement so that the only outstanding issue between the parties was whether there was jurisdiction to grant the orders sought by Applefields, the Halswater group and the Shaws. Another reference[1] of Plan Change 25 was also set down for hearing at the same time. That hearing was duly completed and the Court reserved its decision on the substantive issues.

8. On Thursday 11 February the three outstanding references were called. Mr Hearn for Applefields and the Halswater group, Ms Dewar for the Shaws, and Mr Smith for the SDC then indicated that agreement had been reached between the referrers and the SDC. The Court understood this contemplated a rezoning of some pieces of land in the green belt owned by the Halswater group (but not all six farms) and the Shaws. In other words, the relief sought by some members of the Halswater group was allowed in part. The persons appearing then took the following positions:

(1) For the CRC Ms Perpick indicated that the Regional Council:
   (a) Wished to appear under section 274;
   (b) Wished to submit that there was no jurisdiction to grant the relief sought in the references even though there was now an agreement between the referrers and the SDC.

(2) For their part, Applefields and the Halswater group submitted that there was jurisdiction and also that in any event the CRC had no right to be heard.

(3) As for the SDC: while it had reached agreement with Applefields, that agreement was subject to the Court confirming it had jurisdiction to make

the consent order sought and, indeed, exercising its discretion then to do so. The SDC submitted that the CRC could not be heard under section 274 in respect of a proposed consent order as set out in the consent memorandum.

(4) Finally Mr K Yates[2] appeared although he had given no notice under either section 271A or section 274. His right to be heard was challenged by Applefields and the SDC.

(5) Mr and Mrs Shaw, through their counsel Ms Dewar, indicated that they abided by the decision of the Court on the jurisdictional matters.

9. Thus we have to decide:

(a) Whether the CRC and/or Mr Yates may be heard under section 274 of the Act;

(b) Whether the submissions by Applefields, the Shaws and the Halswater group are proper submissions[3] on plan change 25 and thus within the jurisdiction of the Court to consider.

10. At the end of the hearing on this jurisdictional matter on Thursday 11 February we took a short adjournment to consider the issues. We then returned to Court to announce that we wished to proceed with the substantive hearing since there was a further week set aside. We did so on the express grounds that although we had not finally determined the issues it was more likely than not that we would decide the issues in this way:

(a) that the CRC could be heard under section 274; and

(b) that we had jurisdiction to give the relief sought by the references.

Mr Hearn then indicated he might wish to apply for an adjournment of the substantive proceedings. We then adjourned the proceeding to the next morning, so that he could take instructions.

11. On Friday 12 February 1999 the presiding Judge heard counsel in Court on the application for an adjournment. After hearing counsel, I granted an adjournment *sine die*, so that the Court could release its decision on the interlocutory issues before the case proceeded. Two other events should be recorded. First Mr Hearn said that his instructions were that if the CRC was to be heard, then Applefields intended to resile from their agreement with the SDC. We make no comment on that. Secondly he advised the Court that his instructions were to object to the present composition of the Court hearing the substantive references. Applefields specifically objected to Environment Commissioner Tasker hearing the matter. His grounds were that Mr Tasker:

(a) had been, until 1996, an elected member of the Canterbury Regional Council; and

(b) has written and published an article about elite soils as a 'precious' resource.

Mr Hearn submitted that these matters might raise a suggestion of bias and/or predetermination. The presiding Judge subsequently raised these matters with Mr Tasker, and he has disqualified himself from any part in the substantive

proceeding.

Can the CRC (and/or Mr Yates) be heard?

12. The CRC seeks to be heard under section 274 of the Act. That states (relevantly):

> *"(1) In proceedings before the Environment Court under this Act, the Minister [of the Environment], any local authority, any person having any interest in the proceedings greater than the public generally, any person representing some relevant aspect of the public interest, and any party to the proceedings, may appear and may call evidence on any matter that should be taken into account in determining the proceedings.*
>
> *(2) Where any person who is not a party to the proceedings before the Environment Court under this Act wishes to appear, that person shall give notice to the Court and every party not less than 10 working days before the commencement of the hearing."*

The CRC is clearly not a party since it is neither the appellant, nor the applicant for resource consent, nor the respondent. It did not make a cross- submission on the present appellants' submissions on plan change 25 and therefore can not become a party by giving notice under section 271A of the Act.

13. However the CRC did give notice under section 274 to the Court and to the parties within the appropriate time[4]. It is a "local authority" within the meaning of section 2 of the Act since it is a regional council. Prima facie it is entitled to be heard if there are "proceedings before the Environment Court". In opposing the CRC's right to be heard Mr Smith for the SDC submitted that limits exist on the rights of participation on a section 274 interested person. In particular, he submitted that the Court, in making a consent order between the parties, is not conducting a proceeding but a preliminary jurisdictional hearing.

14. Mr Smith relied on the recent Court of Appeal decision in Mullen v Parkbrook Holdings Limited[5]. The situation in that case was that Mr Mullen had given notice under section 274 of the Act that he wished to be heard on an appeal against a grant of consent to Parkbrook Holdings Limited ("Parkbrook") by the Auckland City Council. The appeal was lodged by a Mr McLean and Ms Stirrup, who with Mr Mullen were neighbours of the development site. Only Mr McLean and Ms Stirrup appealed against the grant of consent to Parkbrook. Before the hearing of the appeal commenced Mr McLean and Ms Stirrup resolved matters with Parkbrook whereby Parkbrook purchased their land so they no longer had any interest in the way in which Parkbrook's development proceeded. They therefore withdrew their appeal to the Environment Court. Mr Mullen was then left rather hanging in the air since although he still opposed the Parkbrook development, he had not filed a submission against it, and so had no appeal (or even appeal rights)

of his own. He sought to argue before the Environment Court that the McLean and Stirrup appeal could not be withdrawn if he did not consent to it. The Environment Court upheld his contention at first instance, but Salmon J in the High Court and then the Court of Appeal then said that the appellants could withdraw their appeal at any time they wished.

15. The Court of Appeal held that Mr Mullen was not a party but merely a person with a right of audience under section 274. It went on:

> *"Mr Mullen's right of audience under section 274 entitled him to appear and to call evidence on any matter that he contended 'should be taken into account in determining the proceedings'. Following a valid withdrawal/ abandonment by the appellant, there are no longer any proceedings to be determined."*[6]

The Court of Appeal then continued by examining authorities cited by counsel and relevant policy considerations. It concluded that:

> *"..... the indications are in favour of an appellant having a right to withdraw or abandon the appeal subject only to that course not being an abuse of process. A section 274 participant may not challenge that withdrawal or abandonment other than as an abuse of process."*[7]

16. Mr Smith acknowledged that Mullen's case was concerned with a withdrawal of an appeal with the respondent's express consent. However he submitted that if the appellant and respondent can reach agreement then that also should be the end of the matter and the need for a consent order is a mere formality. He referred to the various overseas authorities identified in Mullen. We think the gist of this part of his argument is contained in a passage from Re Queensland Nicholl Management Pty Limited and Great Barrier Reef Park Authority[8]. The Administrative Appeals Tribunal there stated:

> *"There is a definite public interest in settlement of proceedings. It ought to be open to an applicant in this Tribunal to settle the claim the subject of the proceeding at any time up to decision. Settlement, whether by mediation or otherwise, should be encouraged. In the vast bulk of cases, it saves the parties and the public money. Parties should not be discouraged from settlement by fearing that, even if they settle, the tribunal will proceed with the case, or by being subjected to financial or other penalties when they have settled."*

Mr Smith submitted that there was no live proceeding before the Court, because it had been settled by the parties.

17. For Applefields, Mr Hearn also referred to Mullen's case, and the conclusion that an interested person under section 274 is not a **party** under section 271A. For example, as the Court of Appeal pointed out, no costs order can be made against a section 274 'interested person'. He argued that if the actual parties to a proceeding can resolve matters between themselves, subject to the approval of the Court (and he conceded that the Court might require evidence from the parties to satisfy it that the proposal is appropriate),

then a section 274 interested person had no right to be heard.

18. Mr Hearn relied on an earlier decision of the Planning Tribunal (as the Environment Court then was): Shield v Marlborough District Council[9]. In that case an applicant applied for a water permit under the Act. This was duly granted by the Marlborough District Council. The appellant Mr Shield lodged an appeal against that grant of resource consent. A Mr Blick, who was also intending to lodge an appeal according to the decision, became aware that his neighbour had done so and so did not himself. Instead Mr Blick subsequently filed a notice under section 274 of the Act. In the meantime it appears that the parties - Mr Shield, the Council and the applicants - had reached agreement between themselves. By memorandum they requested that the Court make a consent order, and it appears an order had already been made. The decision is unclear, but it appears that Mr Blick made some kind of application to set the consent order aside. Judge Treadwell decided that Mr Blick was a party although he does not make it clear whether or not a section 274 notice had been filed by Mr Blick. In any event he held that notwithstanding that Mr Blick was a party a consent order could be made without his consent. His Honour also decided he was *functus officio*. We respectfully consider the case is of limited value as a precedent for two reasons. First, the facts are obscure. Secondly the Act has been amended since Shield by the addition of section 271A giving a procedure for a submitter to join as a party under section 271A of the Act.

19. Mr Hearn also submitted that the CRC had opportunities to become involved by filing a submission or cross-submission on the plan change which would then entitle it to file a notice under section 271A. He said the CRC had chosen not to, and thus should not seek to come into the proceeding at the last minute.

20. In reply Ms Perpick pointed out that the CRC has a duty to ensure that plan change 25 is not inconsistent[10] with the CRC's regional policy statement (called "the RPS"). As we understood her argument it was that the CRC decided to rely on the SDC coming to the correct decision in the hearing before it. Indeed its confidence was shown to be justified by the SDC decision. However when Applefields and other parties referred the plan change to this Court, the CRC decided that, to protect its position and assist the SDC, it should file and serve a notice under section 274. She submitted that there didn't seem much point in the Court excluding the CRC when the express terms of section 274 appeared to allow it a right to be heard. Further the CRC could in a separate proceeding apply for a declaration under section 310 of the Act that the plan change 25, if modified as sought, was inconsistent with the RPS. That would be a waste of time if the matter could be dealt with at this stage.

21. In deciding what the CRC's rights are we have to look at the text, scheme and purpose of the Act as well as any relevant authorities. It seems to

us that if there is a 'proceeding' within the meaning of section 274 then the text of that section suggests that the CRC has a right to be heard unless the scheme and purpose of the Act militate otherwise.

22. As for the narrow question as to whether there is a 'proceeding' this term is not defined in the Act. Section 247 of the Act constitutes the Environment Court a Court of record. In our view any procedural (interlocutory) or substantive step taken before the Environment Court is part of a proceeding. This appears to be borne out by section 269 of the Act which states that:

> *"(1) Except as expressly provided in this Act, the Environment Court may regulate its own proceedings in such manner as it thinks fit.*
>
> *(2) Environment Court proceedings may be conducted without procedural formality where this is consistent with fairness and efficiency."*

In our view the distinction drawn by the rules of other Courts between proceedings generally and interlocutory matters[11] is not generally relevant in the Environment Court. It may be relevant when the Court exercises the powers of the District Court in its civil jurisdiction[12]. Thus we hold that even though the appellants and respondent have reached agreement between themselves there is still a proceeding to be determined as the Court still has a discretion (to be exercised judicially of course) to grant or refuse consent. In this case it is relatively simple to decide that, since the appellants and the respondent themselves are in disagreement over whether there is jurisdiction to make the order sought and thus require an order of the Court. Even in the absence of such disagreement we consider there would still be a proceeding to be determined, since any order of the Court, albeit by consent, is both part of, and in fact in this case determinative of, the proceeding.

23. We now turn to look at the scheme and purpose of the Act to see if the proceeding should be determined in a way that precludes the CRC from being involved. In analysing these matters we have to be careful not to arrogate to ourselves the powers of a commission of inquiry because, as the Court of Appeal has pointed out, the Environment Court is not such[13]. Nor, it has laid down, should we make any "statements" in which we seek to espouse a "public watchdog role"[14]. With respect, it is difficult to reconcile these statements with the Court of Appeal's recognition in Watercare Services Ltd v Minhinnick[15] that, at least in enforcement proceedings, *"... the [Environment] Court acts as the representative of the community at large."* And later it describes the Court as *"the representative of New Zealand society as a whole."*[16]

24. Part XI of the Act outlines the powers of the Environment Court. Basically it hears appeals by way of a re-hearing. In relation to appeals about resource consents it has the *"same power, duty and discretion in respect of a decision appealed against ... as the person against whose decision the appeal or inquiry is brought."*[17] Similarly clause 15 of the First Schedule authorises

the Court, in respect of a reference, to:

> *"[2] ... confirm, or direct the local authority to modify, delete, insert any provision which is referred to it."*[18]

25. In coming to its decision the Court not only has the general procedural powers referred to in section 269, it also has different powers from the normal courts of record with respect to evidence in that it may:

> " .....
> (a) *Receive anything in evidence that it considers appropriate to receive; and*
> (b) *Call for anything to be provided in evidence which it considers will assist it to make a decision or recommendation; and*
> (c) *Call before it a person to give evidence who, in its opinion, will assist it in making a decision or recommendation."*[19]

Under this power the Court has the power to call witnesses or even to anticipate what kind of evidence might be necessary. Or, if it considers the evidence given is deficient, to call for further evidence to be given to the Court.

26. This is quite different from the more passive role the other Courts of record have under the adversary system in respect of the calling of evidence. In fact what is remarkable about this power is not so much its existence as the fact that it does not ever appear to have been used by the Environment Court, perhaps because of the strong common law background of the Judges. The proper parameters of its procedural powers are unclear. There are only a few older statements by the superior Courts in which a different role for the Planning Tribunal and Environment Court and other administrative bodies has been recognized: Wellington Club Inc v Carson and Wellington City[20] and Commissioner of Police v Ombudsman[21].

27. The important point for present purposes in respect of section 276 is that such powers suggest that if the Court is not satisfied with the terms of a proposed consent memorandum (because it may appear to fail to achieve the purpose of sustainable management) presented by the parties[22] then it may call for further evidence. As we have said Mr Hearn accepted that, but limited the allowable evidence to that of the parties or evidence called by the Court under section 276. He said that the Court could not hear the CRC or let it call evidence. We find that an artificial distinction and we cannot understand the basis for it on general grounds.

28. There is also another distinct provision (in section 293) which gives the Environment Court extra powers in relation to plans or plan changes[23]. In addition to the powers in clause 15 of the First Schedule to modify, delete or insert any provision referred to it, the Environment Court may in respect of any public statement, plan or plan change if it considers:

> *" ..... that a reasonable case has been presented for changing or revoking any provision of a policy statement or plan, and that some opportunity*

should be given to interested parties to consider the proposed change or revocation, ... adjourn the hearing until such time as interested parties can be heard."

This provision suggests that if the Court considers that an agreed solution between parties in a consent memorandum affects other *"interested parties"*[24] then it may adjourn the hearing and order further notification. Again the outcome of the proceeding is in the hands of the Court rather than in the hands of the parties. The making of an order is still in the discretion of the Court and is not an automatic consequence of the filing of the memorandum[25].

29. In our view the range of powers and discretions given to the Environment Court coupled with the express words of section 274 suggest that the Environment Court should hear a person who has given notice under section 274 (and otherwise has standing under that section) notwithstanding that there has been an agreement reached between the parties strictly so called. This approach is consistent with the Court of Appeal's decision in Mullen in that here there is still a proceeding to be resolved, whereas in that case there was not.

30. Finally we also note that it appears to be the policy of the Act that it encourages public participation - see Countdown[26]. It seems artificial to restrict the capacity of section 274 interested persons when on the face of the section they are given a right consistent with the general policy of the Act towards public participation. For the reasons given, we hold that the Canterbury Regional Council, having given notice under section 274 of the Act, is entitled to be heard in respect of the orders sought by consent as between Applefields and SDC.

31. As far as Mr Yates is concerned we hold that he also can be heard under section 274 for the same general reasons as to the CRC. He appears to have standing as a person having an interest in the proceedings greater than the public generally, because he had himself referred plan change 25 to the Court. That of course means that Mr Yates could equally validly appear as a party under section 271A. That states:

"(1) Any person who made a submission may be a party to any subsequent appeal ... "

Section 2 of the Act defines a *"submission"* as

"a written statement and, in relation to the preparation or change of a ... plan, includes any submission made under clause 8 of the First Schedule in support of or in opposition to an original submission."

We hold that provided Mr Yates gives written notice under either section 271A or 274 not less than 10 working days before the hearing, he will be entitled to be heard and call evidence.

Scope of Submissions on Plan Change

32. We have already summarised plan change 25 as notified by the Council[27]. There can be no challenge to the capacity of the Council to grant

relief sought by Applefields Ltd and the Shaws. They seek a reduction in lot sizes on subdivision, plus a freeing of the rules controlling building houses on the resulting allotments. That is clearly within the general scope of the plan change, so that their submissions are 'on' plan change 25.

