IN THE MATTER	**of the Resource Management Act 1991**
AND	
IN THE MATTER	**of the Proposed Queenstown Lakes District Council Proposed District Plan**
AND	
IN THE MATTER	of submissions and further submissions by **BOARD OF AIRLINE REPRESENTATIVES NEW ZEALAND INC ("BARNZ"):**
	S271.11 - 14
	S271.18
	FS 1077 to S433.60.

CASE BOOK FOR
BARNZ IN RELATION TO TOPIC 006
20 OCTOBER 2016

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CONTENTS

ORIGINAL

Decision No. A77/93

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of a request for an inquiry pursuant to section 118(6) of the Act

BETWEEN L P HADDON

(RMA 93/92)

Appellant

AND THE AUCKLAND REGIONAL COUNCIL

Respondent

AND THE AUCKLAND CITY COUNCIL

Applicant

BEFORE THE PLANNING TRIBUNAL

Her Honour Judge S E Kenderdine (presiding)
Mr I G McIntyre
Mr F Easdale

THE SEAL OF THE PLANNING TRIBUNAL NEW ZEALAND

HEARING at AUCKLAND on the 17th and 18th days of May 1993

APPEARANCES

Mr L P Haddon in person
Mr J Burns for the Auckland Regional Council
Mr D Kirkpatrick for the Auckland City Council
Mr M Parker and Ms E France on your behalf

REPORT TO THE MINISTER OF CONSERVATION

This request for an inquiry pursuant to section 118(6) of the Resource Management Act 1991 ("the RMA") relates to the recommendation of the Auckland Regional Council ("the ARC") to you to allow the extraction of 30,000 cubic metres of sand from the bed of the sea some 3-4 kilometres off the coast at Pakiri Beach, North Auckland. It relates to the application for a coastal permit for a restricted coastal activity. The sand is required subsequently to be placed on the beach at Mission Bay, Auckland. Although the appeal has arisen pursuant to section 118(6) of the Act that applies the relevant provisions of sections 120 and 121 relating to appeals which requires that it is to be undertaken as an inquiry by the Tribunal at the end of which we are required to report to you for a final decision.

The resource affected by the recommendation is located between 3-4 kilometres off Pakiri Beach, centred on a point 3 kilometres south of Te Arai Point (NZMS 260R08 632572).

The grounds on which the appeal is based are as follows:

The consent authority failed to give adequate and/or proper notice for the application in terms of section 93 of the Act

(ii) The prehearing meeting convened by the consent authority was conducted in a manner which contravened the provisions of section 99 of the Act in that amongst other things:

(a) The meeting was not held for the purpose of clarifying, mediating or facilitating a resolution of matters in issue: and

(b) The meeting did not consider or address a number of matters that were properly at issue, notwithstanding the strong plea by the appellant that the meeting should do so.

(iii) The actions of the consent authority throughout the application proceedings were in breach of and inconsistent with the rights guaranteed to the family of the appellant (the Rahui Te Kiri family) under the Treaty of Waitangi 1840.

(iv) The decision of the consent authority was in breach of and inconsistent with the rights guaranteed to the family of the appellant (the Rahui Te Kiri family) under the Treaty of Waitangi 1840.

(v) Pursuant to Article II to the Treaty of Waitangi 1840 the sand that is the subject of the application is the property of the Rahui Te Kiri family and neither the Crown nor any other person or body has the right to interfere with the Rahui Te Kiri family's entitlement to full exclusive and undisturbed possession of such sand without the express consent of the family. Such consent has not been obtained.

(vi) The relevant area from where the sand is proposed to be extracted is the subject of a claim to the Waitangi Tribunal (WAI 280) by the Rahui Te Kiri family and in the circumstances, it is premature and improper for the consent authority to consider and determine the application before the Waitangi Tribunal has made its findings in regard to that claim.

We have set the grounds of appeal out at length because the issues they raise are important for you to consider.

Background

Pursuant to section 12(1)(c) of the RMA, no person may disturb the seabed by excavating, drilling or tunnelling in a manner that is likely to have an adverse affect on the foreshore or seabed unless authorised by a rule in a regional plan or a resource consent. In addition for the purposes of this inquiry, no person may remove sand in the coastal marine area of the Crown, which you represent, unless authorised by a rule in a regional plan or a resource consent. Pursuant to section 372 of the Act you may from time to time direct a regional council to treat a specified activity in the coastal marine area as a restricted one for the purposes of the legislation. By direction dated 1 October 1991 you directed the ARC in terms of section 12(1)(c) that disturbances or removal of sand in terms of section 12(2) where the removal or disturbances involved volumes of greater than 50,000 cubic metres or areas of greater than one hectare or linear distances of greater than 1,000 metres in any one 12 month period, were to be restricted coastal activities. The Auckland City Council ("the ACC") proposed extracting 30,000 square metres of sand to an average depth of half a metre and a maximum depth of two metres within a maximum area of 400 metres by 300 metres. The proposal will accordingly involve an area of greater than 1 hectare.

As a result of your direction, the ACC's application in relation to the extraction of sand from the seabed was heard and considered by the Special Hearing Committee of the Environmental Management Committee of the ARC. That Committee included one member who is your appointee. The report of the Committee recommends that you grant consent to the council for the sand extraction off-shore from Pakiri Beach subject to the number of conditions. The ACC indicated through its counsel at the opening of this inquiry that it accepted the report and recommendation of the special committee of the ARC.

A copy of the Special Hearing Committee's Recommendation and Decisions are attached to this report marked Appendix "A".

There was consensus amongst counsel that two of the grounds of appeal related to procedural matters and the remaining four to Treaty of Waitangi 1840 jurisprudential matters in other words matters of law. However the ACC most helpfully made available to us its technical witnesses who presented the evidence which was presented before the Special Committee. These were Mr S J Priestly, Consulting Engineer and Dr M Larcombe, Marine Biologist. As this is an inquiry, into the whole of the recommendations made to you we determined that hearing this evidence is a proper procedure in terms of the legislation.

We record there was no rebuttal technical evidence from the appellant, his concerns about the extraction of the sand resource itself being more anecdotal than scientific.

The Proposal

Ms T A Kelly, a Land Resources Officer for the ARC gave evidence that the sand from Pakiri Beach will be dredged from the seabed and then transported by barge to Auckland to be used for beach replenishment works at Mission Bay. Mission Bay has been the subject of coastal erosion over the last 50-60 years with the result that currently there is almost no beach above the high water mark. This has also resulted in the sea wall

backing the beach becoming undermined and as a result the ARC proposes a number of protective structures to stop what has already happened, occurring again in the future. A second application for approval of the associated works at Mission Bay has been granted by the ARC with no appeals outstanding. We do not intend to consider matters relating to that consent in this inquiry.

The evidence demonstrated that not all sand is alike and we are satisfied for both engineering and aesthetic resource reasons, the deep sea sand off-shore Pakiri Beach is particularly suited for its use as a resource to replenish the sands of Mission Bay, Auckland.

In July 1989 the ACC publicly called tenders for the supply of sand for the beach replenishment scheme at Mission Bay. A schedule of sand sizes from this information together with data gathered as part of the overall study taken from the evidence of Mr Priestly is attached as Appendix "B" to this report.

Procedural Issues

One of the issues raised by the appellant was essentially procedural. For your information we set down the following facts as presented to us by the ARC.

The application by the ACC was received by the ARC on 31 October 1991. As required under section 93 of the Act, the application was publicly notified by the placing of an advertisement in the public notices section of the New Zealand Herald on 28 November 1991. Several persons listed were personally notified, Mr Haddon was not amongst them. The Ngati Wai Trust Board was amongst those bodies notified by the ARC of the application on 2 December 1991. The secretary of the Ngati Wai Trust Board subsequently advised the ARC that it had notified Mr Haddon of the application on 11 December 1991. The closing dates for submissions to the application was 22 January

1992. A submission was received from the appellant on 6 January 1992 which was 16 days before the closing date.

Mr Haddon is aggrieved that as tangata whenua he and members of his family were not personally notified given his known commitment to the area.

The matters relating to the application arose shortly after the RMA was introduced. The impression given by the ARC and ACC is that they "were feeling their way" about appropriate iwi and hapu to notify of applications like this. The ARC acknowledged through counsel it will take account of Mr Haddon's interest in any future applications. The ACC submitted that in the event Mr Haddon was able to appear and make representations which meant he suffered no prejudice.

Prehearing meeting and hearing

We were informed by that a prehearing meeting was held on 17 February 1992 and was attended by the applicant and the appellant as well as other submitters. The planning witness for the council indicated that the meeting lasted from 11.00 am to 1.15 pm. Her reading of the notes of the meeting indicated that it was held for the purposes of clarifying, mediating and facilitating resolution of the matters at issue as expressed in the submissions received in reply to the application. It was noted by the ARC that the appellant left the meeting approximately one hour prior to its conclusion.

The appellant also presented his submission at the Special Hearing Committee held on 11 March 1992. That decision records that the appellant's concerns about the impact of the sand extraction on Pakiri Beach were noted by the committee in reaching its decision. It records that the "extraction site has been relocated 1.5 kilometres northwest of the area investigated for the proposal, in recognition of the metaphysical concerns expressed by submitters for the Poutawa Stream outlet area on Pakiri Beach".

The Appellant's Case

The appellant seeks the cancellation of the ARC's decision on a number of grounds, some procedural, relating to the adequacy of the notice of application and the prehearing meeting convened by the council, and secondly, issues relating to the Treaty of Waitangi 1840.

Mr Haddon stated that he and his family are the tangata whenua of the Pakiri District and of the territory that extends off-shore to the Hauraki Gulf Islands known as Hauturu (Little Barrier) Mokohinau, and Aotea (Great Barrier). He belongs to the Ngati Manuhiri and Ngati Te Wharau hapu or sub-tribal hapu of the iwi known as Ngati Wai. Those who occupy the Pakiri area are descendants of the chieftainess Rahui Te Kiri. Mr Haddon who conducted proceedings on his own behalf and on behalf of his whanau made the following submissions:

- As the great grandson of the Rangatira Te Kiri, his whakapapa stretches back to the 14th century and he is entitled to speak on behalf of the hapu.

- The significance of his objection is to ensure that the Maori people get a fair say and have a fair hearing. His people have been the guardians of the (sand) resource for 600 years. It is they and not the Government who have the responsibility to ensure its sustainable management and wise use.

- The area from which the sand is taken is from his tribal rohe.

- At present taking of 170,000 m^3 of sand a year from Pakiri Beach is greed and not the wise use of the resource. There has been no assessment of sustainable use under the provisions of the Act. An additional 30,000 cubic metres will simply compound the problem.

- He brings visitors to the area and sees large sand barges dredging the resource at Mangawhai and used elsewhere. That is an offence both to the nature of the resource and his family's ownership of the resources in the area.

- There are waahi tapu of his family's ancestors from battles with the Ngati Whatua tribe buried in the sandhills fronting the beach. The hapu objects on cultural grounds to the sands containing fragments of those bones being dumped on the beach in another tribe's rohe (Ngati Whatua's at Mission Bay).

- His iwi gave Goat Island for University research into fisheries. Their mana moana stretches over Te Moana nui o Toi (the Sea of Toi) as far as Aotea (Great Barrier Island).

- The identity of his people relates to the waters off the coast, and its resources, and all their power comes from that identity. The sands both on the Pakiri coastline and on the seabed are a treasured taonga. They are identified by the term "Nga one haea o Pakiri" (the gleaming white sands of Pakiri).

- His people have the responsibility to be the guardians of the resources. Adverse impacts on Te Moana nui o Toi impact on their mana.

(A copy of a plan taken from the Notice of Appeal showing the appellant's tribal area is attached to a copy of this decision marked Appendix "C").

Part II Legal Provisions

In this inquiry we had regard to section 5 (1) of the Act which states that one of the purposes of the Act is to promote the

sustainable management of natural and physical resources. Section 5(2) defines "sustainable management "as meaning (inter alia)

> ".... managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and their communities ... to provide for their social, and cultural well-being .....while
>
> (a) Sustaining the potential of natural and physical resources .....to meet the reasonably foreseeable needs of future generations; and
>
> (b) Safeguarding the life supporting capacity of...., water,.....and ecosystems, and
>
> (c) Avoiding,.....or mitigating any adverse effects of activities on the environment."

Section 6(e) of the Act states that:

> " - In achieving the purpose of this Act all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources shall recognise and provide for ... the relationship of Maori and their culture and traditions ... with their ancestral ... waters ... and other taonga."

This section regards the Maori relationship to these issues as a matter of national importance which approving authorities must recognise and provide for.

Section 7 states that:

> "In achieving the purpose of this Act all persons exercising functions and powers under it in relation to managing the use, development and protection of natural and physical resources shall have particular regard to -
>
> (a) "Kaitiakitanga".

"Kaitiakitanga" is defined under section 2 as "the exercise of guardianship; and, in relation to a resource, includes the ethic of stewardship based on the nature of the resource itself."

Section 8 states that:

> "In achieving the purpose of this Act, (set out at section 5(1)(ii)) all persons exercising functions and powers under it, in relation to managing the use, development and protection of natural and physical resources, shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi)."