33. The real challenge by the SDC and the CRC is as to the relief sought by the Halswater group which was:

> *"i)* ***As the first preferred relief:***
>
> *a) That the land identified on the attached plan being lots 1-13 DP 54204 be zoned rural-residential (being same or similar to the existing rural-residential zoning contained in the Paparua Section of the Transitional District Plan) except that the minimum area for subdivision as a controlled activity and the establishment of a dwelling as a permitted activity shall be 5000 m², with no average minimum area required, and no limitation on the maximum number of lots or dwellings within the zone; and*
>
> *b) That the objectives, policies and explanations of the plan be amended to give effect to the establishment of the rural-residential zoning over this land including recognition of the appropriateness of utilising the quality soils of the site for rural-residential amenity (high quality gardening and landscaping) as opposed to solely food production; and*
>
> *c) That as part of the concept plan process already provided for in the plan that Council have regard to, in addition to the matters already listed in the plan, visual amenity, the provision of planting and landscaping, and the need, if any, for site coverage limitations.*
>
> *ii)* ***If the first preferred relief referred to in paragraph (i) above cannot be had, then in the alternative as the second preferred relief:***
>
> *That the land indicated on the attached plan being lots 1-13 DP 54204 be zoned Rural Intensive Farming (being same or similar to the existing Rural Intensive Farming zone contained in the Paparua Section of the Transitional District Plan) except that the minimum area for subdivision as a controlled activity, and the minimum area for the erection of a dwelling as a permitted activity, shall both be 1 hectare, and that the Conditional Use "economic criteria" relating to subdivision and dwellings be deleted; and that if deemed necessary in order to grant the relief sought in this paragraph, that new or additional rule or rules be introduced to the effect or like effect that:*
>
> .....
>
> *iii)* ....." [Our underlining].

The third relief sought was similar to paragraph (ii) above i.e. for a rural intensive spot zone but with subdivision down to two hectares (rather than one hectare) as a controlled activity. Other members of the Halswater group sought rezoning also, but in some cases only to a rural intensive zone, not

rural residential.

34. The major difference between plan change 25 and the relief sought by the Halswater group is that they all sought spot zoning of their land[28] into either for example a Rural/Residential zone with subdivision down to 0.5ha or into a Rural Intensive zone (with subdivision down to 1ha minimum lot size) and a dwelling as of right in those spot zones on any allotment. That difference is particularly significant because plan change 25 did not seek to change any zonings (and thus the activities permitted). It simply proposed to change the rules as to minimum lot sizes and the building of houses within existing zones (or that part of them known as the green belt).

35. To ascertain whether or not the scope of a submission is limited by a plan change we need to look at the purpose and scheme of the Act as it relates to plans and plan changes and the process of submissions on them. Part V of the RMA describes and controls plans. Every district is required to have a district plan at all times[29]. A district plan may also be changed[30] at any time, and it must be reviewed not later than 10 years after it first becomes operative[31]. While a plan is being proposed or changed the Council may at any time promote a variation of the proposed plan or change[32].

36. The process[33] by which plans are prepared or changed is set out in the First Schedule to the Act and we will consider that procedural code shortly. It is however worth noting here that matters to be considered by the territorial authority are outlined in section 74. In particular sub-section (1) states:

> *"(1)A territorial authority shall prepare and change its district plan in accordance with its functions under section 31, the provisions of Part II, its duty under section 32, and any regulations."*

While the requirements of section 31 and Part II provide substantive jurisdictional limits which we need not consider here, it is worth noting that section 32 in effect imposes a further procedural step in relation to the preparation of plans or plan changes. It requires a territorial authority before adopting any objective, policy or rule or other method in a plan[34] to have regard to the benefits and costs etc as set out in section 32.

37. As for plan changes[35] there is no restriction on how much or how little of a plan a plan change may affect, nor is there any guidance in the body of the Act (as opposed to the First Schedule) as to the scope of a submission on a plan or plan change.

38. We now turn to consider the provisions of the First Schedule. On its face this deals with the preparation and change of policy statements and plans by local authorities but every reference to a policy statement or plan includes a reference to a change to such a document.[36] In the following quotations from the First Schedule we have therefore substituted the words *"plan change"* for the phrase *"policy statement or plan"* for ease of reading. After a local authority has prepared a plan change it must publicly notify it[37]. One of the few places in which the First Schedule distinguishes between the process for

a policy statement or plan on the one hand and a plan change on the other is when dealing with the issue of a closing date for submissions which must be specified in the public notice. Clause 5(3) states that the closing date for submissions:

> *"(a) Shall, in the case of a proposed policy statement or plan, be at least 40 working days after public notification; and*
>
> *(b) Shall, in a case of a proposed change or variation to a policy statement or plan, be at least 20 working days after public notification."* (Our underlining).

The halving of the time for filing of submissions suggests that a plan change is contemplated as being shorter and easier to digest and respond to than a full policy statement or plan.

39. Clause 6 of the First Schedule is then of crucial significance in this case because it includes the power to make a submission on a plan change. It states:

> *"6. Making submissions -*
>
> *Any person ... may, in the prescribed form, make a submission to the relevant local authority on a ...[plan change] that is publicly notified under clause 5."*

The limits on the scope of a submission on a plan change are that it must be *"on"* the plan change. The next step is that there has to be public notification through an advertisement of the availability of a summary of submissions.[38] Any person is then given the right to make a submission in opposition or support to submissions made under clause 6.[39]

40. When it comes to make its decision the local authority:

> *"...may include any consequential alterations arising out of submissions and any other relevant matters it considered relating to matters raised in submissions."*[40]

Then any person who made a submission on a plan change may refer to the Environment Court:

> *"(a) Any provision included in the ... [plan change], or a provision which the decision on submissions proposes to include in the ...[plan change]; or*
>
> *(b) Any matter excluded from the ... [plan change], or a provision which the decision on submissions proposes to exclude from the ... [plan change],*
>
> *if that person referred to that provision or matter in that person's submission on the ... [plan change].*[41]*"*

It is by this method that the references in this case to the Environment Court were made by Applefields, the Halswater group and by the Shaws.

41. For the sake of completeness we should mention that clause 16A of the First Schedule deals with variations to plan changes (as well as to proposed plans themselves) and the provisions of the schedule apply with all necessary modifications to every variation *"as if it were a change"*.[42] Finally in clause

21 there is a provision whereby any person may request a change to a district plan. Those provisions give some of the context in which we have to examine the issues in this case. They suggest that if a person wants a remedy that goes much beyond what is suggested in the plan change so that, for example, a submission can no longer be said to be *"on"* the plan change then they may have to go about changing the plan in another way, e.g. by an individual's later request for a *"private"* plan change or by encouraging the Council to promote a variation of the plan change. Those procedures have the advantage that the notification process goes back to the beginning. A further consideration is that if the relief sought by a submission goes too far beyond the four corners of the plan change then the Council may not have turned its mind as to the effectiveness and efficiency[43] of what is sought in the submission.

42. It follows that a crucial question for a council to decide when there is a very wide submission suggesting something radically different from a proposed plan as notified is whether it should promote a variation so that there is time to have a section 32 analysis carried out and an opportunity for other interested persons to make primary submissions under clause 6.

43. Other relevant considerations for the interpretation of clause 6 arise out of the notification of a plan change under clause 5 and the public notice under clause 7. When a local authority has prepared a plan change then as part of the public notification it has either to:

> *"(a)Send a copy of the public notice, and such further information as a territorial authority thinks fit relating to the ... [plan change], to every person ... likely to be directly affected by the ... [plan change]; or*
>
> *(b) Include the public notice, and such further information as the territorial authority thinks fit relating to the ... [plan change], in any publication or circular which is issued or sent to all residential properties and Post Office box addresses located in the affected area ...".*

By contrast the public notification of the summary of submissions is merely through *"a prominent advertisement"*.[44]

44. The consequences of differences in notification appear to be that if a person is not alerted to the relevance of a plan change in the first instance i.e. after public notification of the plan change itself, or if they are alerted to the plan change but see that it is limited on its face to a certain issue (such as the size of allotments on subdivision and the erection of dwellings) they may take the matter no further. In particular they may not check, or be alert to check the notification of submissions on the plan change. In other words there are three layers of protection under clause 5 notification of a plan **change** that do not exist under clause 7 in relation to public notification of the summary of **submissions.** These are first that notice of the plan change is specifically

given to every person who is in the opinion of the Council, affected by the plan change, which in itself alerts a person that they may need to respond; secondly clause 5 allows for extra information to be sent, which again has the purpose of alerting the persons affected as to whether or not they need to respond to the plan change. Thirdly notice is given of the plan change, not merely of the availability of a summary of submissions. Clause 7 has none of those safeguards.

45. Almost all the cases in this area relate to the issue of whether a decision of the Council was authorised by the scope of submissions: Nelson Pine Forest Limited v Waimea County Council[45], Countdown Properties (Northlands) Limited v Dunedin City Council[46], Royal Forest & Bird Protection Society v Southland District Council[47]. They cannot therefore be much assistance to us here. However, in the last case Panckhurst J stated:

> *"... it is important that the assessment of whether any amendment was reasonably and fairly raised in the course of submissions, should be approached in a realistic workable fashion rather than from the perspective of legal nicety."*[48]

In the decision of the Full Court of the High Court in Countdown Properties (Northlands) Limited and Others v Dunedin City Council it stated that the ambit of a council decision is:

> *"a question of degree to be judged by the terms of the proposed change and of the content of the submissions"*[49]*. (Our underlining).*

The Court clearly recognized that the parameters of the plan change in themselves are relevant. We hold that they also affect the scope of a submission.

46. In this case the relief sought by the Halswater group on appeal appears to be within the scope of their respective submissions. The issue is whether any of the submissions goes further than what is permissible in relation to a plan change. That is, whether the relief sought within the submission is not **'on'** the plan change.

47. We accept that the same test should apply in respect of whether submissions are on the plan change itself. In other words it is a question of degree and it should be approached in a realistic workable fashion rather than from the perspective of legal nicety.

48. While, as we have said, there are no authorities under the RMA there is an interesting decision from the High Court on the provisions of the Town and Country Planning Act 1953 ("the 1953 Act"): Taylor v Manukau City Council[50]. In that case the Manukau City Council sought to rezone land from a rural zone to an urban zone. In fixing the boundaries for the new zoning the respondent had regard to topography and not to cadastral boundaries. As a consequence the appellants were left with small areas of rural land which were uneconomic by themselves. They filed submissions seeking to rezone those parts of their land which had been excluded from the

plan change in the urban zone as well. The questions for the Court included:

> *"1. Was the Tribunal correct in holding that, at the time of the objections which gave rise to the appeals [that] were lodged with the respondent, in so far as they related to land outside the area the subject of the proposed change the objections went beyond the scope of the proposed change and in that respect were invalid?"*

49. Section 30A of the 1953 Act set out the procedure to be followed in respect of changes to the district scheme (the equivalent of a district plan under the RMA). In particular section 30A(4)(c) of the 1953 Act controlled, in McMullin J's words:

> *"the contents of the public notice and required that it should call for objections* 'to the proposed change only' *to be lodged at the office of the Council".*

The reference to the objections being *"to the proposed change only"* was in contrast to the provisions of section 30A(4)(b) of the 1953 Act which related to the public notification of a review of the whole scheme and provided for objections *"to any provision of the proposed new district scheme ...".* McMullin J decided that:

> *"An owner of residential land the zoning of which is unaffected by a change may still have a right of objection to a change which alters the zoning of nearby but not necessarily adjoining land from one zoning to another ...".*

50. With respect to the High Court it appears the learned Judge moved from consideration of whether the appellant's submissions were within the scope of the plan change to the question of whether the owners of the land had standing to object. It is respectfully submitted that the real issue in the case was in the submissions of counsel[51] who:

> *"Submitted that the line which the Council drew in relation to a change did not define the extent of its jurisdiction ... he said the Courts should take a broad view of the scope of change and the effects which it had rather than confine it to the area within some particular boundary lines which was more directly affected by it."*[52]

In any event, the High Court answered the question quoted above as 'no'. Given that result and the difference between section 30A(4)(c) of the 1953 Act and clause 6 of the First Schedule to the RMA suggests there must be some flexibility in the parameters of a submission on a plan change.

51. In Striker Holdings (No. 3) Ltd v Paparua County Council[53] two appellants in respect of a plan change to the Paparua County's district scheme objected to having their land included in an "Appendix U" referring to flood-prone land. The Planning Tribunal stated:

> *"We accept, as Mr Hearn submitted, that it must always be open to land owners to say, by way of objection, that they do not want to be subject to the controls sought to be introduced by a scheme change. So, in this case*

for example, there can be no doubt that both appellants have the status to object to the change, and consequently to appeal. But their remedy is not to seek to be excluded from the change. Their remedy is either to have the change withdrawn or to have it amended in a way that will satisfy their concerns. The appellants have not sought either remedy. Instead they have sought, either by exclusion or in the case of Striker by rezoning, to have the district scheme provisions identifying their land changed. But their remedy, as we have just said, was to seek to have the rules governing the land so identified remain the same or changed. The appropriateness of the identification in each case is not put in issue by Change 11.

For the foregoing reasons, we uphold Mr Milligan's primary submission that both objections are invalid, with the consequence that the Tribunal lacks jurisdiction to hear and determine both appeals on their merits."[54] (Our underlining).

It appears that Striker tried to do exactly the same thing (i.e. rezoning) that the Halswater group is seeking to do here. Striker's relief was held to be beyond the powers of the Council or Planning Tribunal to grant. We recognise that under the TCPA 1977 an objection in relation to a scheme change was an objection "thereto"[55] rather than "on" the plan change but we do not see that difference as material. We consider that the same principle applies under the RMA: a submission on a plan change cannot seek a rezoning (allowing different activities and/or effects) if a rezoning was not contemplated by the plan change.

52. While we accept that the scope of submissions on a plan change under the 1953 Act were (perhaps) tighter than under the TCPA 1977 or RMA we still consider the principles we have enunciated above are correct: that there are limits on how far a submission may go beyond the scope of a plan change so that it is no longer 'on' the plan change and that it is a question of degree to be dealt with in a pragmatic fashion.

53. We now turn to the facts of this case. We hold that the seeking of rezoning of the Halswater group land in spot zones as sought by the Halswater group's submissions is beyond the scope of plan change 25 for these reasons:

(a) There was no suggestion in plan change 25 as notified that there was to be any rezoning of land, with consequent changes in permitted activities etc;

(b) Upon notification of plan change 25 members of the public may have decided that they need not become involved in plan change 25 in view of its relatively narrow effects on the plan as a whole;

(c) A further consequence of (b) is that members of the public would not necessarily check for any advertisement as to the summary of submissions nor go to the Council to check as to the content of the summary of submissions, nor check the actual submissions of the Halswater group.

(d) The rezoning sought by the Halswater group cannot have had any section 32 analysis applied to it by the Council.

(e) The appropriate 'remedy' for the Halswater group is to request the SDC to promote a variation of the plan change (although they cannot force the SDC to take that action).

54. Counsel for the SDC and the CRC did not distinguish between the Applefields, the Shaws and the Halswater group appeals, but in fact they are quite different. None of the criticisms above apply to the Applefields reference, and consequently we hold it is properly on plan change 25 and thus within our jurisdiction to consider on the merits. The Shaws reference is similar to Applefields and thus it also is valid.

55. Nor is invalidity necessarily the death of the Halswater group's appeal. We should consider whether we can isolate invalid parts of the Halswater group's reference. There is a kernel of relief in each of their submissions which may be isolated in the relief sought by the Halswater group reference as being within the general scope of plan change 25. It is the request in the reference that in the green belt *"the minimum area for subdivision as a controlled activity shall be 5,000m², with no average minimum area required, and no limit on the maximum number of lots or dwellings within the zone."*

It is permissible for the Halswater group to seek that change for its six farms, but not a rezoning. We hold that we should sever the rest of the relief sought.

56. We also record that any settlement of the appeals by Applefields and the Shaws must be within the scope of their submissions or the amended relief sought by the Halswater group. This should be qualified by the proviso that the Shaws or any section 271A party may also request that there be different minimum sizes for allotments on specific pieces of land.

Outcome

57. We make the following orders under section 269 of the Act:

(1) That the Canterbury Regional Council is entitled under section 274 of the Act to be heard and call evidence on any references of plan change 25;

(2) That Mr K Yates is entitled to appear and be heard under section 274 (or 271A) of the Act if he gives notice to the Court (and parties) under one of the two sections.

(3) The relief sought in appeal RMA 870/98 is struck out except for the words *"the minimum area for subdivision as a controlled activity shall be 5,000m², with no average minimum area required, and no limit on the maximum number of lots or dwellings within the zone."*

(4) Appeals RMA 870/98, 871/98 and 881/98 are adjourned for a pre-hearing conference. The Registrar is to allocate a date as soon as convenient.

(5) Costs are reserved.

FOOTNOTES

1 Yates v Selwyn District Council RMA 892/98

2 The appellant in RMA 892/98

3 In terms of clause 6 of the First Schedule to the Act

4 Ms Perpick suggested that the CRC may not even need to give notice – perhaps section 274(2) only applies to another person who is not a party to the proceedings? We do not have to decide that here.

5 [1999] NZRMA 23.

6 [1999] NZRMA 23 at 30

7 Ibid at page 36

8 (No. 3) (1992) 28 ALD 368 at 374 as quoted by the Court of Appeal in Mullen

9 W73/94

10 Section 75(2)(c)(i)

11 e.g. The District Courts Rules 1992 rule 3 "Interpretation". This defines a "proceeding" as meaning: *"...any application to the Court for the exercise of the civil jurisdiction of the Court other than an interlocutory application."*

12 Under section 278 of the Act

13 Mullen at page 34. Although why the Environment Court would want to be a Commission of Inquiry (and it never claimed to be so in Mullen at first instance) is an open question, given the Court's wide and inquisitorial powers under the Act. The Act itself gives most of the powers of a commission of inquiry under the relevant statute to every person conducting hearings under the Act - see section 41, but does not give them to the Environment Court, presumably because the latter's powers under Part XI are even wider.

14 Mullen at page 34

15 [1998] NZRMA 113 at 125

16 Watercare at p.125

17 Section 290(1) in respect of resource consents

18 Clause 15 to First Schedule

19 Section 276(1) of the Act

20 [1972] NZLR 698 per Woodhouse J; 4 NZTPA (1971) 309.

21 [1988] 1 NZLR 385 at 391

22 Which includes a 271A party: Mullen v Parkbrook

23 Foodstuffs Ltd v Dunedin City Council 2 NZRMA 497 at 543 (EC) held that section 293 includes proposed plans and proposed changes to plans; confirmed on appeal by the Full Court in Countdown Properties Ltd v Dunedin City Council [1994] NZRMA 145 at 177

24 The word 'parties' is obviously not being used in a strict sense here

25 This is consistent with the practice adopted in Transpower NZ Ltd v Rodney District Council Decision A85/94
26 [1994] NZRMA 145 at 146
27 In paragraph 2 above
28 Variously zoned Rural 2, 3 and 4 at present
29 Section 73(1)
30 Section 73(1A)
31 Section 79
32 First Schedule Clause 16A
33 Section 73(1)
34 See section 32(2)(c)(i) and (ii)
35 As defined in section 2
36 Clause 1(1) of the First Schedule
37 Clause 5(1)
38 Clause 7
39 Clause 8
40 Clause 10(2)
41 Clause 14(1)
42 Clause 16A(2)
43 As required by section 32(1)(c)(ii)
44 Clause 7(1)
45 (1988) 13 NZTPA 69 (HC)
46 [1994] NZRMA 145
47 [1997] NZRMA 408
48 At page 413
49 Countdown Properties (Northland) Ltd v Dunedin City Council 145 at p.166
50 (1979) 8 NZTPA 71
51 Mr Salmon (now Salmon J in the High Court of New Zealand)
52 8 NZTPA at 74
53 (1989) 13 NZTPA 420
54 The same at pp.423-4
55 Section 45 TCPA 1977

Westlaw NZ Delivery Summary

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Royal Forest and Bird Protection Society Inc v W A Habgood Ltd

Jump to: » Summary » Legislation Considered » Cases Cited » Words and Phrases Judicially Considered » Noted in Journals

Court: High Court, Wellington
Judges: Holland J
Judgment Date: 31/3/1987
Jurisdiction: New Zealand (NZ)
Court File Number: M655/86
Citations: (1987) 12 NZTPA 76, 1987 WL 965678
Attachments: Judgment Text
Party Names: The Royal Forest and Bird Protection Society Incorporated (Appellant), W. A. Habgood Limited (First Respondent), The Minister of Energy (Second Respondent), The Commissioner of Crown Lands (Third Respondent), Friends of the Earth (N.Z.) Limited (Fourth Respondent)
Legal Representatives: Randerson AP; Maling S; Kenderdine S; Stanaway BM
Classification: » Resource management

SUMMARY

Appeal in respect of report and recommendation of PT to Ministry of Energy; application for mining licence at Kaitorete Spit; recommendation to grant licence for 5 years subject to conditions; application to strike out declined for want of form; proceed by way of notice of appeal; matters PT to have regard to; Maori ancestral land; whether still has to be in possession of Maori; held, need to identify some factor of nexus between culture and traditions and the land in question which affects relationship of the Maori people to the land; continuous ownership often a relevant factor; effect of proposed use of the land on that relationship; examples not exhaustive; consider each case on its merits; PT made an error in law; HC compelled to quash decision or refer it back unless satisfied that error did not materially affect decision; considerable care taken in imposition of conditions to preserve things of value; satisfied PT gave the same weight to all the evidence; error of law played no material part in conclusions; no injustice to the appellant; pyrrhic victory

Legislation Considered

- *High Court Rules* R 697, R 698, R 716
- *Maori Affairs Act 1953*
- *Mining Act 1971* s 21, s 30, s 69, s 126
- *Town and Country Planning Act 1977* s 3(1)(g), s 62

Cases Cited

Overruled

- *Otago Harbour Board v Silverpeaks County Council*(1983) 9 NZTPA 331 (PT)

Not Followed

- *Auckland District Maori Council v Manukau Harbour Maritime Planning Authority*(1983) 9 NZTPA 167 (PT)

Referred to

- *Knuckey v Taranaki County Council*(1978) 6 NZTPA 609 (PT)
- *Re an application by NZ Synthetic Fuels Corporation Ltd under the National Development Act 1979*(1981) 8 NZTPA 138 (PT)

Words & Phrases Considered

"ancestral land", "Maori land"

Journals noted in

Richard Boast, "Property Rights and Public Law Traditions in New Zealand" (2013) 11 NZJPIL 161

(1996) 8 Otago LR 452

D V Williams, "Maori Issues II" [1989] NZ Recent Law 177

[1989] NZ Recent Law Review 234

Kenneth A Palmer, "Law, Land and Maori Issues" (1988) 3 Canta LR 322

Steve Bielby, "Section 3(1)(g) of the Town and Country Planning Act 1977" (1988) 6 Auckland UL Rev 52

(1988) 3 Canta LR 336

[1987] BCL 628

Rick Shera, "Section Three of the Town and Country Planning Act 1977: Adjudicating the Non-Justiciable" (1986) 5 Auckland UL Rev 440

1 TCL 11/8

IN THE COURT OF APPEAL OF NEW ZEALAND C.A. 56/88

IN THE MATTER of the Town and Country Planning Act 1977

A N D

IN THE MATTER of an appeal under Section 162 of the Act

BETWEEN ENVIRONMENTAL DEFENCE SOCIETY INCORPORATED

Appellant

AND MANGONUI COUNTY COUNCIL

Respondent

A N D

C.A. 57/88

BETWEEN TAI TOKERAU DISTRICT MAORI COUNCIL

Appellant

AND MANGONUI COUNTY COUNCIL

Respondent

Coram: Cooke P.
McMullin J.
Somers J.
Casey J.
Bisson J.

Hearing: 2, 3 and 4 May 1988

Counsel: G.P. Curry and P.F. Majurey for Environmental Defence Society Incorporated
Sian Elias Q.C. and Denise Bates for Tai Tokerau District Maori Council
P.M. Salmon Q.C. and P.A. Fuscic for Mangonui County Council and Doubtless Bay Development Co.
K. Robinson for Minister of Conservation

Judgment: 27 February 1989

JUDGMENT OF COOKE P.

These are appeals by leave granted by Chilwell J. from his decision reported in (1987) 12 N.Z.T.P.A. 349 dismissing appeals on questions of law from a determination of the Planning Tribunal approving (subject to amendments) the rezoning of part of the Karikari peninsula as a destination tourist resort. The case has been the subject of extensive decisions by both the Tribunal and the High Court Judge and the facts will also be stated quite fully in judgments of other members of this Court, which I have had the advantage of reading in draft. Accordingly I will endeavour to confine the present judgment to essentials.

The appellants, the Environmental Defence Society and the Tai Tokerau District Maori Council, are supported in their appeals by the Minister of Conservation, whose counsel adopted the submissions made by counsel for the appellants. This was a change of governmental stance in that before the Tribunal and the High Court the Minister of Works and Development supported the rezoning.

The peninsula is a remote one near the north-eastern tip of the North Island. It has white beaches, virtually unspoilt countryside, and some small settlements with a total population of a few hundred, no doubt increasing during the summer holidays. Approval has been limited to

the first stage only of a planned three-stage development that would cover in all about 288 hectares. Stage I alone is estimated to generate a visitor population of 2280; at least one major hotel to accommodate 360 visitors, and possibly more hotels; motels to accommodate 320 visitors; a camping ground to take about 800; an international golf course; an equestrian centre; various other recreational facilities such as tennis and squash courts; a commercial centre including shops and a service station; beach community services; permanent and temporary staff housing. What is aimed at is an integrated 'one-stop' resort which would attract overseas and New Zealand tourists all the year round. Hence, for instance, the golf course and the riding. But the main tourist attraction is intended to be the beach. The main developments are planned to be sited one or two kilometres from the Karikari beach, on high ground. Between that site and the beach and dunes there is a tract of swamp and wetland. The proposal is that people staying at the resort should be transported to the beach, as required, by vehicles and that some appropriate facilities be constructed at the beach. It would seem that a question-mark must hang over whether a beach-orientated complex situated so far from the beach would prove a major tourist attraction. Especially in the winter, it would have to face the competition of other major New Zealand resorts.

In carefully chosen words, the Tribunal in an interim decision delivered by Judge A.R. Turner found that there was

justification for making zoning provision for a tourist resort of this kind and that the land of the company concerned was a suitable location for it. The Tribunal made it clear that these findings were deliberately limited. For instance they were not prepared to find that there was a clearly demonstrated need for a tourist resort development in the district.

The arguments that we heard from Mr Curry and Miss Elias for the appellants ranged widely, but were based on s.3(1) of the Town and Country Planning Act 1977, which enacts that in the preparation of the district schemes certain matters are declared to be of national importance and shall in particular be recognised and provided for. These include '(b) The wise use and management of New Zealand's resources': '(c) The preservation of the natural character of the coastal environment and the margins of lakes and rivers and the protection of them from unnecessary subdivision and development': '(g) The relationship of the Maori people and their culture and traditions with their ancestral land'.

Section 4 defines the purposes of district schemes, referring among other matters to the economic and general welfare of the people of every part of the district, while s.36 lays down that having regard to the present and future requirements of the district every district scheme shall make provision for various matters. It is important to note

that both those sections are expressly made 'subject to section 3 of this Act'.

A section similar to s.3 was first introduced into the legislation in 1973 as s.2B of the Act then in force, but at that stage (g) above was not included and the sections about the purposes and contents of district scheme were not declared to be subject to the new section. When the legislation stood thus, Wild C.J. in Minister of Works v. Waimea County [1976] 1 N.Z.L.R. 379, a case concerning rural subdivisions, endorsed an Appeal Board decision which held that 'it is simply a matter of weighing the welfare of the inhabitants of the County of Waimea against s.2B...'

The decision of the Tribunal now in question contains no discussion of the relationship between s.3 and the other sections, but Chilwell J. observes in his judgment that the Tribunal has consistently held that the change in wording making certain sections subject to s.3 does no more than make explicit what was previously implicit and that the Waimea decision applies to the present Act. The High Court Judge also adopted that view and it may fairly be said, I think, to have been both an express basis of his decision and an underlying assumption of the Tribunal's decision. Read as a whole, their reasoning appears to involve an overall balancing of the various considerations in ss.3 and 4 on the lines approved in the Waimea judgment.

With respect, I am unable to agree that this is a correct view. Rather I agree with the view taken by Dr K.A. Palmer in his Planning and Development Law in New Zealand 202 that the 1977 change was significant. The qualification 'subject to' is a standard drafting method of making clear that the other provisions referred to are to prevail in the event of a conflict. This Court had occasion to say so expressly in a reported case the year before the 1977 Act: Harding v. Coburn [1976] 2 N.Z.L.R. 577, 582. There was no need nor reason to insert those words in ss.4 and 36 of the 1977 Act if the legislature had intended that the s.3 matters were no more than matters to which regard was to be had, together with district considerations, in preparing a district scheme. The explanation of the insertion of the words that leaps to the eye, as it seems to me, is that the argument for the Minister of Works rejected in Waimea was henceforth to prevail. There is an analogy with the legislative guidelines provided by declaring a special object for the amending Act considered by this Court in Ashburton Acclimatisation Society v. Federated Farmers [1988] 1 N.Z.L.R. 78 87-8; see also per Bisson J. at 94-5 and per Chilwell J. at 97-9.

Whether or not, in relation to any particular proposed provision of a district scheme, national matters of the categories listed in s.3 can properly be seen as having a significant bearing is partly a question of degree

(compare Foodtown Supermarkets Ltd v. Auckland City Council (1984) 10 N.Z.T.P.A. 262, 267-8). Moreover both the national matters covered by s.3 and the district purposes covered by s.4 are stated in fairly broad and general language; there is enough flexibility in the wording to suggest that often it should be feasible to reconcile in a reasonable way national and district goals. But the general rule made clear by Parliament, in my opinion, is that in the end the matters of national importance must carry greater weight.

In given cases the particular matters of national importance listed as (a) to (g) of s.3(1) may compete among themselves. There is no legislative direction about their weights inter se. It is for the planning authority or the Tribunal on appeal to undertake a balancing exercise on the facts of each particular case. This Court has already so held in North Taranaki Environment Protection Association v. Governor-General [1982] 1 N.Z.L.R. 312, 316.

Paragraph (c) includes the protection of the coastal environment from unnecessary development. In that context, as in many others, necessary is a fairly strong word falling between expedient or desirable on the one hand and essential on the other. Of course the Tribunal are right in commenting that absolute protection is not given to the coastal environment. I accept, too, that when paragraph (c) is relevant a reasonable rather than a strict assessment is

called for. In other words the question is whether, despite the background that the coastal environment is to be protected, the proposal is reasonably necessary (compare Carlton & United Breweries Ltd v. Minister of Customs [1986] 1 N.Z.L.R. 423, 430; Commissioner of Stamp Duties v. International Packers Ltd [1954] N.Z.L.R. 25, 54 per North J. in this Court). But the test is no light one.

As to para. (g), which first appeared in 1977 and is another sign of heightened sensitivity to Maori issues, the Tribunal's decision was given at a time when there was a line of Tribunal cases treating land no longer owned by Maoris as automatically not ancestral land. Holland J. has since overruled that view in Royal Forest & Bird Protection Society v. W.A. Habgood Ltd (1987) 12 N.Z.T.P.A. 76. In my opinion this Court should now endorse that High Court ruling.

Land which was the original home of a Maori tribe - as here the Karikari Peninsula was by tradition of the Ngati Kahu the landing place of their first canoe - may still be ancestral land although it has been sold to Europeans. If, even after sale, some special Maori relationship with the land has continued down the generations, that is a factor to be weighed when a zoning change is proposed. The weight to be given to it may well vary greatly according to the facts. For instance, a change in the zoning of city land long in Pakeha ownership is unlikely to have any real effect on Maori culture and

traditions. In the case before Holland J., which concerned the mining of sand at Kaitorete Spit, Lake Ellesmere, the same was found to apply. The Judge, in a word derived from a quite different culture, said that the case was a pyrrhic victory for the appellant. But the Courts must of course not allow the Maori safeguard to become a dead letter. It can have true strength, as the result of this case may show.

It is now necessary to apply more specifically the views of the law that I have expressed to the Tribunal's decision. As already noted, the Tribunal appear generally to have reviewed matters of district and national importance without taking into account the Parliamentary intention (as I see it) that the national ones are more important. A specific example of this is that they said that the possibility that the proposed resort may significantly reduce local unemployment and under-development had weighed heavily with them, while stressing that it was only a possibility.

Particularly at the present time, everyone must sympathise with plans to provide more employment opportunities in Northland. This was certainly a most significant district purpose within the scope of s.4. But the Tribunal were careful to put it as no more than a possibility. They could hardly have put it higher. No market or feasibility study was in evidence before them. I do not suggest that one was required by law; that is not

so; but in the absence of careful evidence of the economic practicability of a proposal, it must be harder to show that interference with the coastal environment is necessary.

In any event, as the Tribunal specifically recognised, a resort could be successful from a developer's point of view, yet unsuccessful in terms of its social and economic impact on the local community. What they were avowedly doing was creating an opportunity for a venture of a size and type novel and necessarily speculative in New Zealand: a venture that might or might not be economically successful and might or might not be beneficial for the district and the local community.

The philosophy of encouraging enterprise in development, which can be seen to lie at the heart of the Tribunal's reasoning, has its attraction. Yet cases under the Town and Country Planning Act have to be approached within a statutory framework and with regard to the scheme of values laid down by Parliament. So it was crucial to decide whether the case for affording an opportunity was strong enough to persuade the Tribunal that the proposed development of the coastal environment was necessary in terms of s.3(1)(c).

The Tribunal made no such finding. Indeed they appear to have deliberately refrained from one. The way in which they perhaps sought to meet this difficulty was by their finding that the higher scrub-covered land was

sufficiently far from Karikari Beach to enable the provision of tourist and holiday accommodation to be carried out in a manner subservient to the landscape and substantially preserving the natural character of the coastal environment. But I am constrained to think that this finding is not consistent with their other express findings that all the company's land is in the general coastal environment and that Stage I alone 'would add a massive and abrupt dimension to growth on the peninsula'.

In his careful argument for the company in this Court Mr Salmon put it that 'protection' in para. (c) is not as strong a word as prevention or prohibition; that it means keeping safe from injury and that a development may be permitted if the natural environment is more or less protected. Accepting this apart from the vagueness of 'more or less', I am nevertheless unable to accept that the Tribunal have found that the natural environment would be kept safe from injury. Read as a whole, their decision seems to me ambiguous on this important matter.

Further, it is not clear how the Tribunal saw the Maori issue. They recorded that one of the concerns of the Tai Tokerau Council was the effect of the development on the relationship of the Ngati Kahu with their ancestral land; but they did not make any finding that ancestral land was or was not affected. They made no express mention of s.3(1)(g). Chilwell J. thought that this would have been

preferable but that the Tribunal had adequately taken into account Maori concerns. It is true that they did describe these concerns in passages to be cited in the judgments of other members of this Court, seeking to meet them to some extent by confining approval to Stage I and suggesting that there be at least two Ngati Kahu on a joint committee. But, with respect, this does not directly meet the contention that, to adopt the words of Miss Elias in this Court, the sheer scale of the development, in which the tribe could not participate, would overshadow their presence on the peninsula: that they could not relate to or feel at home with a development of this kind and magnitude. As their spokesman put it in evidence before the Tribunal, the large-scale development would be a flood which would carry his people into the sea.