Section 2 defines "mana whenua" as "the customary authority exercised by an iwi or hapu in an identified area". "Tangata whenua" is defined as - "... in relation to a particular area means the iwi, or hapu, that holds mana whenua over that area:"

"Tikanga Maori" means Maori customary values and practices".

Part II Issues

The ACC impressed upon us that it recognises and accepts the importance of the provisions of the Treaty of Waitangi 1840 in respect of resource management and appreciates the importance of the concerns of the tangata whenua in relation to the issue. Counsel submitted on its behalf that in considering the application and inquiry, the Tribunal balance the interests of

the parties on a judicial basis. Counsel submitted that the Tribunal is obliged to recognise and provide for the relationship of Maori and their culture and traditions with their ancestral lands ... waters and other taonga. Counsel pointed out that the location of the sand is well away from areas of any frequent human activity and the volume to be taken is minute compared to the total size of the resource. With respect to Kaitiakitanga, counsel submitted that the ethic of stewardship will be observed, as the sand is to be used for a public purpose - and the environment from which it is being taken will not be significantly adversely affected by the taking. With respect to specific principles of the Treaty of Waitangi it was submitted none are of particular relevance to the issues before the Tribunal on this proposal. Counsel noted also that one way of empowering the hapu is for it to share in the royalties and that you have power to direct how such monies are disbursed.

In respect of Treaty of Waitangi issues the ARC adopted the ACC's submissions perceiving also the appellant's argument on the question of royalties to be an issue only with the Crown. It was also submitted that the ARC is well aware of its responsibilities under section 8 of the Act stating that the evidence will show it took those into account.

Your counsel in opening submissions submitted that the appeal did not raise any resource management issues - at least in the more restrictive meaning of that phrase. She explained that you were represented at the hearing before the Respondent and evidence was given on your behalf evidence being mainly directed at the appropriate conditions for the consent. She further explained that because neither the conditions imposed or any environmental matters are in contention, it was not proposed to call evidence on your behalf.

With respect, the Department's representative at the ARC hearing, either misapplied or did not fully comprehend the Treaty issues at large in this application and, with respect to

all the parties, we have difficulties with all submissions on the evidence put before us in relation to section 6, section 7 as well as section 8 of the Act.

Ownership of the Resource

Mr Haddon representing his family as tangata whenua, claims exclusive ownership and possession of the sands through their rights under the Treaty of Waitangi 1840. This claim relates to one of customary title to the seabed and its resources. The point for this inquiry is, however, that under the Territorial Sea and Exclusive Economic Zone Act 1977, Part I section 7, the territorial seabed and subsoil of which the Pakiri sands is part are deemed to have always been vested in the Crown. Section 7 states as follows:

> "Bed of territorial sea and internal waters vested in Crown - Subject to the grant of any estate or interest therein (whether by or pursuant to the provisions of any enactment or otherwise, and whether made before or after the commencement of this Act), the sea bed and subsoil of the submarine areas bounded on the landward side by the low water mark along the coast of New Zealand (including the coast of all islands) and on the seaward side by the outer limits of the territorial sea of New Zealand shall be deemed to be and always to have been vested in the Crown." (our emphasis)

Your counsel submitted that ownership per se, is not an issue under the RMA, the issue being the promotion and sustainable management of the natural and physical resources under section 5 of the Act. Counsel also submitted that section 88 of the Act does not require the applicant to own the land to which the application for a resource consent relates.

We adopt these submissions, for the whole thrust of the purposes and principles under Part II of the Act is towards managing the use, development and protection of resources in a

way which recognises and makes provision for some of the matters of national importance; allows for particular regard to be paid to other matters pursuant to section 7 such as Kaitiakitanga (the Maori concept of stewardship), and an application of the principles of the Treaty of Waitangi in managing the use development and protection of those natural and physical resources. Further, taking just one of the sections of the Act relevant to this inquiry (section 6(e) the relationship of Maori with their ancestral lands) does not in law require those lands to be an actual ownership. (See Royal Forest and Bird Protection Society v W A Habgood Ltd 12 NZTPA 76 and also EDS v Mangonui County (1989) 13 NZTPA 197).

This Tribunal is not the appropriate forum in which to determine whether the vesting of the seabed in the Crown was a breach of the Treaty of Waitangi or not.

Section 112 of the Act requires the ARC to collect royalties on coastal permits on behalf of the Crown. That is a statutory requirement and as counsel for the ARC submitted, not a condition over which the regional council has any discretion. In terms of ownership of the resource and compensation by the Crown through provision of royalties for any possible breach, by its purported expropriation of the hapu's coastal resources, we hold we do not have the jurisdiction to determine those issues either. We hold that the proper jurisdiction which are both matters of relevance are pursuant to claims under the Treaty of Waitangi Act 1975. Any determination as to questions of ownership and redress must, as a matter of law, go to the expert forum the Crown has set up to determine such matters and redress is an issue between the Crown acting in its Executive capacity and the Maori people.

We hold therefore that it is not appropriate for us to make recommendations as to whether the Crown's principle of redress for breach of the Treaty applies, given the purposes and principles of the RMA already listed.

That is not to say other principles of the Treaty do not apply because they do and to them we return below.

A Matter of National Importance

The appellant requires us to reject the application. We do not have the power of rejection under the legislation. We have, as in the mining legislation, power to recommend to you only.

We do, however, have concern about the effects of the proposal on the relationship the hapu has with its ancestral lands and waters.

By vesting the seabed and consequently the sands and collecting royalties for its own use, the mana whenua of the hapu is not recognised and provided for by the Crown as a matter of national importance in section 6(e). We do not think that on this occasion the ARC or ACC have your powers to remedy the situation as the Crown owns the resource. We recommend however (and as the ACC suggested) that the hapu be actively involved in the monitoring programme as one way of restoring customary authority. There are others. We recommend that in the future, the hapu be involved in the development, management and protection of the sand resource as Kaitiakitanga. This may even require formalising the position in much the same way as there are Guardians of Lakes Manapouri and Wanaka.

Your counsel helpfully referred us to the dicta of the Waitangi Tribunal in the Manukau claim (WAI 81,94). You will remember the Tribunal concluded that Ngai Te Ata's interest in the foreshore and harbour could not be denied, but did not consider that interest in the seas is "full, exclusive and undisturbed possession" the English text (a view the Waitangi Tribunal may no longer hold in view of the conclusions it has come to on other resources, for example, fisheries). The Waitangi

Tribunal did make conclusions which we consider apposite in this case when it stated:

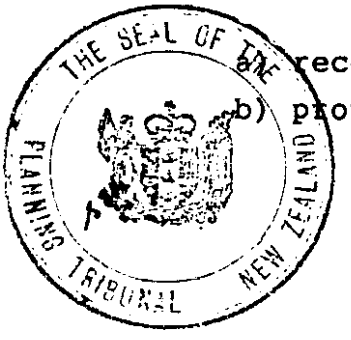
> "We conclude that the Treaty did promise the tribes an interest in the harbour. That interest is certainly something more than just of a minority section of the general public, more than just a particular interest in particular fishing grounds but less than that of exclusive ownership. It is in the nature of an interest and partnership the precise terms of which have yet to be worked out. In the meantime any legal owners should hold only as trustee for the partnership and acknowledge particular fiduciary responsibilities to the local tribes, and the general public, as distinct entities."