Miss Elias told us that some 21,000 people claim Ngati Kahu descent. About 9000 of them live in Northland, mainly in the vicinity of Kaitaia. On the peninsula itself there are only about 150, including only about 40 of employable age. It is important to remember that the land in the rezoning proposal itself all belongs to the company, although the intention is to take advantage of beaches vested in the Crown and open to public use, albeit comparatively little used at present. But the Ngati Kahu are the tangatawhenua and they still have considerable landholdings on the peninsula. There are archaeological sites in the dunes. The rezoning was inevitably regarded by

the Tribunal as of both national and regional significance. Without doubt the impact of such a resort would not be confined to the company's land. It would change the character of the whole peninsula. The apparently somewhat conventional seaside settlement at Whatuwhiwhi could well be transformed into a service township. The more successful the project economically, the less the quiet and remote rural quality of the environment. Mr Salmon pointed out that according to the evidence of Mr Jones, the planning officer for the County Council, most of the people on the peninsula support the proposal. Be that as it may, it is clear that the District Maori Council do not, although not opposed to some smaller locality-related development.

Those were all matters to be weighed by the Tribunal in the light of the principle declared by Parliament to be of national importance, that planning should recognise and provide for the relationship of the Maori people and their culture and traditions with their ancestral land. The weighing is not for this Court. On these appeals we are confined to questions of law. Our responsibility is simply to decide whether the true intent, meaning and spirit of the statute has been applied. This is a case where the facts called for a clear and direct grappling with the principle. While sympathising with the Tribunal in a difficult case, I think that they thought it safer or better not to proceed in that way.

Another contention for the appellants was that the Tribunal had merely presumed that it was not possible to attach a destination resort to an existing tourist community in Northland. Again I do not consider that there was any legal onus on the supporters of rezoning to exclude alternative sites (compare the North Taranaki case, supra, at 315) but the apparent lack of specific evidence on this point is another, though lesser, factor contributing to the impression that the proposal has not been subjected to as rigorous a scrutiny as the Act requires.

In summary I think that the Planning Tribunal have not correctly interpreted the Act, or have not given the weight intended by the Act to two principles. One is that the coastal environment should be protected from unnecessary development. The other is that provision should be made for the relationship of the Maori people and their culture and traditions with their ancestral land. So I would allow the appeals.

The remaining question is whether approval of the rezoning should simply be refused or whether the matter should be remitted to the Planning Tribunal for reconsideration. I think that the second course is fairer, particularly as it would give all parties the opportunity to call further evidence in the light of any changes of circumstances that may have occurred since late 1985. Because of retirements a newly-constituted Tribunal will

have to hear the case, assuming that the parties still wish to proceed. That is unfortunate, but it is an unusually important case. Accordingly I would remit the original appeals to the Planning Tribunal for full rehearing.

In accordance with the opinion of the majority of this Court the appeals are allowed and the case remitted as just mentioned. Costs of the present appeal are reserved, leave being reserved to counsel to lodge memoranda if necessary.

RB Cooke P.

Solicitors:
Russell McVeagh McKenzie Bartleet & Co., Auckland and Wellington, for Appellants
Dragicevich Campbell & Smith, Kaitaia, for Respondent

IN THE COURT OF APPEAL OF NEW ZEALAND C.A.56/88

IN THE MATTER of the Town and Country Planning Act 1977

A N D

IN THE MATTER of an appeal under Secton 162 of the Act

BETWEEN ENVIRONMENTAL DEFENCE SOCIETY INCORPORATED

Appellant

A N D MANGONUI COUNTY COUNCIL

Respondent

A N D C.A.57/88

BETWEEN TAI TOKERAU DISTRICT MAORI COUNCIL

Appellant

A N D MANGONUI COUNTY COUNCIL

Respondent

Coram: Cooke P
McMullin J
Somers J
Casey J
Bisson J

Hearing: 2, 3 and 4 May 1988

Counsel: (CA 56/88)
G P Curry and P F Majurey for Appellant
P M Salmon QC and P A Fuscic for Respondent

(CA 57/88)
Miss Sian Elias QC with Miss Denise Bates for Appellant
P M Salmon QC and P A Fuscic for Respondent

K Robinson for Minister of Conservation

Judgment: 27 February 1989

JUDGMENT OF CASEY J

This appeal concerns a major tourist development proposed for the Karikari Peninsula, at present a remote area on the east coast near the top of the North Island. It was described in a Department of Lands and Survey Report of 1979 as in many ways a unique part of Northland combining qualities of remoteness and isolation with a regionally distinctive natural environment. "The combination of barren landscape and spectacular seascape produces an environment with outstanding scenic qualities rarely encountered elsewhere." What is proposed is a "destination tourist resort" comprising a self-contained settlement with facilities which will attract both overseas and local visitors for longer periods by providing a wide range of recreational facilities, as well as serving as a base for visits to other tourist attractions conveniently available.

Similar developments have occurred in areas outside New Zealand but nothing on this scale has been attempted here. When fully developed it is expected to cater for nearly 10,000 visitors and the facilities will include hotels, motels, camping grounds and other accommodation together with shops and supporting services. There will be a full international golf course, equestrian facilities and accommodation for tennis and squash. An artificial lake of some 58 hectares is also envisaged, and the whole

development is expected to require approximately 288 hectares. It is planned to take place in three stages, the first of which will provide accommodation for 2,280 visitors, with only partial development of the recreational and other facilities.

The land concerned is largely owned by a company which has had dealings with the respondent Council over the concept for many years and eventually in 1984 the latter notified a variation of its District Scheme (No.1) providing for an appropriate zoning for such a development. Following objections it determined not to proceed without additions and amendments which it notified in Variation No.4. The Environmental Defence Society objections were disallowed and it appealed to the Planning Tribunal, being supported by the Tai Tokerau District Maori Council. The Tribunal's decision effectively confirmed the zoning and variations approved by the Council, but with some further important variations of its own. Both the Society and the District Maori Council brought separate appeals to the Administrative Division of the High Court and these were heard together. Chilwell J gave judgment on 18 December 1987 in which he dealt with the numerous specific questions asked and dismissed both appeals. On 8 March 1988 he gave leave pursuant to 162(H) of the Town and Country Planning Act 1977 to appeal to this Court.

In granting leave, Chilwell J noted the wide-ranging content of the questions of law put to the High Court, and

observed that the issues might be more effectively identified by Counsel for this Court. This has been attempted in the points on appeal.

Mr Robinson (appearing for the Minister of Conservation) advised us he had appeared in the High Court on behalf of the then Minister of Works and Development to support the Tribunal's decision. There had since been a change of Ministry and he felt he could make no submissions. We gave him the opportunity to obtain further instructions and eventually we were informed that the Minister of Conservation supported the Appellants' submissions but wished to make no independent contribution to the appeal. Counsel for the other parties accepted that she was entitled to be heard, as successor to the Minister of Works and Development, in this area of environmental protection.

In the appeals attention was focussed on the proper interpretation and application of s.3(1) of the Town and Country Planning Act 1977, and in particular of sub-sections (a), (b), (c) and (g). It reads :

> "Matters of national importance -
>
> (1) In the preparation, implementation and administration of regional, district, and maritime schemes, and in administering the provisions of Part II of this Act, the following matters which are declared to be of national importance shall in particular be recognised and provided for :
>
> (a) The conservation, protection and enhancement of the physical, cultural and social environment:

(b) The wise use and management of New Zealand's resources:

(c) The preservation of the natural character of the coastal environment and the margins of lakes and rivers and the protection of them from unnecessary subdivision and development:

(d) The avoidance of encroachment of urban development on, and the protection of, land having a high actual or potential value for the production of food:

(e) The prevention of sporadic subdivision and urban dvelopment in rural areas:

(f) The avoidance of unnecessary expansion of urban areas into rural areas in or adjoining cities:

(g) The relationship of the Maori people and their culture and traditions with their ancestral land."

The Appellants submitted that s.3 matters of national importance are to be accorded a primacy or priority over other parts of the Act. In his judgment Chilwell J rejected this and said the Council had correctly followed the approach approved by Wild CJ in Minister of Works v Waimea County [1976] 1 NZLR 37, concerning the weight to be given to s.2B of the 1953 Act, the predecessor of the present s.3; "it must be read with all other provisions because the Act must be read as a whole." He commented at p.403 of the case :

> "Reported decisions of the Tribunal show that in weighing up the matters to which its attention is directed by ss.3, 4, 36 and other sections, it adopts a balancing exercise between conservation and development and between public and private advantages and disadvantages of the particular land use under investigation. The balancing exercise relates to competing considerations within the matters to which each section relates and to competing considerations between each material section." (emphasis added)

Section 3 of the 1977 Act added further matters of national importance to those specified in the earlier s.2B, as well as declaring that they should "in particular" be recognised and provided for. Furthermore, s.4(1), dealing with the purpose of regional, district and maritime planning, was made subject to s.3; and s.36, governing the contents of District Schemes, was also made subject to that section. It is as a result of these last two amendments that it is now contended s.3 has a primacy over other provisions relating to regional and district schemes.

Chilwell J accepted the obiter view adopted by the Tribunal in Smith v Waimate West County [1980] 7 NZTPA 241, 259, that the 1977 Act did no more than make explicit what was previously implicit in the earlier Act, adding that "to give s.3 matters the absolute primacy contended for would be to provide a jurisdictional bar to much development." However, Mr Curry informed us that he did not seek absolute primacy and accepts that s.3 must take its place in the Act as a whole; but he submitted that the words "subject to" in the succeeding sections require something more than simply balancing the matters of national importance along with all the other purposes and provisions laid down for regional and district schemes.

I agree with this submission and consider that the words "subject to Section 3" introducing sections 4 and 36 call for more than a mere balancing exercise whenever there is a

divergence between their application and the requirements of s.3 As this Court observed in Harding v Cockburn [1976] 2 NZLR 577, 582,

> "The qualification "subject to" is a standard way of making clear which provision is to govern in the event of conflict. It throws no light, however, on whether there would in truth be a conflict without it."

Accordingly, if conflict exists between their provisions, s.3 must prevail over the other sections. There is also an obvious potential for conflict among the different matters of national importance specified in s.3(1) itself. When this occurs the Tribunal must engage in a balancing exercise, which will be affected by indications of special emphasis or weight to be given to any particular matter.

One factor which the Tribunal said weighed heavily in its decision was the possibility that tourism may significantly reduce local unemployment and under-development. It mentioned the developer's intention to set up a management committee with local people on it to deal with the functioning of the resort and its integration with the community, and suggested there should be two Ngati Kahu people included. The emphasis on employment opportunities was criticised as indicating that it had simply balanced s.4 against s.3 without recognising that the former was subject to the latter. However, I am satisfied that notwithstanding the acknowledged weight s.4 considerations had in the decision (and not surprisingly,

having regard to the current economic position of Northland), the scheme as now approved effectively resolved any inconsistency between them.

Chilwell J conducted an extensive review of the Tribunal's treatment of the evidence and its conclusions in relation to the sub-section 3(1). He observed that although there was no express reference to (a), its decision "is replete with references to the physical environment and concern for its conservation protection and enhancement." This is indeed so; the Tribunal was acutely alive to the physical, cultural and social impact of such a huge development in that area.

It was equally concerned with the matters in s.3(1)(c) and a large part of the decision was specifically directed towards the preservation and protection of the peninsula, finding that the subject land is within the general coastal environment. It dealt with environmental and archeological aspects requiring preservation, including the immediate coastal strip, the wetlands and the dune areas, which also afforded sanctuary for the wildlife. It referred to the extensive landscape planning, resulting in siting the development on higher scrub-covered land, designed to take advantage of its natural attributes and maintain the integrity of the landscape.

The Tribunal considered the fundamental question of the need for such a development and was obviously influenced by

witnesses in the tourist industry called by the Respondent, including one from the Tourist and Publicity Department on behalf of the former Minister of Works and Development. It also discussed contrary evidence from the Appellants. From the way this evidence was dealt with, I am satisfied that, contrary to Appellant's submissions, the Tribunal recognised that a need for the project had to be established. It pointed to the obvious commercial risks, observing that market demand and support must be generated, and concluded that "land use planning should give the opportunity for someone to take that risk if their market research indicates that it is justified, and no-one from the tourist industry opposed the variations." That uncertainty led the Tribunal to restrict the development in the meantime to what it saw as the viable Stage I.

There must, of course, (as Chilwell J pointed out) be a strong subjective element involved in reaching such a conclusion, but the evidence was there for the Tribunal to accept and act upon, enabling it to regard such a development as a wise use and management of New Zealand's resources to be balanced against the other matters of national importance in s.3(1).

The Appellants submitted that no evidence had been produced of the developer's financial position. The Tribunal ruled financial viability was irrelevant, stating that "zoning can only provide opportunities; and it does not necessarily follow that opportunities will be taken up."

Chilwell J upheld this approach. With respect, I do not share his view. As Miss Elias submitted, this is really a tailor-made zoning for a proposal of regional and national significance involving a tourist development on a quite unprecedented scale for New Zealand. The prospect of an abandoned half-built resort of this size in such beautiful surroundings would have to be of concern to anybody considering the requirements of s.3(1)(c), and probably would be relevant (a), (b) and (g) as well. However, I think the Tribunal - whether consciously or not - took such a consideration into account in its programme by allowing only Stage I to proceed at first, with very specific controls over the manner of development. It considered this would be viable.

There was also criticism of an alleged failure to consider other sites. In a passage at p 324 of the case the Tribunal said it had to "presume" it was not possible to attach a destination resort to an existing tourist community in Northland, and that those supporting the Variations assured it to that effect, while nothing advanced by the Appellant gave any ground to question it. There was evidence about the suitability of other sites. In dealing with this point, Chilwell J concluded there was ample evidence supporting the Tribunal's view, and while the use of the word "presume" might have been unfortunate, it did not alter the sense of its finding in this respect. I agree with this assessment.

The Appellants made a strong attack on what they saw as the Tribunal's failure to come to grips with s.3(1)(c), relating to preservation of the natural character of the coastal environment and the margins of lakes and rivers, and their protection from unnecessary sub-division and development. They submitted both in the High Court and before us that the word "unnecessary" imposed a very high level of protection, and stressed that unless the need for this resort and its viability were established to a correspondingly high degree of probability, then the interests protected by sub-clause (c) must prevail. They accepted, however, that the section does not impose an absolute bar on development.

The Act's essential concern is with people and the quality of their lives. Section 3 declares that the matters of national importance need only be "recognised and provided for" in the various schemes; it does not require a higher degree of protection. Accordingly the Act is not to be approached in quite the same way as one more directly concerned with the preservation of physical resources, such as the Water and Soil Conservation Act 1967. It will be clear from my earlier comments that I consider the Tribunal fully appreciated the importance of s.3(1)(c).

The Tribunal's decision, read as a whole, satifies me that it gave due recognition to the matters set out in sub-sections 3(1)(a),(b) and (c) of the Act, and the conditions it has either approved or imposed ensure that the scheme contains proper provision for them.

This brings me to s.3(1)(g) requiring that the scheme recognise and provide for the relationship of the Maori people and their culture and traditions with their ancestral land. The Tribunal observed that there was a small Maori community and marae on the eastern side of the peninsula at Whatuwhiwhi, and a very small community at Merita on the northern part. They were members of Ngati Kahu and we were informed by Miss Elias that there are about 9,000 in the whole tribal area, of whom only about 150 live on the peninsula. In expressing their particular concerns the Tribunal said this at p 322 of the case :

> "The appeals were supported by the Tai Tokerau District Maori Council. The particular concerns of the Maori Council were the effect which development in accordance with the variations would have on the relationship of the Ngati Kahu people with their ancestral land, the effect which it would have on the coastline and the sea, the protection of sacred sites and archaeological values and the social impact. .....
>
> The eminent spokesman for Ngati Kahu, who gave evidence, said that his people wish to see progress but that they are against a large scale tourist resort at Karikari Bay; that they wish to preserve their lifestyle from such an obtrusive development, which he foresees as a flood which will carry his people to the sea. He told us of the history of the area, of the significance to his people of the sea and its bounty, of the struggle for existence there and the efforts being made to ensure economic, social and cultural survival. He concluded by saying that his people would like to be associated with a small, locality-related development which would fit into their community and with which they could grow into a warm, welcoming and distinctively different tourist centre from the type that would be permitted by the Variations.

> Another witness for the Maori Council was an archaeologist who told us of the archaeological discoveries already made in various parts of the company's land and the effect which development would have on these, and of the archaeological evidence in other parts of the peninsula."

The Tribunal accepted the following passage from the evidence of Mr Hanley :

> "The economy must diversify and look to labour intensive opportunities. Tourism does not guarantee local jobs nor the protection of the natural environment or the economic and cultural well-being of the area's substantial Maori population. However, if well planned and with broad based local participation and control, tourism may substantially reduce local unemployment and under-development. Few alternative opportunities are apparent at this time."

As Chilwell J said, when giving reasons for confining the re-zoning to Stage I, the Tribunal accepted evidence from a social planning witness that to achieve appropriate and sustainable development, tourism on the peninsula must ensure the protection and enhancement of the environment, local community life, and the role of the Ngati Kahu as protectors of the waahi tapu and kaimoana. The conditions imposed serve to protect the foreshore and dune area (the latter containing sacred burial sites) from virtually any development.

Miss Elias informed us that she had asked the Tribunal to rule that the peninsula was "ancestral land" within the meaning of s.3(1)(g), but it had failed to do so and she

submitted that its thinking on this aspect was probably influenced by earlier decisions that the land had to be in Maori ownership. Since then Holland J decided in Royal Forest and Bird Protection Society (Inc) v W A Habgood Ltd [1987] 12 NZTPA 76 that previous definitions had been unduly restrictive. The ordinary meaning of "ancestral land" is land which has been owned by ancestors. He held that there must be some factor or nexus between their culture and traditions and the land in question which affects the relationship of the Maori people to it. With respect, I think that is an appropriate view of s.3(1)(g).

It must be accepted that the Tribunal made no specific reference to that section, but it did not express any disagreement with the Maori Council's assertion that it was Ngati Kahu ancestral land. And, as Chilwell J observed, it did not ignore Maori concerns; indeed, from the extracts quoted above, it was obviously very sensitive to them, as well as to the social and economic problems of the Maori people in the district. There is obvious overlapping between the matters set out in sections 3(1)(a) and (g). From the evidence before us and the submissions by Counsel, it seems clear that the Maori concerns are due to the sheer size of the project and its character as a self-contained resort. They are very real, notwithstanding that those occupying the peninsula are now only a remnant of Ngati Kahu. The land is still regarded as part of the home territory by others in the tribal area and by those who have left the district.

The Tribunal clearly addressed these concerns and sought to meet them by the limitation on the siting and scope of the development and its timing, and the stringent restrictions on access to the coast and dune areas. It also acepted undertakings and itself suggested proposals for the operation of a committee on which Maori people would be represented. Although there is no specific reference to s.3(1)(g) in the decision, its concerns have been recognised and provided for in the scheme, and in achieving that result I am satisfied that it was effectively taken into account by the Tribunal to the extent warranted by the evidence disclosed in the appeal hearings.

For these reasons I would dismiss the appeals.

M.E. Casey J

IN THE COURT OF APPEAL OF NEW ZEALAND CA 56/88

IN THE MATTER of the Town and Country Planning Act 1977

A N D

IN THE MATTER of an appeal under Section 162 of the Act

BETWEEN: ENVIRONMENTAL DEFENCE SOCIETY INCORPORATED

Appellant

AND: MANGONUI COUNTY COUNCIL

Respondent

A N D

CA 57/88

BETWEEN: TAI TOKERAU DISTRICT MAORI COUNCIL

Appellant

AND: MANGONUI COUNTY COUNCIL

Respondent

Coram: Cooke P
McMullin J
Somers J
Casey J
Bisson J

Hearing: 2, 3 and 4 May 1988

Counsel: G P Curry and P F Majurey for Environment Defence Society Incorporated
Sian Elias QC and Denise Bates and Tai Tokerau District Maori Council
P M Salmon QC and P A Ruscic for Manganui County Council and Doubtless Bay Development Co
K Robinson for Minister of Conservation

Judgment: 27 February 1989

JUDGMENT OF BISSON J

Moves to establish a destination tourist resort on land at Karikari peninsula go back some 10 years. They have reached the stage that the Respondent Council has made zoning provision for the development of such a resort and opposition from the two appellants has failed before the Planning Tribunal and in the High Court. In granting leave under s.162H of the Town and Country Planning Act 1977 to appeal to this Court, Chilwell J summarised the background to the appeals as follows,

> "The two appeals to this Court arose from a determination of the Planning Tribunal approving of variations to the proposed reviewed district scheme of the Mangonui County Council (the Council) which provided for the zoning of land on the Karakari Peninsula for the development of a destination tourist resort to be called the Karakari Tourist Resort Zone. According to the scheme statement the zone provides for the development of an integrated, self-contained, fully serviced tourist complex which is expected to cater for both domestic and international tourists and to contain a variety of accommodation, recreation, entertainment and shopping facilities. It is a resort which will contain a wide variety of tourist accommodation ranging from camping grounds through low-cost accommodation to top quality hotels with a small commercial area to serve the resort and with recreational activities such as an international golf course and a riding trail. It is common ground that the proposed development is on a scale unique to New Zealand. For that reason alone it must have significant impact upon the environment of the Karakari Peninsula and upon the wider community of Northland.
>
> In my judgment I answered 16 questions framed by the appellants as questions of law which were resolved unfavourably to the appellants with the result that each appeal was dismissed leaving the Planning Tribunal determination intact. These same questions have been advanced by each appellant as the questions of law to be involved in the appeal to the Court of Appeal if leave is granted."

His reasons for granting leave were,

"In the present case the magnitude of the proposed development, its uniqueness, its impact upon the environment and upon the wider community of Northland is such as to make it proper to grant leave. In addition there are several issues of town planning jurisprudence of general and public importance which ought to be examined by the Court of Appeal."

The first point of law of importance is the application of s.3(1) of the Act in the context of the Act as a whole. In particular the question is what degree of primacy, if any, is to be given to matters of national importance specified in s.3(1) as follows,

"3. Matters of national importance - (1) In the preparation, implementation, and administration of regional, district, and maritime schemes, and in administering the provisions of Part II of this Act, the following matters which are declared to be of national importance shall in particular be recognised and provided for:

(a) The conservation, protection, and enhancement of the physical, cultural, and social environment:

(b) The wise use and management of New Zealand's resources:

(c) The preservation of the natural character of the coastal environment and the margins of lakes and rivers and the protection of them from unnecessary subdivision and development:

(d) The avoidance of encroachment of urban development on, and the protection of, land having a high actual or potential value for the production of food:

(e) The prevention of sporadic subdivision and urban development in rural areas:

(f) The avoidance of unnecessary expansion of urban areas into rural areas in or adjoining cities:

(g) The relationship of the Maori people and their culture and traditions with their ancestral land."

It is the relationship of s.3(1) to s.4 which is at the heart of these appeals. Section 4 is as follows,

> "4. Purpose of regional, district, and maritime planning - (1) Subject to section 3 of this Act, regional, district, and maritime planning, and the administration of the provisions of Part II of this Act, shall have for their general purposes the wise use and management of the resources, and the direction and control of the development, of a region, district, or area in such a way as will most effectively promote and safeguard the health, safety, convenience, and the economic, cultural, social, and general welfare of the people, and the amenities, of every part of the region, district, or area.
>
> (2) The general objectives of regional, district, and maritime schemes shall be to achieve the purposes specified in subsection (1) of this section.
>
> (3) In the preparation, implementation, and administration of regional, district, and maritime planning schemes, and in the administration of Part II of this Act, regard shall be had to the principles and objectives of the Soil Conservation and Rivers Control Act 1941 and the Water and Soil Conservation Act 1967."

As I read the Planning Tribunal's decision it preferred to provide an opportunity for the proposed development rather than to consider the need for it. The Planning Tribunal's emphasis on opportunity for development rather than need for development is shown in this passage of its decision,

> "If (the land) is to be put to those purposes, then other resources will be required to develop the land. Where those resources will come from, indeed whether they will be available, are not questions which land use planning can examine. So that while land use planning must examine questions of need, zoning can only provide opportunities; and it does not necessarily follow that opportunities will be taken up."

The Planning Tribunal rejected the essential issue defined by counsel for the appellants, whether there is a clearly demonstrated need for a tourist resort development in the district, preferring to formulate the issue whether there is justification for making zoning provision for a new tourist resort.

While in considering zoning provisions of regional and district schemes there is justification to anticipate demand and plan ahead, that approach is not appropriate if the zoning may fail to protect the natural character of the coastal environment. If that possibility exists, the preservation of that environment, as a matter of national importance, must not be threatened by a subdivision or development which is unnecessary. This is because planning under s.4 is subject to the provisions of s.3. Accordingly an opportunity for development under s.4 should not be made if it is outweighed by a matter of national importance as defined in s.3(1). The Planning Tribunal had particular regard for the possibility of the beneficial consequences of the development by reducing local unemployment and under-development of the district but stressed this was only a possibility. Such beneficial consequences are desirable aspects of such a development particularly relevant in a district scheme under s.4. But the Planning Tribunal also recognised that tourism does not guarantee the protection of the natural environment and that it can be destructive of

that environment. Those two aspects of the case raise for consideration the preservation of the environment from unnecessary development under s.3(1)(c).

As with recognising and maintaining the amenity afforded by waters in their natural state, the object of the Water and Soil Conservation Amendment Act 1981, the emphasis of s.3(1)(c) is conservation. "Although certainly not to be pursued at all costs, it has been laid down as a primary goal; and this must never be lost sight of." (See Cooke P in Ashburton Acclimatisation Society v Federated Farmers of New Zealand Inc [1988] 1 NZLR 78 at p.88. As matters of regional and district importance under s.4 are subject to matters of national importance under s.3(1), Parliament has decreed that the latter have an overriding objective. Once the natural character of the coastal environment has been lost, it may never been regained. Once the door has been opened to allow a development which fails it is difficult to close the door without some permanent damage, some scar, remaining.

Referring to the provisions of s.3(1)(c), the Planning Tribunal said, only by way of comment in parenthesis,

> "(By way of comment on that requirement, we say that it does not require that land use planning give absolute protection to the natural character of the coastal environment, else there would be no subdivision or development at all in that environment.)"

That writing down of the impact of s.3 on s.4 of the Act appears to have led the Planning Tribunal into

considerations of the suitability of the site for possible development rather than considering whether the development of land admittedly in the general coastal environment was necessary. The latter consideration should have been its first and paramount consideration. Obviously the provisions of s.3(1) are not absolute in their terms but it is mandatory that the matters declared to be of national importance be recognised and provided for to the extent that they are relevant. It is from unnecessary subdivision and development that the preservation of the natural character of the coastal environment must be protected.

Chilwell J referred to the judgment of Wild CJ in Minister of Works v Waimea County [1976] 1 NZLR 379 which concerned the weight to be given to ss.2B and 18 of the 1975 Act. In that judgment it was held, at p.382,

> "It is not a matter of "weigh[ing] the effect of both sections" as stated in question (1), but rather of weighing all the facts and circumstances and applying the sections. This is a matter of judgment for the board bearing in mind its powers, duties and functions as set out in s.42."

Since that judgment the amendments to the Act by making s.4 subject to s.3 in my view now involve "weighing the effect of both sections", the effect being to accord primacy to matters of national importance. This change does not appear to have been appreciated by the Planning Tribunal as according to Chilwell J reported decisions of the Tribunal show that,

> "in weighing up the matters to which its attention is directed by sections 3, 4, 36 and other sections it adopts a balancing exercise between conservation and development and between public and private advantages and disadvantages of the particular land use under investigation. The balancing exercise relates to competing considerations within the matters to which each section relates and to competing considerations as between each material section."

This balancing exercise must, however, take into account that the scales are weighted in favour of matters of national importance being recognised and provided for, but if a subdivision or development in a coastal environment is necessary then the protection and preservation of that environment may be outweighed. Necessary is a strong word defined in the Shorter Oxford English Dictionary as meaning "indispensible" or "that which cannot be done without". Accordingly, the necessity for this substantial development at Karikari rather than elsewhere in Northland called for a wide ranging enquiry into that issue for which the Planning Tribunal said the appeal process was not apt. The approach adopted by the Planning Tribunal and upheld by the High Court, was that the possibility of the tourist development taking place was a justification for a planning provision, having beneficial social and economic effects on the district in general and on the local community. All the land in question was in the general coastal environment and even if planning were restricted to Stage I on the higher scrub-covered land its effect on that natural environment could be destructive. But there was no finding that the

need for such a development outweighed the national importance of preserving and protecting the natural character of the coastal environment. That being the case the vital issue, as I see it, under s.3(1)(c) namely, "The preservation of the natural character of the coastal environment and the margins of lakes and rivers and the protection of them from unnecessary subdivision and development", has not been addressed.

Another point of law raised on appeal is the interpretation of s.3(1)(g).

> "(g) The relationship of the Maori people and their culture and traditions with their ancestral land."

The Planning Tribunal made no direct reference to this provision. Its decision was delivered prior to judgment being delivered by Holland J in Royal Forest and Bird Protection Society (Inc) v W A Habgood Ltd (1987) 12 NZTPA 76. In that judgment he said, at p.81,

> "I can see no logical or legal reason why s.3(1)(g) of the Act should be of no application solely because the land in question is no longer owned by Maoris. Previous decisions of the Tribunal to this effect should be regarded as overruled."

An example of such a previous decision is that of the Planning Tribunal (Special Division) in Re An Application by NZ Synthetic Fuels Corporation Ltd under The National

Development Act 1979 (1981) 8 NZTPA 138. The decision in that case referred to a number of decisions of the Tribunal in which the meaning and application of s.3(1)(g) were considered. From these decisions it was derived,

> "(4) 'Ancestral land' means land inherited from one's ancestors. Emery v Waipa County Council. Land which has passed into ownership and occupation of people who are not Maori does not qualify. Quilter v Mangonui County Council."

I agree with Holland J that land no longer owned by Maoris may nevertheless qualify as ancestral land under s.3(1)(g). To the extent that the ancestors of present day Maoris occupied New Zealand most of New Zealand would qualify as ancestral land. But, s.3(1)(g) is only concerned with ancestral land with which the Maori people (not individuals) and their culture and traditions have a relationship. As Holland J said, at p.81,

> "Clearly continuous ownership of the land by Maoris would often be a relevant factor in that relationship. Likewise it may be an important factor to consider the extent to which a special relationship by Maoris has been claimed or recognised by them throughout the generations. More importantly, the effect of the proposed use of the land on that relationship will have to be considered in each case."

The Planning Tribunal did refer in its decision to the concerns of the Tai Tokerau District Maori Council, one of the appellants. It said,

> "The particular concerns of the Maori Council were the effect which development in accordance with the variations would have on the relationship of the Ngati Kahu people with their ancestral land, the effect which it would have on the coastline and the sea, the

> protection of sacred sites and archaeological values and the social impact.
>
> ... The eminent spokesman for Ngati Kahu, who gave evidence, said that his people wish to see progress but that they are against a large-scale tourist resort at Karikari Bay; that they wish to preserve their lifestyle from such an obtrusive development, which he foresees as a flood which will carry his people to the sea. He told us of the history of the area, of the significance to his people of the sea and its bounty, of the struggle for existence there and the efforts being made to ensure economic, social and cultural survival. He concluded by saying that his people would like to be associated with a smaller, locality-related development which would fit into their community and with which they could grow into a warm, welcoming and distinctively different tourist centre from the type that would be permitted by the Variations.
>
> Another witness for the Maori Council was an archaeologist who told us of the archaeological discoveries already made in various parts of the company's land and the effect which development would have on these, and of the archaeological evidence in other parts of the peninsula."

Although the Planning Tribunal referred to the relationship of the Ngati Kahu people with their ancestral land, it did not then refer to this relationship in terms of s.3(1)(g). There is a danger that, as the land in question was owned by a company, the Planning Tribunal considered it could not be "ancestral land" in terms of s.3(1)(g). I agree with Chilwell J that the Planning Tribunal did not ignore Maori concerns but it reached a decision without applying and according primacy to the mandatory provisions of s.3(1) to recognise and provide for the relationship of the Maori people and their culture and conditions with their ancestral lands. To allow Stage 1 of this development to take place,

2280 people would be accommodated where the present population of the peninsula is only a few hundred. This could open the floodgates and see the remaining Ngati Kahu people with their culture and traditions swept away. The minority representation of the Ngati Kahu people on a "Karikari Advisory Sub-committee" or on a "Karikari Joint Committee of Management" falls far short of Parliament's intention to treat their relationship with their ancestral land as a matter of national importance. If the recognition and provision for that relationship of the Maori people with their ancestral land requires refusal of planning consent for a tourist development on that land as being incompatible with that relationship, then that is the price to be paid for preserving the culture and traditions of the Maori people as a matter of national importance.

As the Planning Tribunal said, its task was "an onerous and difficult one". It has special skills and experience in dealing with such cases. My views are in no way a reflection on the comprehensive and careful analysis it made of the evidence and issues as it saw them in its decision. However, two important questions of law have emerged, the answers to which, in my view, indicate errors of law by the Tribunal in its application of s.3(1)(c) and (g) to the facts of this case.

For these reasons I would allow each appeal, set aside the decision of the Tribunal, and remit the case for rehearing.

G E Bisson J.

IN THE COURT OF APPEAL OF NEW ZEALAND C.A. 56/88

IN THE MATTER of the Town and Country Planning Act 1977

AND

IN THE MATTER of an appeal under Section 162 of the Act

BETWEEN ENVIRONMENTAL DEFENCE SOCIETY INCORPORATED

Appellant

A N D MANGONUI COUNTY COUNCIL

Respondent

A N D C.A. 57/88

BETWEEN TAI TOKERAU DISTRICT MAORI COUNCIL

Appellant

A N D MANGONUI COUNTY COUNCIL

Respondent

Coram Cooke P
McMullin J
Somers J
Casey J
Bisson J

Hearing 2, 3, 4 May 1988

Counsel G.P. Curry and P.F. Majurey for Environmental Defence Society Incorporated
Sian Elias QC and Miss Denise Bates for Tai Tokerau District Maori Council
P.M. Salmon QC and P.A. Fuscic for respondent and Doubtless Bay Development
K. Robinson for Minister of Conservation

Judgment 27 February 1989

JUDGMENT OF SOMERS J

These appeals are brought under s.162H of the Town and Country Planning Act 1977 and are accordingly on questions of law only. The facts giving rise to the litigation, the decision of the Planning Tribunal, and the determination of the High Court on appeals to it on questions of law are fully set out in the judgments of McMullin J and Casey J and I do not propose to repeat what they have written except to the extent necessary to explain my opinion of the two cases.

The central issue is whether the path followed by the Planning Tribunal in reaching its decision accords with the true construction of s.3 of the Act and the relation between that section and s.4. It is convenient to consider the meaning and intent of the statute before examining the decision of the Tribunal.

Sections 3 and 4 of the Act provide as follows -

> 3. Matters of national importance - (1) In the preparation, implementation, and administration of regional, district, and maritime schemes, and in administering the provisions of Part II of this Act, the following matters which are declared to be of national importance shall in particular be recognised and provided for:
>
> (a) The conservation, protection, and enhancement of the physical, cultural, and social environment:
>
> (b) The wise use and management of New Zealand's resources:
>
> (c) The preservation of the natural character of the coastal environment and the margins of lakes and rivers and the protection of them from unnecessary subdivision and development:
>
> (d) The avoidance of encroachment of urban development on, and the protection of, land having a high actual or potential value for the production of food:

(e) The prevention of sporadic subdivision and urban development in rural areas:
(f) The avoidance of unnecessary expansion of urban areas into rural areas or in adjoining cities:
(g) The relationship of the Maori people and their culture and traditions with their ancestral land.