As Minister of Conservation you are seen as part of the Crown's identity as legal owner but as trustee meanwhile of the resources which pertain to the shores of Pakiri. You therefore have a statutory duty to give particular recognition to and make provision for the relationship of the local tangata whenua in terms of section 6(e) with their ancestral lands and waters.

It seems to us that role is one that is unique to you as representative of the Crown and as the repository of power in terms of being able to grant the permit applicable. It is a power not given to either the ACC or the ARC.

Pursuant to section 6(e), the Act requires that all persons exercising functions and powers under it shall recognise and provide for the relationship of Maori and their cultures and traditions with their ancestral lands, waters ... and other taonga. Thus there are two steps in the process of applying this purpose:

a) recognition of the relationship; and
b) provision for the relationship.



There is little doubt to us on the evidence available that Mr Haddon and his family are the tangata whenua of the area in which the sands are located - which in turn, is part of the tribal rohe of the tribe. What is clear, in customary terms, is that the tangata whenua have the mana of the area and its customary authority. The Ngati Wai Trust Board recognised this by sending on to Mr Haddon the notification of the application for his response.

We hold that it is appropriate, once the relationship is established, and we consider it to be established in this case, to give the recognition required. Consideration then must be given to how the relationship of the hapu of Pakiri (through the representatives Mr Haddon and his family) with their ancestral lands and waters may be provided for. The ARC has already done this to some extent by recommending the extraction site be moved away from the Poutawa Stream outlet which brings down sandy sediments from the sandhills in which tribal members were buried after the battles with Ngati Whatua. In our opinion that provision does not go for enough.

We hold that a consideration of the authority of iwi representatives where tribal issues are involved, is relevant to this application. Where possible it is appropriate to give that authority some empowering mechanism when it comes to development and protection issues. Authority is meaningless without some power (ihi) which can be provided for or recognised. In this application there are several ways in which this can be recognised.

The Matter of Kaitiakitanga

It seems clear to us that particular regard should be given to the aspects of Kaitiakitanga pursuant to section 7(a) of the Act which is defined as the exercise of guardianship and in relation to a resource includes the ethic of stewardship based on the nature of the resource itself. The geographical identity of the hapu is inextricably bound up with that of the

white gleaming sands. Mr Haddon is greatly concerned about the fact that commercial sand mining is already taking place at Pakiri Beach. He and his family view the sands as an attraction to tourists and he is concerned at the use of the resource off-shore as well as on-shore. It is his desire that the off-shore resource be left as it is. He stated the sands were a treasured taonga and that he preferred the commercial sands only to be taken as monitoring off-shore was a difficult process. He saw the current taking of so much sand a year as sheer greed and not a wise use of the resource.

Mr Haddon spoke of a Ngati Wai tradition which holds that the disturbing of the resources of the sea is a serious breach of tikanga, tapu, mana and mauri - that if the sands of Manawahuna are disturbed, a storm will rise and cause destruction (Manawahuna being known as "a sea area"). He was concerned also that the remains of his people buried in the sand hills were going to be placed on another tribe's beach - a tribe that had caused the deaths in tribal wars in the first place.

We hold that the hapu should be able to exercise Kaitiakitanga over the resource and give guidance on how it should be developed and to what extent.

We recommend that if section 6(e) and section 7(a) are to have any meaningful effect in Maori terms, then there should be a three step process with regard to your consent.

(a) Recognition in some form that these are the ancestral lands and waters of the hapu. That recognition will go some way to affirming the mana whenua of the hapu.

(b) Provision in some practical form, for the ancestral relationship with the coastal resources (for example as part of a team monitoring the resource).

(c) Provision in some form for Kaitiatikanga over the resource and its future.

There is one other tribal issue. Mr Haddon found the whole cultural ethic of putting the offshore sands of Pakiri in the proximity as they are to the waahi tapu created by the very tribe to whose shores they are going, very offensive. As you will be aware, Maori see the lands, seabeds, foreshores and waters as one continuum and the cultural result of this is that even though the waahi tapu are not immediately proximate to the offshore sands the cultural relationship as a whole is not compartmentalised.

If you make a decision to grant the permit, it seems to us in tribal terms, there needs to be advice from Ngati Whai on how the sands are to be extracted and handed over.

The Principles of the Treaty of Waitangi

Pursuant to section 8 of the Act the ACC as applicant preparing a function, the ARC as a recommending authority exercising a function, and yourself as the licensing authority exercising a power, have a mandatory duty to take into account the principles of the Treaty of Waitangi 1840. The Tribunal also has that duty in performing its powers and functions under the Act.

Your counsel recited to us three principles of the Treaty - namely that the Crown must act reasonably and in good faith to its Treaty partner, that the Crown make informed decisions, and that the Crown avoids impediments to providing redress (New Zealand Maori Council v Attorney General [1987] 1 NZAR 641, 696, 959), (the Land's case)). It was submitted there are, however, dangers in extrapolating judicial interpretations from the State Owned Enterprises Act 1986, firstly because section 9 was interpreted by the Court of Appeal as a point of reference for all the powers exercised under that Act. It was submitted that the RMA has a different purpose from the State Owned Enterprises Act; - the latter one being a scheme which enables assets the subject of Maori claims to be removed from

the Crown's estate where if they had stayed they could have provided the basis for redress for well founded claims: the former which is to restate and reform the law relating to the use of land, air and water. Counsel's next submission was that it is the principles not the Treaty itself which must be given effect to, in that the Treaty in literal terms, could not have been intended to encompass the vastly different society for whose needs the RMA has been devised (Lands per Cooke P at 663, Richardson J at 680 and also in New Zealand Maori Council v Attorney General [1992] 2 NZLR 576 at 578 per Cooke P). It was submitted that within the context of the RMA, different principals may be identified although those identified by the Court of Appeal may prove a useful guide in cases like this.

We accept those submissions in their entirety and for all the reasons given.

The section however requires decision makers under the Act "to take into account "the principles of the Treaty.