(2) The Minister may exercise all such powers as are reasonably necessary for promoting, in accordance with the provisions of this Act, matters of national interest and the objectives of regional, district, and maritime planning.

4. Purpose of regional, district, and maritime planning - (1) Subject to section 3 of this Act, regional, district, and maritime planning, and the administration of the provisions of Part II of this Act, shall have for their general purposes the wise use and management of the resources, and the direction and control of the development, of a region, district, or area in such a way as will most effectively promote and safeguard the health, safety, convenience, and the economic, cultural, social, and general welfare of the people, and the amenities, of every part of the region, district, or area.

(2) The general objectives of regional, district, and maritime schemes shall be to achieve the purposes specified in subection (1) of this section.

(3) In the preparation, implementation, and administration of regional, district, and maritime planning schemes, and in the administration of Part II of this Act, regard shall be had to the principles and objectives of the Soil Conservation and Rivers Control Act 1941 and the Water and Soil Conservation Act 1967.

The relation between these two sections is, in my view, apparent from their provisions. Each deals with regional district and maritime schemes and the administration of Part II of the Act. For ease of exposition, however, I will refer only to district schemes with one of which these appeals are concerned.

Section 3(1) declares the seven stated matters to be of national importance and requires that they shall in particular be recognised and provided for in district

schemes. Section 4, on the other hand, is concerned with the purposes and objectives of district schemes. The resources, the wise use and management of which are a general purpose of a district scheme, are the resources of the district and the direction and control of the development of a district are to be undertaken so as to promote and safeguard the health, safety and convenience of the people of the district and their economic, cultural and social welfare, and the amenities, of the whole district.

Section 4 is expressly declared to be 'subject to section 3'. As the district scheme must provide for the matters of national importance mentioned in s.3 this can only mean that the purposes and objects set out in s.4, which have as their aim the benefit of the district, must give way to the stated national interests. In short, the interests of the district are subordinate to the declared matters of national importance. This I think is not only the natural meaning of the provisions of the Act but a rational approach to any conflict between such matters.

Minister of Works and Development v Waimea County [1976] 1 N.Z.L.R. 379 was concerned with this point in relation to ss.2B and 18 of the Town and Country Planning Act 1953. Section 2B contained provisions similar to s.3(1)(c)(d) and (e) of the 1977 Act. Section 18 set out the general purpose of district schemes on lines similar to the second part of s.4 of the 1977 Act. The Town and Country Planning Appeal Board had held that 'it is simply a matter of weighing the

welfare of the inhabitants of the County of Waimea against s.2B'. The Supreme Court held that s.2B must be read with all the other provisions of the Act and that the Board was required to act in every case according to the circumstances and upon the facts before it.

If this was intended to mean that the national and local interests must be weighed or balanced against each other I am afraid I cannot agree. Any doubt which attended the matter is removed by the addition to s.4 of the 1977 Act of the words 'Subject to section 3'.

There are only three aspects of s.3 to which reference need be made in these cases. The first is the use of the word 'unnecessary' in s.3(1)(c) which provides as a matter of national importance -

> The preservation of the natural character of the coastal environment and the margins of lakes and rivers and the protection of them from unnecessary subdivision and development:

(The word unnecessary is also used in s.3(1)(f) while in s.3(2) the words 'reasonably necessary' are employed.)

The word 'necessary' is one of somewhat protean dimensions. It may import something which cannot be done without, that is to say something indispensable or it may mean requisite or needful. The last two themselves embrace varying degrees of necessity.

The meaning and strength of the word 'unnecessary' in s.3(1) is to be gathered from the fact that preservation,

declared to be of national importance, is only to give way to necessary subdivision and development. To achieve the standard of necessity it must be shown that the subdivision or development attains that level when viewed in the context of national needs. Further than that I do not think it desirable to go.

That leads to the second point. It will, no doubt, often be the case that there is some conflict between the matters of national importance listed in s.3. When that occurs it will be necessary to weigh the conflicting national interests and reach a conclusion as to where on balance the matter lies. A necessity which might otherwise be sufficient may have to succumb to other features in s.3 whose importance is, in the circumstances, of greater strength.

The third point arises under s.3(1)(g) -

> The relationship of the Maori people and their culture and traditions with their ancestral land.

In Knuckey v Taranaki County Council (1978) 6 N.Z.T.P.A. 609 the Planning Tribunal held that the words 'their ancestral land' was land which, regardless of legal tenure belongs to or is vested in the tribe concerned and by operation of law and/or custom is owned by or is regarded as owned by or is capable of being owned by the present members of the tribe and their descendants as one entity and is associated historically with the burial of ancestors. This

has been elaborated in later cases with the result that, in effect, land no longer in Maori ownership has been held not to be ancestral land. In Royal Forest and Bird Protection Society (Inc) v W.A. Hobgood Ltd (1987) 12 N.Z.T.P.A 76, however, Holland J held that present ownership was not necessary. It was enough that it had been owned by ancestors and that the relationship referred to in s.3(1)(g) was established.

I am in agreement with Holland J. In ordinary parlance the word 'ancestral' means of, belonging to, or inherited from, ancestors and there is no reason to suppose it was not so used in s.3(1)(g). It follows that present ownership is not necessary. The extent of the necessary relationship of the Maori people and their culture and traditions with the ancestral land will obviously vary and with that variation the weight to be accorded it and degree of protection necessary to preserve it.

I turn now to the interim decision of the Planning Tribunal of 3 February 1986 with which these appeals are concerned.

The Tribunal found, inevitably as I think on the evidence, that all of the land concerned is in the general coastal environment, and, also inevitably, that Stage 1, which it authorised, 'would add a massive and abrupt dimension to growth on the peninsula. Change can be overwhelming and destructive by its mere size'. It also

considered that the beach and foreshore area is such an important part of the coastal environment that it would be quite contrary to the requirements of s.3(1)(c) to permit any development within it other than beach related facilities. By limiting the development to Stage 1 in areas behind the beach it sought to limit or contain the adverse effects of the proposal. That view was summarised as follows -

> It is sufficiently far from Karikari Beach that development of tourist and holiday accommodation can be carried out in a manner which is subservient to the landscape and which substantially preserves the natural character of the coastal environment. That part of the company's land does not have an untouched or remote character.

The process by which the Tribunal reached that conclusion must now be considered.

Early in its decision the Tribunal stated its approach -

> In allowing or disallowing these appeals we must apply the provisions of sections 3 and 4 of the Act to the circumstances of the case. ... We do so against the background that the respondent by adopting Variations Nos 1 and 4 has in effect concluded that they are an appropriate application of sections 3 and 4 to the circumstances of the case; and that by supporting the respondent in its opposition to these appeals the Minister is of the same opinion.

(It should be mentioned that in this Court the Minister of Conservation supported the appeals).

The appellants had defined the issues as being whether there was a clearly demonstrated need for a tourist resort in the District, and, if so, whether the Karikari peninsula was a suitable location. The Tribunal thought the issues

were better formulated as being whether there was justification for making a zoning provision for a new resort and, if so, whether the peninsula was a suitable place. It held that 'applying the requirements of sections 3 and 4 there is justification' for making the zoning provision on the peninsula. This conclusion followed a finding that a destination resort would have regional and national significance even if developed only to Stage 1 and having posed the question whether the proposal was a wise use and management of the land affected, implicitly at least, answered it in the affirmative. It supported that conclusion by reference to the possibility of significant reduction in local unemployment and under-development - a possibility which it records 'weighed heavily with us'. It must also be added that the Tribunal found that 'it is only a possibility that a destination resort will have beneficial, social and economic effects on the district in general and on the local community in particular. A resort could be successful from the developer's point of view yet unsuccessful in terms of its effects on the district and community'. It also recorded that 'those supporting the Variations did not call any evidence to establish that there is anyone with the financial resources ready and willing to undertake the development should the Variations be upheld.'

This was a difficult case for the Tribunal and the structure of its decision means that it is not an easy one for this Court. I am left with the clear impression that

the Tribunal has approached its examination of the case in the way indicated in Minister of Works and Development v Waimea County [1976] 1 N.Z.L.R. 379. For the reasons already set out I am of opinion that this was erroneous. The matters of local advantage must take second place to those of national importance. The land was found to be within the coastal environment, a matter specifically dealt with in s.3(1)(c). It was accordingly for the applicants to show that the development was necessary and outweighed any other national interests. As I read the decision support for the Tribunal's conclusion was found by reference to the wise use and management of New Zealand's resources - this must be a reference to s.3(1)(b) - and by the weight of the (possible) local advantages mentioned.

As already indicated, I think the latter were subservient to the former. There may be cases in which the matters of national importance will to some extent overlap but I do not think this was one in which paras (b) and (c) of s.3(1) did so. The particular reference to preservation of particular parts of the countryside in s.3(1)(c) seem to me to call for separate consideration rather than being weighed against the wise use of New Zealand's resources. In present day jargon coastal environment may be described by some as a resource. But, as I read the Act, it is not Parliament's usage of the term. The resources referred to in s.3(1)(b) do not include the matter mentioned in s.3(1)(c) and the case was one which called for consideration of s.3(1)(c) unaffected by para (b).

The other feature of the case to which I wish to refer is that relating to s.3(1)(g). The Tribunal recorded the case for the Tai Tokerau District Maori Council in this way -

> Their appeals were supported by the Tai Tokerau District Maori Council. The particular concerns of the Maori Council were the effect which development in accordance with the variations would have on the relationship of the Ngati Kahu people with their ancestral land, the effect which it would have on the coastline and the sea, the protection of sacred sites and archaeological values and the social impact. But counsel for the Maori Council addressed on the whole case in the light of the evidence by the other parties to the appeals.
>
> The eminent spokesman for Ngati Kahu, who gave evidence, said that his people wish to see progress but that they are against a large-scale tourist resort at Karikari Bay; that they wish to preserve their lifestyle from such an obtrusive development, which he foresees as a flood which will carry his people to the sea.
>
> ...
>
> He concluded by saying that his people would like to be associated with a smaller, locality-related development which would fit into their community and with which they could grow into a warm, welcoming and distinctively different tourist centre from the type that would be permitted by the Variations.

At the time of the hearing before the Tribunal the Royal Forest and Bird Protection Society (Inc) case had not been heard. Planning Tribunals had evidently followed the decision in Knuckey's case. The Tribunal was asked to reconsider Knuckey and to decline to follow it. These submissions are not referred to in the decision. Having stated the case for the District Maori Council in the way set out above the Tribunal did not again refer to s.3(1)(g) although mentioning the fact that the beach and dune area had particular significance to the Maori people and

contained a number of archaeological sites and approving the constitution of a committee of Management including Maori representatives. I think it is to be inferred that, consistently with Knuckey, it did not consider the lands in question were 'ancestral lands'. If that is not so, then I am of opinion that no appropriate weight was given to s.3(1)(g).

The case was one in which at least two matters of declared national importance, those mentioned in s.3(1)(c) and s.3(1)(g), were present. Each formed an obstacle to the planned development of the area which those seeking to achieve that development had to overcome. My consideration of the decision of the Tribunal leads me to the conclusion that the importance and primacy given those matters by Parliament was not fully recognised by the Tribunal. It follows that the case has been approached by it under a misapprehension of law.

For those reasons I would allow each appeal, set aside the decision of the Tribunal, and remit the case to it for rehearing.

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IN THE COURT OF APPEAL OF NEW ZEALAND CA. 56/88

IN THE MATTER of the Town and Country Planning Act 1977

AND

IN THE MATTER of an appeal under Section 162 of the Act

BETWEEN ENVIRONMENTAL DEFENCE SOCIETY INCORPORATED

Appellant

A N D MANGONUI COUNTY COUNCIL

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Coram Cooke P
McMullin J
Somers J
Casey J
Bisson J

Hearing 2, 3 and 4 May 1988

Counsel G.P. Curry and P.F. Majurey for Environmental Defence Society Incorporated
Sian Elias QC and Miss Denise Bates for Tai Tokerau District Maori Council
P.M. Salmon QC and P.A. Fuscic for respondent and Doubtless Bay Development
K. Robinson for Minister of Conservation

Judgment 27 February 1989

JUDGMENT OF McMULLIN J

These appeals are brought against the judgment of Chilwell J delivered in the High Court on 18 December 1987 dismissing the appeals of the present appellants, the Environmental Defence Society Incorporated ("EDS") and Tai Tokerau District Maori Council ("the Maori Council"), against an interim decision of the Planning Tribunal given on 3 February 1986 allowing variations to the District Scheme of the Mangonui County Council ("the County Council"). The case is of considerable public and environmental importance and involves the interpretation and application of ss. 3 and 4 of the Town and Country Planning Act 1977. For these reasons Chilwell J gave the appellants leave, pursuant to s.162H of the Act, to appeal to this Court.

The land to which the appeals relate is situated on the Karikari Peninsula on the east coast of the far north of New Zealand. That peninsula projects into the Pacific Ocean between Rangaunu Bay to its west and Doubtless Bay to its east. It is a remote part of the country, some 5½ hours by road from Auckland and 150 kilometers north of Whangarei which is the closest city to it. There is only one road leading to the peninsula from State Highway 10. This road is 15 kilometers long and all but one kilometer of it is unsealed. The peninsula has a long coastline containing bays, inlets, ocean beaches, shell banks, rocky headlands and cliffs. There are numerous islands off shore. According to a report made by the Department of Lands and Survey in 1979 the peninsula was formed by the complex motion of ocean

currents which deposited sediments to create a bridge of sand and silt between the then existing mainland and an outlying group of islands. The resulting land formation is predominantly low lying swamp and swamp-covered sand although some parts, the remnants of the islands, rise to a height of 185 metres.

There are relatively few people living on the peninsula. At the time of the 1981 census, the latest statistical information available to the Tribunal at the hearing before it in September and October 1985, there were only about 300 people living there, but that number may have increased since. The main settlement is at Whatawhiwhi-Tokerau beach, where there are 700 residential sites. Only 140 of these have buildings on them but the relevant zoning under the Mangonui Council's District Scheme would permit approximately another 600 building lots.

The Karikari peninsula was the home of the Ngati Kahu people although their landholding there is no longer very extensive. There is one small Maori community and a marae on the eastern side of Whatawhiwhi and another at Merita further north. No public access to the Karikari beach exists at present but there are two informal camping grounds in the area. Otherwise the natural environment is largely preserved.

In 1978, as a result of approaches to it by a developer,

the County Council proposed a change to its then operative district scheme to provide support "in principle" for the establishment of "a major self-contained tourist resort centre on the Karikari Peninsula which will cater for both overseas and New Zealand residents with a wide range of accommodation facilities, supporting services and attractions". The land affected was owned by the Doubtless Bay Development Company ("the company"). The proposed change was the subject of objections and appeals. The latter were determined by the Planning Tribunal on 1 October 1979 in a decision reported as Burkhardt & Ors v. Mangonui County Council [1979] 6 NZTPA 614. The Tribunal concluded that the concept was not then sufficiently advanced to justify recognition in the Scheme Statement. It said:

> ... it is not yet possible for this Tribunal to determine the questions whether, in the light of sections 3 and 4 of the Act, there is the need for a "total resort" in the district (or indeed whether there is the need for any other form of tourist development not already permitted by the District Scheme); and if so, whether it should be on the Karikari Peninsula. Issues of that kind cannot be decided in the abstract.
>
> If in due course those interested in promoting such a development on the Karikari Peninsula persuade the respondent to initiate a change to its District Scheme, or to incorporate certain provisions in a review of its District Scheme, having the effect of rezoning certain land, then that specific proposal can be evaluated in terms of the requirements of sections 3 and 4 by the process of objection and appeal.
>
> ... But the respondent identified the Karikari Peninsula as the most likely place for a major new tourist resort largely on an intuitive basis. We have concluded that even the more neutral form of words proposed to us goes too far in so identifying the Karikari Peninsula; and that until full studies have been completed and evaluated, that matter should be left open in the District Scheme. However some change to the Scheme Statement is called for. We have therefore modified and in part rewritten the further revision tended to us at the hearing.

The change to the Scheme Statement permitted by the Planning Tribunal recorded that:

> Interest has been shown in establishing a major tourist resort on the Karikari Peninsula. The development proposals are only at the conceptual stage and when evolved further may be of regional and national interest. At the present time there is insufficient detail available to assess clearly the likely impact of a specific proposal. There are many questions and problems that require detailed investigation study and evaluation before any land on the Peninsula is rezoned for a tourist resort.
>
> ... In any tourist resort development within the county the investigations and studies connected therewith must be carried out at the developer's expense and must relate to the total development envisaged in the long term, even though it may be appropriate to carry out the development in stages.
>
> So as to establish guidelines for the investigations and studies that are required, the Council hereby sets out the matters which must be adequately dealt with and submitted to it with any proposal for the development of a tourist resort:
>
> (i) Need for a Tourist Resort;
>
> (ii) Suitability of the area for a tourist resort and the reasons for development away from existing urban zoning;
>
> (iii) Development Plan; ...
>
> (iv) Services; ...
>
> (v) Erosion control; ...
>
> (vi) Impact:
>
> (a) physical
> (b) social; ...
>
> (vii) Items of Natural Beauty and Historic Interest" (pages 619-621).