The Court of Appeal has determined that the duty "to take into account" differs from that "to have regard to" which is part of the phrase in section 7(a) (qualified in RMA by the word "particular"). In the words of Mr Justice Somers in R v CD [1976] 1 NZLR 436:

> "The first question ..., is what is meant by the words 'shall have regard to'. I do not think they are synonymous with 'shall take into account'. If the appropriate matters had to be taken into account, they must necessarily in my view affect the discretion [of the decision maker]."

There was no focus on this clause from counsel, so we required research counsel to establish what case law there was available on the point. The above mentioned was the only one found - there may be others available. Meanwhile it is clear to us that the parties had not taken into account the principles of

being adequately informed, or of consulting sufficiently as to the full implications for the hapu of what exactly was proposed, or of how to give effect to some of the hapu's customary practices, early enough in the decision-making process.

It would appear that the duty "to take into account" indicates that a decision maker must weigh the matter with other matters being considered and in making a decision, effect a balance between the matter at issue and be able to show he or she has done so. In this case the concerns which seem to have been taken into account are the general social concerns of the community. The cultural concerns of the Maori community and its relationship with traditional resources do not seem to have been weighed and shown to be weighed. (apart from in one small aspect)

The Court of Appeal has established that consultation is a principle of the Treaty. N.Z. Maori Council v Attorney General [1989] 2 NZLR (CA 42,52). That principle was not cited by any of the parties before us but as a party exercising a function and a power under the Act, we too are required to take into account the principles of the Treaty. We have thus taken judicial notice of the existence of this principle and hold that it was applicable in this case.

It is our view after hearing Mr Haddon, that had all the parties entered into a dialogue with him and the hapu even before the formal notification had taken place, such consultation might well have circumvented the inquiry process or at least some of the issues raised before us.

We gained the clear impression that he should have been part of the process which formulated the application instead of, as he put it, being brought in only at the 7th stage in a 9 stage process. Your counsel drew our attention to the Treaty principle of the Crown making informed decisions. To be informed all the parties under RMA, including the ACC and ARC, must be informed where the interests of a Treaty partner is

concerned and demonstrate in their various functions that they have taken those interests into account. To be properly informed therefore the parties must consult at the initial stages in the process.

Notification

Counsel for the ACC submitted that the Tribunal does not have the jurisdiction to review the decisions made by the ARC in terms of section 93(1)(e) and (f) of the Act. We considered that submission carefully and accept it in part only.

The section states:

> "93 Notification of applications - (1) Once a consent authority is satisfied that it has received adequate information, it shall ensure that notice of every application for a resource consent made to it in accordance with this Act is - ....
> (e) Served on such persons who are, in its opinion, likely to be directly affected by the application, including adjacent owners and occupiers of land, where appropriate: and
> (f) Served on local authorities, iwi authorities, and other persons or authorities as it considers appropriate: and
> (g) Publicly notified: ...."

There are several qualifying factors which point some validity in counsel's submission. Firstly there is the point that which the council of itself must be satisfied it has sufficient information on which to proceed with the notice provisions. The word "received" however, indicates that of itself it must be on inquiry in order to generate adequate information on which to proceed.

Secondly pursuant to section 93(1)(e), it serves the application on those who in its opinion are likely to be directly affected, including adjacent owners, but only "where appropriate", the ascertainment of "appropriateness" being, it seems purely the council's function. However, we consider that even the notice provisions are qualified by the matters provided for in s.6(e) which emphasises that the council, in exercising its function to serve notices, is under a duty to recognise the relationship the appellants have with their ancestral lands and waters and ensure they are served after proper inquiry. It is Te Wai, not some other hapu, which is directly affected by the application. The onus is therefore much more on the council in applications such as this, not only to notify the iwi, but the hapu also as the appropriate land owners adjacent to the resource.

In that Mr Haddon family's are adjacent owners and occupiers of the land and may be considered in the category of "other persons" the notification was defective. The section effectively requires notifying authorities to be on inquiry as to whom it is appropriate to notify. In the event the breach was to some extent remedied by the Ngati Whau Trust Board which meant the Haddon family were not eventually disadvantaged <u>at least</u> in terms of being able to make submissions on the application.

We hold however that even before hearings take place "particular regard" needed to be given by the applicant to Treaty principles which would have involved members of the hapu in Kaitiakitanga, in the assessment of the resource its development and in the monitoring.

We realise that all parties are trying to come to understand the new legislation and the Treaty jurisprudence as it pertains to resource management, but in our opinion the parties to this inquiry have not come close to understanding procedural issues or Treaty principles.

These begin with the applicant making the application for a resource consent pursuant to section 88. Section 88(b) refers to compliance by the applicant with the Fourth Schedule. That includes at Clause 1(h).

> "An identification of those persons interested in or affected by the proposal, the consultation undertaken and any response to the views of those consulted."

Those interested may not have been readily identifiable, but we understand Mr Haddon's interest was well known as should have been known to the ACC. We consider however that the ACC were somewhat justified in pressing on because it felt the resource was too far off-shore for the hapu to be interested. We have all learnt on this inquiry that this approach denies the holistic approach of Maori to resources. The approach also breaches section 6(e) of the Act which requires the ACC as developer -

(a) to recognise the ancestral relationship of thes hapu with their waters and resources; and

(b) to provide (in some way) for that relationship.

The Effects of the Proposal

There is no regional or proposed coastal plan for the area which may be taken into account pursuant to section 104(4)(c) so we turned to a consideration of section 104(1) of the Act, that is an assessment of the effects of the proposal. These are given an extended definition under section 3 of the Act.

In terms of a positive effect it is clear from the evidence that the replenishment of the beach at Mission Bay by the special Pakiri sands will be for the greater good of the community of Auckland. In this regard, therefore, the proposal fulfils the purpose in section 5 (2) of the Act enabling the community to provide for its social well-being. That purpose -

is qualified, however, by the requirement in section 5 (2) (a) (b) (c) to sustain the potential for the sand resource to meet the reasonable needs of future generations, to safeguard the ecco-system in the process and to avoid or mitigate any adverse effect that may occur in its development. It is to those issues we now turn.

We then assessed whether there might be any adverse effects on the kind and quantum of sand available and whether it would replenish. Mr Haddon pointed out that sand is continually being taken from Pakiri Beach and that as a resource it is to be protected and used wisely. He saw the current taking of thousands of cubic metres a year as just greed with no thought as to whether the end use to which it is being put, is the best way of utilising the resource. He was concerned too that the present proposal it was being taken too far off-shore for effective monitoring.

Mr Priestly gave evidence that the original proposal for beach replenishment at Mission Bay was based on mean sized sand size of 0.2 to 0.3 millimetres. Because the sand size was significantly smaller than the native sand, it was considered a shallow more dissipative beach would be formed and this necessitated a longer, more visual headland structure to support the beach fill. To reduce the impact of the resulting structures on Mission Bay Beach and following discussions with your Department, the decision was made to find a source of coarser sand.