After the Burkhardt decision, the company submitted a development statement to the County Council in support of a request for the rezoning of part of its land to permit a

tourist resort. In September 1983 a proposed review of the district scheme was published by the County Council. That review did not include any zoning provision for a new tourist resort on the peninsula. But in January 1984, as a result of information supplied by the company, the County Council resolved to vary the district scheme by including provisions for a resort. The variation, Variation No. 1, was publicly notified on 1 May 1984. There were objections to it, including one from EDS which asked that the proposed variation be abandoned. After hearing the objections the County Council resolved to allow Variation No. 1. But it acknowledged that there was a need for conditions and amendments to be made to the variation. It resolved to include them in a further variation, Variation No. 4, which made additions and amendments to the earlier variation. It publicly notified the new variation. EDS and others objected to it. The County Council disallowed the objections. However, it met some of the points of concern voiced by the objectors in that it recorded in the variations its intention to set up a "Karikari Advisory Sub-committee" and a "Karikari Joint Committee of Management", the functions of the subcommittee being to monitor the impact of the development and the function of the committee of management being to deal with the functioning of the resort and its integration with the community. The committee was to comprise representatives of the County Council, the developer, the resort operator, the Ngati Kahu people and the local community.

The development for which the variations provided was to be in three stages. As defined in the variations the scale and stages of development were to be as follows:

First Stage

One or more hotels to a total of 200 rooms
Four motels
) in Area 7 shown on Map 2

One fully serviced camping ground to accommodate at least 200 berths (adjacent to Area 7).

An 18-hole international size golf course including club house facilities; and up to 200 tourist accommodation units adjoining the course (in Area G).

An initial commercial development of at least one general store, one food shop, service station and Post Office facilities (in Area Co).

Provision for public access to Karikari Beach and other areas.

An equestrian centre

Recreational facilities including squash courts, tennis courts and buildings for indoor recreation (in Area Co).

An initial development of beach services (in Area B).

Second Stage

Up to a further 200 tourist accommodation units adjoining the golf course.

Further facilities attendant to the golf course itself to be constructed such as extensions to the club house together with restaurant and conference facilities.

Construction of lake areas and up to 300 lakefront tourist accommodation units.

One tourist village to be constructed to accommodate some 300-400 tourist accommodation units.

Up to an additional six motels.

Extensions to the commercial centre to be carried out which will involve the building of further service shops, craft shops and additions to the existing retailing set-up.

A further camping ground.

Extensions to the equestrian centre and other facilities for the riding school.

One or more hotels of a room total not exceeding 200 rooms.

Further development of beach services.

Third Stage

A further camping ground.

Up to a further 300 lakefront tourist accommodation units.

Additional tourist village of some 300-400 tourist accommodation units.

Additional facilities of a recreational nature to be installed where appropriate either by the commercial centre or adjoining the existing hotel facilities.

Up to one or more hotels of a room total not exceeding 200 rooms.

The Scheme Statement also records that for the purposes of utilities planning, the approximate capacity "visitor population" generated by the development would be:

Stage 1	2,280	(Amended to 2,280
Stage 2	4,840	4,240
Stage 3	3,560	2,960
Total	10,680	9,480)

(The population of Mangonui County and Kaitaia Borough was stated to be approximately 14,500.)

As the district scheme stood prior to the variations, a development of the kind contemplated by the three stages was not permitted under the ordinances applicable to the various zones in which the company's land was situated. That part of the company's land which was within 800 metres of the coast was then zoned Rural C. The balance of its land was zoned Rural A. The Rural A zone permitted the use of the land for motels, hotels and camping grounds. These uses

were not permitted in the Rural C zone. The Rural C zone provided for "the conservation of the coastal environment by applying design criteria to create harmony between proposed buildings and their natural surroundings, ... and by excluding incompatible uses". Part of the company's land within 800 metres of the coast was within the Rural C zone.

The effect of Variations 1 and 4 was to rezone 288 hectares of the company's land into zones other than Rural A, C or E. The 288 hectares includes the proposed golf course of 77 hectares, and proposed artificial lake of 58 hectares. Most of the company's land was to be included in a special zone - the Karikari Tourist Resort Zone, the zone statement for which provided "This zone, which is composed of a number of dispersed development areas, provides for the development of tourist accommodation and services for an integrated, self-contained, fully serviced tourist resort". Part of the land was to be rezoned Rural E which was a special zone to provide for the treatment and land disposal of sewage. All the provisions of the Rural C zone would apply in the Rural E zone, with the addition of sewage disposal works and an equestrian centre as permitted areas. The remainder of the company's Rural A land affected by the variations would be rezoned as Rural C. But there was a note in the ordinances of the Karikari Tourist Resort Zone which read "Until the Council brings down an appropriate change to the District Scheme ... only those developments comprised in Stage 1 ... may proceed except as provided for

under conditional uses". Conditional uses for the zone included "any use listed (in the scheme statement) as part of Stage 2 or Stage 3 development ...". But certain conditions precedent to consent were specified.

EDS and the Maori Council appealed to the Tribunal against the variations. The Tribunal heard evidence on the appeals over six days. In its reserved decision it concluded that a rezoning to the extent of Stage 1 only of the proposed development was justified on the evidence; that all references in the district scheme to Stages 2 and 3 should be deleted; and that the balance of the company's land must be zoned in a manner which did not permit any of the uses permitted in Stage 1. It did not think that the zoning provisions and the performance standards relating to the beach community service development area were appropriate because the area, one of dunes, was extremely sensitive. The Tribunal then requested the County Council to modify the contents of the variations and to supply a copy of the modifications to the Tribunal and other parties. The Council did so and on 14 March 1986 the Tribunal made a formal order allowing the appeals of EDS and the Maori Council in part. However, the substance of the Tribunal's decision was to permit the establishment of a resort on the peninsula to the extent of Stage 1 of the development and it was against this that EDS and the Maori Council appealed to the High Court on points of law.

There was considerable evidence given in the lengthy hearing before the Tribunal. From this two opposing points of view emerged. One which favoured the development of the area claimed that New Zealand needed what are known as "destination resorts" to broaden the tourist industry's product range and market appeal; and that there was room for such a resort in the Karikari peninsula area. (A destination resort is one in which a tourist stays for the whole time he is a tourist in this country. The one resort caters for all his needs). As one witness put it:

> A destinational beach resort would demand a site which provided enough land for a major development, access to a beach which was sandy and safe for swimming and sailing, and a variety of other coastal environments such as secluded bays and diving waters. These water based activities should be complemented by land based facilities providing for golf, tennis, horse riding and other participatory recreational activities. In addition to these resort-provided activities, the visitor would also demand day excursions to other points of historical, cultural and scenic interest.

Those who held this view claimed that there was a place for such a resort in the Northland, on the Karikari peninsula in particular, and that the development of such a resort would confer social and economic benefits on the district, particularly in relieving unemployment and stopping the movement of people away from the area.

The company called a witness to support that view. He was a landscape architect who was commissioned in 1981 to consider a proposal for the development of the area. He identified three distinct areas in the company's land, namely:

1. The beach and foredune area;

2. An extensive swamp and wetland area behind the foredunes and river flats at the eastern end.

3. Higher scrub covered land rising behind the area in (2).

He recognised that the beach and foredune area were environmentally sensitive and would be easily damaged; that the whole of it must be left untouched; that the micro-climate of that area was relatively hostile; and he recommended that the development be sited in the various positions shown on maps put in evidence before the Tribunal. He said that his proposals sought to achieve the preservation of the areas of high natural beauty and interest, to ensure the protection of land that was environmentally sensitive, and to build the development around the natural attributes of the land, thus maintaining the integrity of the landscape and ensuring the survival of the very elements that attracted development in the first place.

The case for development was also supported by an officer of the Tourist & Publicity Department called by counsel for the then Minister of Works and Development. He gave an overview of the tourist industry, saying that there was a segment of the international tourist market which sought a destination resort of the kind of a "stay-put", all-inclusive holiday at a single resort. He suggested that there should be three such resorts in New Zealand of which a beach holiday in a warm and secluded area was one.

The contrary view was advanced by EDS and by the Maori Council. EDS seeks the preservation of the whole of the natural wild and rural character of Karikari Beach and its protection as a wildlife habitat. It claims that this can only be achieved by the acquisition of the beach and dune area by some public agency and the exclusion of the public from a large part of it. It sees the company's development as an unwarranted intrusion into a vulnerable natural environment.

The Ngati Kahu people also expressed their opposition to a large scale resort at Karikari. They did so through the Maori Council which was set up pursuant to the Maori Community Development Act 1962. In essence their concern is to preserve their existing lifestyle. They see a large-scale resort as detrimental to their way of life. They do not oppose development or change if it is sound and in conformity with their lifestyle and culture. They favour a smaller locality-related development which would fit better into the existing communities on the peninsula. They say that the beach and dunes in the area are of particular significance to the Maori people and that they contain a number of archaelogical sites. They oppose the development proposed as imperilling their own cultural values and their ability to relate to their land.

The case for the conservation of the area was supported before the Tribunal by the evidence of a number of

witnesses. One with high qualifications in ecology said that the beach and duneland and the swamp and wetland behind them were interconnected areas of high floral and faunal value; that they have a number of nationally important floral and faunal features; that the high natural values of these areas would be threatened by the proposed development; that in particular, large numbers of people on the beach would cause severe damage to the dune and vegetation and affect the summer breeding of the New Zealand dotterel. He also spoke of the effects which changes to the hydrology and fertility of the swamp and wetland would have, and of the effects of run-off from site preparation and the effects of excavations for the proposed lake. Evidence of possible adverse effects on the beach, dunes, swamp and wetlands was given by the Wildlife Service.

There was also evidence from a witness experienced in tourism that development, even to Stage I, could result in an intrusion into the area of a development that could not be sustained, resulting in an unsuccessful development which would irretrievably alter the natural environment.

The decision of the Tribunal notes that those supporting the variations did not call any evidence to establish that there was anyone with sufficient financial resources ready and willing to undertake the variations should they be upheld, a point on which counsel for EDS based a submission that the Tribunal was unable to judge whether the proposal

would represent wise use and management of resources, to which s.3(1)(b) of the Town and Country Planning Act is directed. The Tribunal ruled against this submission. I refer to it later. It held that the availability and source of those resources were not questions which land use planning could examine and that while land use planning must examine questions of need, zoning can only provide opportunities which may or may not be taken up.

In its decision upholding the variations to the point where they permitted development of the company's land to Stage 1, the Tribunal concluded that applying the requirements of ss.3 and 4 of the Act, which are set out and discussed later in this judgment, there was justification for making zoning provision for a new tourist resort to the extent of Stage 1; that there was a place for such a resort in New Zealand tourism and that it should be in the Northland; that there was no case for suggesting that a destination resort should be attached to an existing tourist community in Northland; that while, if a sufficient degree of new market for such a resort were not generated, it could have an adverse effect on the existing tourist infrastructure, land use planning should give the opportunity for someone to take that risk if their market research indicated it was justified; and that a well planned tourist development in the Mangonui County might significantly relieve local unemployment from which the County suffers and promote the development which it needs. But the Tribunal said that "it

was only a possibility" that a destination resort would have significant social and economic effects on the district in general and the local community in particular.

In the course of the hearings before the Tribunal, the High Court and this Court the various issues have been highlighted and refined. In the High Court the issues were further refined, perhaps over refined, and Chilwell J noted that counsel had framed no less than 16 points of law for him to decide.

In his judgment Chilwell J analysed the Tribunal's decision and divided the questions of law arising from it into three principal categories. The first, whether the Tribunal had evidence upon which it could reasonably conclude that there was a place for a destination resort in New Zealand tourism and whether that place should be in the north. The second concerned the interpretation and application of sections 3 and 4 of the Town and Country Planning Act 1977. The third concerned the function of the Tribunal in hearing and determining appeals of this type.

On the first question he concluded that the Tribunal could reasonably have concluded on the evidence before it that there was a place for a destination resort in New Zealand tourism, and that it should be in the north. On the second he concluded that the Tribunal had correctly

interpreted and applied s.3(1)(a), (b), (c) and (g) of the Act. On the third he upheld its approach to the matter of appeals.

The issues raised on this appeal arise from certain findings of the Tribunal although on one issue, whether the land is Maori ancestral land, the complaint is that the Tribunal made no finding at all. The relevant findings of the Tribunal can be summarised as follows: That the development would add a massive and abrupt dimension to growth on the peninsula; that the resultant change would be substantial and would have regional and national significance even if developed only to stage 1; that such change could be overwhelming and destructive by its very size; that the accommodation capacity of stage 1 was expected to reach 2280 people, as against the present population of only a few hundred; that the promotion of the new destination resort involved very considerable risk and that market demand and support must be generated; that if a sufficient degree of new market support were not generated the development could have an adverse affect on existing tourist infrastructure; that it was only a possibility that a new destination resort would have beneficial social and economic effects; and that there was no evidence that there was anyone available with sufficient financial resources to develop the resort.

Although the case undoubtedly raises important points of planning law and environmental considerations, essentially

it depends on the construction of s.3(1), particularly (a), (b), (c) and (g), of the Act and its application to the findings of the Tribunal. Section 3 provides:

> (1) In the preparation, implementation, and administration of regional, district, and maritime schemes, and in administering the provisions of Part II of this Act, the following matters which are declared to be of national importance shall in particular be recognised and provided for:
>
> (a) The conservation, protection, and enhancement of the physical, cultural, and social environment:
>
> (b) The wise use and management of New Zealand's resources:
>
> (c) The preservation of the natural character of the coastal environment and the margins of lakes and rivers and the protection of them from unnecessary subdivision and development:
>
> (d) ....
>
> (e) ....
>
> (f) ....
>
> (g) The relationship of the Maori people and their culture and traditions with their ancestral land.
>
> (2) The Minister may exercise all such powers as are reasonably necessary for promoting, in accordance with the provisions of this Act, matters of national interest and the objectives of regional, district and maritime planning.

Section 4 should also be mentioned. It provides:

> (1) Subject to section 3 of this Act, regional, district, and maritime planning, and the administration of the provisions of Part II of this Act, shall have for their general purposes the wise use and management of the resources, and the direction and control of the development, of a region, district, or area in such a way as will most effectively promote and safeguard the health, safety, convenience, and the economic, cultural, social and general welfare of the people, and the amenities, of every part of the region, district, or area.

(2) The general objectives of regional district, and maritime schemes shall be to achieve the purposes specified in subsection (1) of this section.

(3) In the preparation, implementation, and administration of regional, district, and maritime planning schemes, and in the administration of Part II of this Act, regard shall be had to the principles and objectives of the Soil Conservation and Rivers Control Act 1941 and the Water and Soil Conservation Act 1967.

All counsel made submissions as to the place to be given to s.3 in the scheme of the Act. Mr Robinson appeared in the High Court for the Minister of Works and Development pursuant to the Minister's role as representative of the Crown for the purposes of the Town and Country Planning Act. With the abolition of the Ministry of Works and Development on 1 April 1988, the responsibility for the conduct of this appeal passed to the Minister of Conservation whose instructions to Mr Robinson were that she wished to add nothing to the submissions made by the appellants which Mr Robinson adopted on the Minister's behalf. The substance of other counsels' submissions was as follows:

E.D.S Submissions

In considering s.3 Chilwell J adopted a passage in the judgment of Wild CJ in Minister of Works v. Waimea County [1976] 1 NZLR 379 to which I refer later. In substance Chilwell J said that s.3 was not to be given primacy but must be read in the context of the Act as a whole. Mr Curry submitted that the Judge's approach was wrong. While he did not contend that s.3 should be given absolute primacy and

acknowledged that conflicting interests under the Act should be balanced he submitted that this should be done only in the light of the overriding principles of s.3; and that s.3 imports a presumption in favour of national importance.

Section 3 did not appear in its present form in the Town and Country Planning Act 1953. There was no provision in that Act relating to matters of national importance. They were added to the legislation by s.2 of the Town and Country Planning Amendment Act 1973. Section 2B provided:

> 2B The following matters are declared to be of national importance and shall be recognised and provided for in the preparation, implementation, and administration of regional and district schemes:
>
> (a) The preservation of the natural character of the coastal environment and of the margins of lakes and rivers and the protection of them from unnecessary subdivision and development:
>
> (b) The avoidance of encroachment of urban development on, and the protection of, land having a high actual or potential value for the production of food:
>
> (c) The prevention of sporadic urban subdivision and development in rural areas.

Section 2B was discussed by Wild CJ in Minister of Works v. Waimea County. He said:

> The object and scope of s.2B is perfectly plain both from its place in the scheme of the Act and also from its language. It is to be read together with and deemed part of the Act, and it is noteworthy that it was inserted at the beginning of the Act, after the short title and the two sections dealing with interpretation and the liability of the Crown. It precedes part I

> which deals with regional planning schemes and part II which deals with district schemes. Apart from the clear indication in the insertion of s.2B in that position in the Act, the section itself declares in terms that the three topics it prescribes "shall be recognised and provided for in the preparation, implementation, and administration of regional and district schemes". That means just what it says. It follows that every council and every appeal board or other authority acting under the Act must do what s.2B requires. But s.2B must be read with all the other provisions because the Act must be read as a whole. Section 18, which opens part II of the Act, declares what shall be the general purpose of every district scheme. In the same way s.3, which opens part I, declares what shall be the general purpose of every regional planning scheme. Authorities acting under the authority of the statute in regard to regional planning schemes or district schemes must, therefore, have regard to s.3 or s.18 as the case may be. (382)

In Smith v. Waimate West County Council [1980] 7 NZTPA 241 ~~259~~, a case decided after the 1977 Act was passed, the Tribunal accepted a submission that s.3 must be read in the context of the 1977 Act as a whole and that it did no more than "make explicit what was previously implicit" - a view which Chilwell J adopted. Mr Curry submitted that greater weight is now to be given to the matters of national importance mentioned in s.3 than was the case under s.2B. He referred to a passage in Palmer, Planning and Development Law in New Zealand vol. 1 p.202 in support of that proposition.

The place which s.3 occupies in the legislation can best be determined by reference to the stages in its statutory evolution. Section 3(1) of the 1953 Act provided that every original planning scheme should have for its general purpose the conservation and economic development of the

region to which it related but, as stated, it made no reference to specific matters of national importance. Section 18 of that Act, which was also relevant, provided that every district scheme should have for its general purpose the development of the area to which it related in such a way as would most effectively tend to promote the health, safety and convenience in the economic and general welfare of its inhabitants in the communities in every part of its area. The text of s.2B has already been given. It introduced the concept of national importance which is the hallmark of s.3 of the 1977 Act. The difference between s.2B and s.3 is that in s.2B the matters mentioned as being of national importance were limited to:

(a) The preservation of the natural character of sea and lake and river margins and their protection from unnecessary subdivision and development;

(b) The avoidance of urban development on land which had a food producing value;

(c) The prevention of sporadic urban development in rural areas.

Section 3 considerably widened the scope of the matters recognised as being of national importance by adding new paras. (a), (b), (f) and (g). Paras. (c), (d) and (e) of s.3 repeat paras. (a), (b) and (c) of s.2B. And the scope of s.4 of the 1977 Act was made wider than s.4 of the 1953

Act. But undoubtedly while the scope of the matters listed as areas of national importance were considerably enlarged by s.3, the real question is whether those matters are to be given any special priority or weighting over other planning considerations mentioned in the Act. Mr Curry submitted that this was so; that whereas s.2B was a section, albeit an important one, which took its place in the scheme of the previous legislation, in the 1977 Act its primacy has been emphasised in that certain other sections, namely s.4 (already cited), s.36 (contents of district schemes) and s.72 (conditional uses) have been made subject to it.

It would, however, be too much to say that s.3 has been given absolute primacy in the Act. To do so would be to suggest that it takes precedence over all other planning considerations and would require its application as a matter of principle as the single dominating factor to which all other statutory provisions and all other planning considerations were made subordinate. Section 3 is not expressed in such downright terms. Indeed, Mr Curry did not contend for such an absolute construction. But even a contention that, short of absolute primacy, s.3 must be treated as containing a principle that overrides other planning considerations is an overstatement of the position.

But that is not to write down its obvious force. Some sections, namely 4, 36 and 72, are made expressly subject to it. And, apart from its special application to them, s.3 in

its very terms transcends the territorial limitations of regional and district and maritime schemes. The considerations which s.3(1) treats as the matters of national importance must be "recognised and provided" for in every regional, district and maritime scheme. The phrase "be recognised and provided for" is stronger than the phrase "regard must be had to". Every scheme must cover, inter alia, the matters of national importance listed in s.3(1). It follows that unless it is plain from the terms of a scheme that the matters listed in paras. (a) to (g) have been identified and provided for, the scheme will be in breach of s.3(1). Every council must do what the section requires. What s.3(1) has done is to increase the number of matters which the framers of the statute consider to be of national importance; all of which matters any thoughtful citizen, I think, would accept to be such in any case.

The difficulties of this case lie not in deciding whether or not s.3 should receive primacy or any special weighting over and above other provisions of the Act but in the application of paragraphs (a) to (c) and (g) and the balancing of some of the matters mentioned as being of national importance against others. There will be some cases where that balancing will be even more difficult. For instance, in a coal mining area the wise use and management of New Zealand's resources (para. b) will have to be balanced against the conservation, protection and enhancement of the physical, cultural and social environment (para a) and the

preservation of the natural character of the coastal environment and the margins of lakes and rivers and their protection from unnecessary development (para c). The very use of "unnecessary" makes it clear that the preservation of the natural character of the coastal environment and the margins of lakes and rivers is not a bar to necessary development.

For these reasons the Tribunal was right when it said in its decision:

> Tourism does not guarantee the protection of the natural environment. It can be destructive of that environment. Section 3(1)(c) requires land use planning to preserve the natural character of the coastal environment and to protect it from unnecessary subdivision and development. (By way of comment on that requirement, we say that it does not require that land use planning give absolute protection to the natural character of the coastal environment, else there would be no subdivision or development at all in that environment.)

Having referred to the matter just discussed, namely the place of s.3 in the legislation, Mr Curry went on to submit that the Tribunal had failed to apply its provisions properly to the facts. He directed his submissions to a number of heads:

Section 3(1)(a)

He referred to findings by the Tribunal as to the possible gains and detriments resulting from the development of a destination resort on the peninsula. The Tribunal expressed these as follows:

> "We are of the opinion that .... tourism, and in particular a new destination resort, may significantly reduce local unemployment and underdevelopment. The possibility that it will have those beneficial consequences on the district has weighed heavily with us in coming to the conclusion that land use planning should give the opportunity for someone to develop such a resort, to the extent of stage 1. (However, we repeat that it is only a possibility that a destination resort will have beneficial social and economic effects on the district in general and on the local community in particular, a resort could be successful from the developer's point of view yet unsuccessful in terms of its effects on the district and community).

In summary, the Tribunal was only able to rate the beneficial effects deriving from a destination tourist resort in the area as a possibility.

Mr Curry contended that in having regard to the supposed benefits which were no more than a possibility, the Tribunal had given insufficient weight to the reference in s.3(1)(a) to "the conservation, protection and enhancement of the physical, cultural and social environment". He said that s.3(1)(a) required the establishment of more than a mere possibility of beneficial social and economic effects on the district; that the Tribunal had to reach the conclusion that these benefits were made out to the point of being probabilities before they could displace matters declared by s.3(1)(a) to be matters of national importance; and that in accepting a lesser standard than this the Tribunal had not applied s.3(1)(a) correctly.

This submission can conveniently be considered with the submission by Mr Curry made under s.3(1)(b).

Section 3(1)(b)

In a passage already cited, the Tribunal referred to the considerable risks involved in the promotion of a new destination resort and the need to generate market demand and support. It also noted that those who supported the variations had not called any evidence to establish that there was anyone with the financial resources ready and willing to undertake the development should the variations be upheld. But it ruled against an EDS submission that in the absence of such evidence the Tribunal was unable to judge whether the proposal would represent the wise use and management of New Zealand's resources. The Tribunal's ruling followed its previous rulings that s.3(1)(b) speaks principally of New Zealand's "land resources" (the emphasis is the Tribunal's), and that the question was whether it would be a wise use and management of the land affected to allow it to be put to the purposes proposed in the variations, the source of the resources to develop the land, even their very availability, not being questions which could be examined under land use planning. The Tribunal had expressed that view in Smith v. Waimate West County [1980] 7 NZTPA 241. And, in a number of cases since, it has adopted it.

Chilwell J considered that the principle was so entrenched in the cases that it would be wrong now to hold that the Town and Country Planning Act is not confined to land use planning.

Before examining Mr Curry's submission further, I would agree with him that the resources, the wise use and management of which must be recognised and provided for, are not to be narrowly construed. Obviously in a statute which deals with land use planning the enquiry will centre on land use. Land use in a narrow sense is generally at the core of every application under the Act. But land use in a planning background is a term of wide import. Water in the sea, rivers and lakes, the air around us, the climate of an area, a particular configuration of mountains or valleys, the growth of a forest are all resources in the wider sense. Land use should be construed as including all these things.

Chilwell J said that there should rarely, if ever, be instances where the Tribunal need enquire whether or not there is a person with the financial resources ready and willing to undertake a permitted development; that a council in the first place and the Tribunal on appeal are entitled to assume that if a person decides to develop the land in compliance with a particular zoning, it will do so with the objective of financial success. This, too, was the view advanced by Mr Robinson when he appeared in the High Court as counsel for the Minister of Works and Development. Mr Curry submitted that because there was no evidence of the availability of anyone with financial resources ready and willing to undertake the development, the Tribunal should have refused it. With that submission he joined issue with the line of authority already referred to, although he

acknowledged that in some of the cases (Smith v. Waimate West County, Chelsea Investments Ltd v. Waimea County [1981] 8 NZTPA 129 and Re an application by New Zealand Synthetic Fuels Corporation Ltd [1981] 8 NZTPA 138) the Tribunal had detailed evidence of the proposed use.

The concerns underlying this submission are understandable. It would be a serious thing if a development of the scale envisaged here, even to stage 1, were to fail for economic or other considerations. What would be left by the failed development might be a blot on the landscape and possibly demonstrate that the proposed development had been an unwarranted intrusion into the natural environment in the first place. This was a matter which the Tribunal had to weigh when considering whether, or to what extent, the district scheme should be amended. But the absence of evidence that there was a person available to undertake such a development was not fatal to the scheme. In some cases the possibility that a particular development which underlies a proposed scheme change or zoning will ever be undertaken may be remote. In that case a change in zoning may be unjustified. But, where there is a reasonable possibility that the particular development underlying the projected change will take place, a council and the Tribunal are entitled to weigh its merits and allow the change even if no person is shown to be presently available to undertake the development. It is undesirable to lay down a general rule. Each case must depend on its circumstances. But here

the Tribunal addressed itself to the issue with s.3(1)(a) and (b) in mind and it was entitled to conclude that provision should be made in the scheme against the reasonable possibility that proper financial backing for the enterprise would be forthcoming.

Section 3(1)(c)

The Tribunal found that the destination resort concept was one which had to be marketed in order to generate market demand and support. Mr Curry submitted that s.3(1)(c) was concerned with the establishment of a present need for development, not one which may be generated in the future; that any justification for taking advantage of an opportunity to develop is not the establishment of a need; but that even if a case could be made for a future need that need would require to be demonstrated at least to the point of probability.

Section 3(1)(c) does not specifically refer to need but need does by implication arise in the reference in the subsection to "unnecessary" subdivision and development, thereby recognising the point made earlier that there may be necessary subdivisions and developments that impinge on the natural character of the coastal environment and the margins of lakes and rivers to which s.3(1)(c) has no special application. Section 3(1)(c) does not impose absolute requirements in regard to subdivision development, but rather requires all schemes to provide for the preservation

of the natural character of the features it mentions against "unnecessary" subdivision and development. This requires those responsible for any scheme to engage in some forward thinking. If schemes can take account of only those developments which are shown to be certain developments planning will be restricted. The drafting of a scheme may be greatly hampered and restricted if those responsible for it cannot look ahead at what may reasonably be projected. Planning is about looking ahead more than looking behind. It is at least as concerned with the desirable developments of the future as it is with the preservation of the desirable developments of the past. For these reasons I do not think that the Tribunal fell into error in permitting the variations even though the development was not shown to be more than a reasonable possibility.

The Maori Council Submissions

I now turn to the case for the Maori Council which in the submissions made on its behalf was closely identified with EDS. Miss Elias said that the Ngati Kahu people believed that the Karikari peninsula was the landfall for the canoe which brought their ancestors to New Zealand and it was there they first settled. (See also the Mangonui Sewerage Report, Waitangi Tribunal 1988 para. 1.2). The Maori Council's concern is to see that decisions for the development of the peninsula are made with care and having regard to the relationship of the Ngati Kahu people with the land. Miss Elias said that they accept that soundly based -

development is necessary but wish to ensure that it is in conformity with their lifestyle and culture. They are opposed to the development contemplated in the variations and regard it as unsound and threatening to their culture. In particular, the Maori Council is concerned with (i) the social and cultural impact of the proposal (s.3(1)(a)); (ii) the impact of the development on the coastal environment (s.3(1)(c)); and (iii) the relationship of the tribe with their ancestral land (s.3(1)(g)).

Section 3(1)(a)

Reference has already been made to the submissions made by Mr Curry under this head. They received the support of Miss Elias and need not be discussed further.

Section 3(1)(c)

It was the Maori Council's case that s.3(1)(c) is equivalent to a legislative judgment that the coastline is to be protected against development which is unnecessary. Miss Elias submitted that it was not correct to suggest, as she said Chilwell J had in his judgment, that it is only in circumstances in which the natural character of the environment is particularly important that the Tribunal may require compelling evidence of need before commencing the balancing exercise which led him to accept the Tribunal's approach distinguishing between dunes and swamp on the one hand and the higher ground behind the beach on the other even though all this land was found to be within the general coastal

environment. In essence she submitted that it was not for the Tribunal to grade the coastline before giving it the protection required; that all the coastal environment was to be protected from unnecessary development; that where development is necessary the qualities of the coastline will be relevant to the balancing of advantages and disadvantages in the proposal; that where the benefits of the necessary use so outweigh the detrimental effects of the development on the coastal environment the development will prevail; that, in appropriate cases where necessity is established the impact of the use can be minimised by confining it and by prescribing conditions; but that the balancing stage is not reached unless the development is first shown to be necessary.

I do not think that this approach follows from the wording of s.3(1)(c). That provision has the aim of preserving the natural character of the coastal environment and the margins of the lakes and rivers. As already noted, by implication it recognises that there will be some development which is necessary. There can also be development which is unnecessary and which may not interfere at all with the natural character of the coastal environment or may interfere with it in only an insignificant way. Such may result from the way in which the development is planned. In the present case the Tribunal thought that by allowing the higher scrub covered land to be used for a destination resort, while preserving the beach and foredune area and the

swamp and wetland area, the object of s.3(1)(c) could be attained. Such a view does not run counter to s.3(1)(c) which does not place a prohibition on development. It merely provides that a council's scheme must make provision, inter alia, for the matters covered by s.3(1)(c). Whether a scheme does that adequately or does it at all is a question to be decided in the light of the circumstances of the case. Even though the Tribunal did not find the development, even to the point of stage 1, to be necessary, I think that its decision fairly reflected the concerns expressed in s.3(1)(c).

Section 3(1)(g)

No definition is given in the Act as to what is ancestral land. Miss Elias said that she invited the Tribunal to find that the company's land was ancestral land within the meaning of s.3(1)(g) and to overrule its earlier decisions that s.3(1)(g) applies only to ancestral land still in Maori ownership. There have been a number of cases where the Tribunal has taken that view. In Knuckey v. Taranaki County Council 6 NZTPA 609, the Chairman of the Tribunal ruled that ancestral land in that particular case was land which, regardless of legal tenure, belonged to or was vested in or reserved to a particular tribe, and by operation of law and/or custom was owned by or regarded as owned by or was capable of being owned by the present members of that tribe and their descendants as one entity, and was associated historically with the burial of ancestors as distinct from land an individual or group of individuals might legally

dispose of to other specified individuals to the exclusion of tribal members as a whole. And in Quilter v. Mangonui County Council 296/77 and 38/78, decision 21 July 1978, the Tribunal held that land which had passed into the ownership and occupation of people who are not Maoris does not qualify as ancestral land. That, too, was the view taken by Chilwell J in the present case. But in Royal Forest & Bird Protection Society (Inc) v. W.A. Habgood Ltd 12 NZTPA 76, decided on 31 March 1987 (that is, after the Tribunal had given its decision in the present case) Holland J held that it was wrong to confine "ancestral land" to land now owned by Maori people. He disapproved of what had been said to the contrary in Knuckey and Quilter. He said that ancestral land is land which has been owned by ancestors although not necessarily still in the ownership of the Maoris. I am largely in agreement with the approach adopted by Holland J. In the absence of any statutory definition, and on the plain meaning of the words, ancestral land is land which was owned and occupied by one's ancestors. Whether it is only land which was occupied by the first arrivals in New Zealand in the canoes is a question I leave open as it is not presently relevant. In some contexts it might be reasonable to assume that ancestral land which has since been disposed of is not ancestral land; that it must still be owned or possessed by the descendants of those ancestors and the chain of ownership or occupation maintained through successive generations. But s.3(1)(g) does not speak of present day ownership of ancestral land by the Maori people; only of the relationship

of the Maori people and their culture and traditions with ancestral land. That phraseology contemplates an association with ancestral land which is much wider than present day ownership or possession. That is one reason why I think that the words "ancestral land" where used in s.3(1)(g) should not be read down to exclude ancestral land which has passed out of Maori ownership or occupation. Another reason, allied to it, is that the very use of the word "ancestral" is a reference to the past and not to the present so that the emphasis is on a state of ownership or occupation which pertained in years, perhaps centuries, gone by. The fact that it no longer pertains does not make it any less ancestral. However, the circumstances in which the ties of ownership or occupation of ancestral land have been severed may be very relevant to the question of "the relationship of the Maori people and their traditions and culture with their ancestral land". If there has been a voluntary disposition in the past by Maoris to Europeans the considerations made relevant by s.3(1)(g) may be considerably diminished in their impact. Therefore, for the purposes of considering s.3(1)(g), I would treat the land the subject of the development as Maori ancestral land which s.3(1)(g) made it obligatory for the County Council to recognise and provide for in the district scheme.

Mr Salmon said that no evidence had been given before the Tribunal that the land in question had been owned by the ancestors of the Ngati Kahu tribe. However, even in the

absence of such evidence, I am prepared to assume that the Karikari peninsula was the ancestral land of the Ngati Kahu people. And I cannot think that the Tribunal regarded it as otherwise. Miss Elias acknowledged that the proposed development met with the approval of the majority of the people on the peninsula and that the greater part of the tribe lived elsewhere in the north - principally around Kaitaia where better work opportunities are available. The Tribunal is likely to have had regard to these facts. But the concerns which the local Maori people expressed for the area were put quite strongly to the Tribunal and its decision shows that it had them in mind in considering whether or not to allow the appeals against the variations. It decided that these concerns could be protected. There was evidence to that end which the Tribunal was free to adopt. Mr B.W. Putt, a senior planner with the Ministry of Works, who gave evidence before the Tribunal, recognised that the Ngati Kahu people were the Tangatawhenua of the Karikari peninsula and that the whole area contained historic and archaelogical sites. But he said that these could be safeguarded through the consultative process and that traditional values can be protected as long as the change was not catastrophic.

In the end, I think as Chilwell J did, that the Tribunal did not misdirect itself on the law and that there was evidence to support its findings. The issues raised by the case are sensitive ones and have no doubt roused strong

feelings in the minds of the appellants. But the function of this Court is limited to considerations of law. It is not for it to make a fresh appraisal of the evidence which, not having seen and heard the witnesses, it would be ill equipped to do.

For these reasons I would dismiss the appeals.

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