Field investigations were undertaken around the inner Hauraki Gulf and deposits from Tauranga, Tiroa, Whangamata, Whitianga, Waikato Heads, Orere Point and Woodhill were assessed but found to be either unsuitable, uneconomic or pose significant environmental problems. Eventually, in December 1989 following discussions with a scientist who was at that time carrying out research work into the off-shore deposits at Pakiri, and the applicant's own seabed investigations it was established that the sediments there were of a suitable grading although the

depth of the deposit was not known. It was Mr Priestly's expert opinion however that enough field work had been undertaken to prove that there is a sand deposit, of greater than 0.5mm in grain size, to replenish Mission Bay with a volume of 30,000 cubic metres.

The applicant's consultants estimate the total sand resource from Bream Tail to Cape Rodney to be a volume of 120 million cubic metres at depth between 20 to 40 metres of up to 2 metres thickness. An extraction of 30,000 cubic metres therefore represents 0.025% of what is available. On the evidence before us, therefore, there seems to be sufficient resource to meet the quantum of sand necessary.

Dredging methods considered included grab dredge, submersible storing pump and trailer suction dredge with the final method of dredging being determined through the tender process. No extraction is proposed over the period November through to February.

On the question of the long-term effect of the extraction thought seems to be given to the matter of sustainability. We find that the monitoring programme needs to cover the seabed profile following extraction addressing issues like infill and rehabilitation to determine its sustainability, and the results published.

We then assessed carefully the question of adverse effects on the resources of the area as Dr Larcombe in his evidence-in-chief stated that the removal of sand would destroy the benthic fauna in the area, made up chiefly of small bivalve molluscs, and possibly some fisheries.

Of particular interest was the scallop Pecten novaezelandiae which is the target of some low level commercial fishing (and possible recreational fishing), the witness having indicated that snapper and gurnard which are also present would not be affected. Density of the scallops is estimated at about

one per square metre, the density dependent on the success of settlement which varies from year to year. Records indicate that extensive scallop beds exist at between 15 to 42 metres depth (which includes the depths from which it is proposed the sand will be taken). Dr Larcombe identified two factors which are important to take account of in determining the impact of dredging - the surface area dredged, which determines the proportion of biological resource destroyed, and the nature of the surficial sediment in the dredged area following dredging. He stated that if the sediment thrown up by the dredging is similar to that in the area at present, similar biota would recolonise the area. A change would result in different biotas becoming established.

It was also Dr Larcombe's opinion that coarse shell of more than 50 millimetres minimum dimension should be screened from the sand and returned to the seabed. He pointed out that larger shells are potentially important for a grazing habitat for small gastropods and attachment sites for a variety of small filing organisms and could be important in providing stable habitat suitable as attachment sites for juvenile scallops. If this was done it was his view, which went unchallenged, that the excavation to a depth of 2 metres (or even greater) would be acceptable and that as a result the surficial sediment characteristics of the area will quickly revert to the condition they were before dredging. The area would then be recolonised by the dominant ethnic organisms present partly by migration and partly through the recruitment of juveniles - he estimated three years after dredging had been completed.

The filling of the dredged hole with sand deposits (from the beach system) and intercepting sand from the onshore-offshore sediment transport system <u>can</u> both lead to coastal erosion but will not occur in this case.

In terms of coastal erosion Mr Priestly stated that the sediment body from which the sand is being extracted is not likely to be part of the beach system because it is up to 4 kilometres offshore in depths of greater than 20 metres. Studies show the exchange of sediment occurs up to depths of 20 metres. The holes created by the dredging will fill by slow sediment transport in the area and through the side slopes being affected by the frequency of swell conditions. They may take possibly years (Dr Larcombe thought one year) and certainly months to fill. Mr Priestly noted that surveys along the Pakiri-Mangawhai coastline have shown the beach system to be incorporating new material i.e. systematically aggrading.

It was Mr Priestly's evidence that overseas studies and local knowledge indicated that the sediment transport system at Pakiri Bay indicates that the effects of the dredging will be minimal since the extraction is outside the foreshore/near shore area, that is to depths greater than 20 metres. According to Mr Priestly also there are two separate bodies of sand in the foreshore/near shore area and the removal of sand from the offshore area is unlikely to impact on the sands of the near shore. The mean grain size of the sand increases with distance off shore and according to Mr Priestly this gives a good indication that the net rate of sediment transport in an off-shore/on-shore direction is very low. Hence the sediment body from which the sand is being extracted is not likely to be part of the beach system because it is 4 kilometres out. Therefore no coastal erosion is envisaged with the proposed dredging operation.

Given that it is anticipated that three years after dredging the diversity and abundance of ethnic organisms will be the same as in the surrounding area: and given that the holes, trenches and depressions caused by the extraction will be effectively smoothed away by the swell action within a reasonably short period, we concluded that whilst in the short term there will be adverse affects on the biota and seabed there will not be a long term or cumulative impact.

Dr Larcombe also examined the effects on the adjacent habitats which could occur as a result of deposition of fine material discharge in the dredge tail waters. The witness concluded that because the depth of water in the proposed dredging area is more than 30 metres, any fine sands released, would be widely dispersed before they reached the bottom. (Mr Priestly estimated that conservatively over an area of 0.5 square kilometres a worse case deposition for the entire operation would be less than 1.5 millimetres.

If a hydraulic dredge is used there is possibility that a high proportion of fine material would be discharged and he indicated that bucket or grab-dredge would be less detrimental. Dr Larcombe indicated that if there was an abrupt change in the nature of the sands within the depth range of dredge extraction it would be obvious in the fine material brought to the surface. This could be assessed by instituting a monitoring programme and a change in the management of the dredging if required. The witness also advocated careful delineation of the dredge site would prevent its operation in bottom areas with finer muddy sand sediments. This however, occurs at a depth of over 40 metres and should be easily avoided on the basis of proposed depth of dredging alone.

He also recommended monitoring of sediment that is returned to the sea be carried out including sampling of the discharge from the dredging to the sea together with sufficient sampling of sea water in the vicinity of the dredge to enable the dispersal of discharged sediment to be determined. Mr Priestly, meanwhile, recommended that records of the volume, location and mean grain size of the sand extracted be recorded in that suspended solids of overflows from the dredger be measured and that bathymetric changes before and after the extraction operation be surveyed.

We see from the conditions attached to Recommendation of the ARC's committee that all Dr Larcombe's technical concerns have been adequately addressed as are Mr Priestly's.

We note however that if adverse sediment levels are found nothing is required to be done - simply "monitored". We recommend that any decision to continue mining with adverse sediment levels present should be determined not by the ARC alone but also by yourself through a representative. Apart from that one issue, we are satisfied on the evidence available to us, that the technical evidence is thorough and the conditions attached to the recommendation reflect that thoroughness.

Delay Until After The Waitangi Tribunal Hearing

Mr Haddon urged us to consider that any grant of the permit by you should be delayed until after the Waitangi Tribunal hearing.

Your counsel made extensive submissions on this point. In support she cited the Attorney General v New Zealand Maori Council [1991] 2 NZLR 129,135,139 (No 1) the Radio Spectrum case) where Cooke P held that the Crown could not act in conformity with the principles of the Treaty without taking into account any relevant recommendations by the Waitangi Tribunal. The majority of the Court concluded that the decision maker should defer making the decision about the disposal of radio frequencies until an imminent report on that specific issue was to hand (the report was expected in 6 weeks). Cooke P further held that "excessive delay" on the Tribunal's part might make it necessary for the decision maker not to wait.

In this present case the claim was only lodged with the Waitangi Tribunal in March 1992 and no hearing date has been allocated and the matter is apparently not on the Tribunal's current schedule of hearings. There was no evidence at the date of our conducting this inquiry of any substantive nature

yet filed. Research would have to be done before the Tribunal could consider the matter. Accordingly, as your counsel stated, it is unlikely that there will be a report from the Tribunal within a "reasonable" period of time.

If this was a non-renewable resource, and being aware of the concept of Kaitiakitanga, we would strongly recommend to you the appropriateness of such an action as delay, but it is not. Further, if the payment of royalties is perceived by you to be a consideration after receiving this report, then the Crown has the power to grant them to the hapu at any time, that power not being dependent on the deliberations of the Waitangi Tribunal. (We merely note in this regard that the Crown might grant an estate or interest in the subsoil of submarine areas should it wish to do so as is identified in section 7 of the Territorial Sea and Economic Zone Act).

Mr Haddon himself commented that he realised pursuant to section 5 of the RMA that the Act does not automatically protect Treaty rights, rather that their relationship must be balanced against other competing interests as already recorded. There is much the Crown can do to accord status to its Treaty partner in this application, which would balance out the interests of the people of Auckland.

Summary of Findings

1. The Pakiri offshore sands are part of the tribal rohe of the tangata whenua of Pakiri-Te-Kiri and the iwi of Ngati Wai.

2. The Pakiri offshore sands are a comparatively rare resource for the purpose for which they are required.

3. The extraction of the resource and its placement at Mission Bay will be of district and regional benefit.

4. The technical evidence indicates the extraction of the sand resource located offshore will have short-term adverse effects but no long term or potential effects on the biota and fisheries of the area.

5. The technical evidence indicates there will be no long term impact on the availability of the resource itself but there should be long term monitoring on the effects on the seabed and that the hapu be involved in this process.

6. There will be no adverse effect on the Pakiri Beach system itself, such as draw down.

7. The adverse effects claimed by the appellants are overstated.

8. The way in which the resource is to be utilised accords with the principles of sustainable management pursuant to section 5 of the Act.

9. The ACC did not recognise the ancestral relationship of the hapu with their waters and resources or provide for that relationship (in some way) with the utilisation of the resource.

10. There were procedural defects in the ACC's notification process.

11. The relationship of the Maori and their culture and traditions to the waters and sands off Pakiri was paid particular regard by the ARC as a matter of national importance in one aspect only - by moving the development area away from the outlet of the Te Poutawa Stream which washes down from the sand hills where Waahi tapu are buried. We consider recognition of the

ancestral relationship did not go far enough nor was provision made for that relationship in the ARC's recommendations to you.

12. There has been no particular regard paid to the mana whenua of the hapu of the area. This particular inquiry process has not shown up any other hapu or iwi interested.

13. The Treaty principle of recognition of the customary authority of the hapu in the area needs to be formalised in some way. Kaitiakitanga may be one such method.

14. The Treaty principle of consultation in respect of the development and protection of the resource appears not to have been complied with early enough in the application process, given the appellant's known interest in the area.

15. There is cultural sensitivity about transferring the sands of this tribal rohe onto the beaches of another - in this case because of the association of the Waahi tapu with the sand, despite being located well away from the extraction area. We recommend there needs to be consultation with Mr Haddon on this issue before the development occurs.

16. We do not recommend that the extraction be halted until after the Waitangi Tribunal holds an inquiry into the hapu's claim. If the resource was non-renewable we may hold otherwise.

17. The RMA is not concerned with, at least in this specific inquiry, with questions of the principle Crown re-dress for possible breaches of the Treaty of Waitangi 1840. The appropriate forums for this lie elsewhere.

18. The RMA is not concerned with questions of ownership of the resource.

Recommendation

In the shorter term particular regard should be given to the iwi as a recipient of the ethic of stewardship provided for as Kaitiakitanga in s.7(a) of the Act. In the immediate term we recommend that the iwi be involved in the monitoring process itself. In the long term there may be objectives and policies appropriate to the provision and recognition of the customary relationship with the coastal resources in coastal plans.

For the foregoing reasons and in view of our findings and subject to these recommendations we agree that the application for the permit be granted subject to the conditions suggested by the ARC in its recommendations and reports, with the addition of a provision for subsequent long-term monitoring of the extraction area.

DATED at AUCKLAND this 11th day of AUGUST 1993

S.E. Kenderdine

S E Kenderdine
Planning Judge

THE SEAL OF THE 0693P
PLANNING TRIBUNAL NEW ZEALAND

APPENDIX A

SUBJECT: DECISION IN RESPECT OF MISSION BAY BEACH REPLENISHMENT COASTAL PERMIT APPLICATION AND RECOMMENDATION ON EXTRACTION OF SAND FROM OFFSHORE PAKIRI BEACH COASTAL PERMIT APPLICATION

FROM: Special Hearing Committee of the Environmental Management Committee
11th and 18th March 1992
Consisting of:

Mr D R Cholmondeley-Smith, JP (Chair)
Mrs J Sampson
Mrs M Brooker
Dr K E Parnell (Minister of Conservation appointee)

FILE: 14/10/A32X27UM

TO: APPLICANT/SUBMITTERS

DATE: 23.3.92

CONTENTS OF THIS REPORT

1. INTRODUCTION

The Auckland City Council (the applicant) propose to replenish Mission Bay Beach with sand extracted from offshore Pakiri Beach.

The Group Managers Report to the Special Hearing Committee divided the discussion on the application into two parts. Part A addressed those issues pertaining to the Mission Bay site, and Part B addresses those issues pertaining to Pakiri Beach. Recommendations on the proposal were made following Parts A & B. The same format is followed in this report.

Dr Kevin Parnell, the Minister of Conservation representative, participated as a committee member solely for Part B, sand extraction offshore Pakiri Beach.

2. APPLICATION

Consent is sought in terms of Section 12 of the Resource Management Act (RMA) 1991 for the:

(i) extraction of sand from the Pakiri off-shore area (Restricted Coastal Activity);
(ii) discharge of sand and water extracted from Pakiri onto the Mission Bay Beach;
(iii) placement of rock rip rap along the existing seawall at the eastern end of the beach and to move the existing rock groyne eastward;
(iv) extension of the Selwyn Creek channel by constructing a stormwater separation wall at the western end of the beach;
(v) recirculation of sand from the beach east of the Tamaki Yacht Club (TYC) to be placed onto Mission Bay Beach;
(vi) periodic clearance of sand from the Selwyn Creek channel;
(vii) occupation of site - (parts (iii) & (iv)).

The Minister of Conservation is the consent authority for part (i) of the proposal. The Auckland Regional Council is the consent authority for all other parts of the application.

3. PART A - DECISION IN RESPECT OF MISSION BAY BEACH REPLENISHMENT AND ASSOCIATED WORKS (APPLICATION NUMBER 7976)

3.1 REPRESENTATION AT HEARING 11 March 1992

Submissions and evidence were heard by the Special Hearing Committee from the following parties:

Auckland Regional Council Environment & Planning Division

Andrew Benson	(Foreshores Officer)

Auckland City Council

David Kirkpatrick	(Counsel for Auckland City Council)
Steven Priestley	(Consulting Engineering, Beca Carter Hollings & Ferner Ltd)
Tom Barton	(Chairperson of the Eastern Bays Community Board)
Neil Rasmussen	(Senior Planner, Auckland City Council)

Submitters

John Reelick	(Mission Bay-Kohimarama Residents Association)
Felicity Fahy	(Minister of Conservation's representative)
John Abbott	(Abbott & Associates, Civil Engineers; and a resident of Mission Bay)

3.2 REPORTS, APPLICANTS SUPPORTING INFORMATION AND EVIDENCE RECEIVED BY THE SPECIAL HEARING COMMITTEE

The report by the Group Manager, Environmental Management Department, Auckland Regional Council was circulated to all parties prior to the hearing.

This presented information on:

- the Mission Bay site;
- background to the proposal;
- options considered by the applicant;
- the proposal;
- statutory matters;
- submissions received on the application, and comments on those submissions;
- pre-hearing meeting held which amended the proposal;
- recommendation and possible conditions of consent.

Copies of detailed supporting information received by the Council and which was available to all parties:

Abbott & Associates	1987 Erosion study of Eastern Suburbs Beaches 80pp
Abbott & Associates	1988 Discussion of Options for the Restoration of Mission Bay Beach 18pp
Beca Carter Hollings & Ferner	1988 Mission Bay Beach Replenishment & Stormwater Disposal - Consent Design 16pp
Beca Carter Hollings & Ferner	1989 Mission Bay Beach. Replenishment - Environmental Impact Statement 84pp
Beca Carter Hollings & Ferner	1991 Mission Bay Beach. Replenishment - Environmental Impact Statement Addendum Report 36pp
Hamill R A	1988 Beach Erosion at Mission Bay ME Thesis - University of Auckland 133pp
Hamill R A	1988 Mission Bay Beach Erosion Study Volume 1: Report. University of Auckland, School of Engineering 55pp
Hamill R A	1988 Mission Bay Beach Erosion Study Volume 2: Appendices. University of Auckland, School of Engineering 100pp
Ports of Auckland	1988 Mission Bay Beach Erosion Study
Ports of Auckland	1989 Report to Auckland Harbour Board 5pp
Tonkin & Taylor Ltd	1988 Mission Bay Beach Erosion Protection 15pp

Written Evidence from D A Kirkpatrick, S J Priestley, T Barton, N F Rasmussen, J C M Reelick, F M Fahy and J E Abbott was submitted during the hearing.

With the permission of the Chairman, Mr Henry representing the Ngati Whatua Trust Board spoke during the hearing. The Ngati Whatua Trust Board supports Mr Laly Haddons submission on the extraction of sand from Pakiri (see Part B of this report).

3.3 EVIDENCE FROM AUCKLAND REGIONAL COUNCIL STAFF

Andrew Benson summarised the Group Manager's Report and answered questions from the Committee.

3.4 EVIDENCE FROM APPLICANT

Without traversing all of the evidence presented those aspects most relevant to the Special Hearing Committee's determination on the resource consent and their respective terms and conditions are summarised below:

D A Kirkpatrick

Counsel introduced submitters for the applicant. An amendment to the date of expiration of consent for the discharge of sand onto Mission Bay Beach was sought.

S J Priestley

Information was presented outlining: the development of Mission Bay; the causes of erosion; the options considered for the beach replenishment; the proposal; and the potential impacts of the proposal. The flexibility of the proposal the structures could be removed from Mission Bay if the scheme proved unsuccessful and the increased understanding of the coastal system from undertaking the monitoring programme were two other issues discussed.

T Barton

The support of the Eastern Bays Community Board.

N F Rasmussen

The witness made the point that the Waitemata Harbour Maritime Planning Scheme, which forms part of the Transitional Regional Coastal Plan provides for the replenishment of popular beaches.

3.5 EVIDENCE FROM SUBMITTERS

J C M Reelick

The submitter called for further research into the erosion problem at Mission Bay and suggested temporary structures could be used to stabilise the beach in the meantime.

Considerable research has already been undertaken on the causes of erosion at Mission Bay Beach. The proposal addresses all of the identified factors leading to beach deterioration. Furthermore the proposed monitoring programme will determine the need for further works.

F M Fahy

The submitter gave evidence that the proposal was supported provided certain conditions, as she outlined, were included in any consent granted.

The conditions which were requested and that are not explicitly included in the special conditions of the officer's report are:

i. That replenishment will take place over as short as time period as possible in order to maximise retention of sand on the beach.

It has been recommended that the date of expiration for consent to discharge sand onto Mission Bay Beach be two years. This is because certain months of the year are unfavourable for sand extraction, when extraction is allowed . (Refer special conditions 8, Part B Sand Extraction, Offshore Pakiri Beach). Bad weather conditions unfavourable for sand extraction may be encountered.

ii. That as far as practicable works on the replenishment will take place from the sea rather than the land in order to minimise disturbance to the coastal environment.

"As practicable" and "to minimise" cannot be measured and therefore are not enforceable. In the short-term the coastal environment of Mission Bay will be disturbed, this is an accepted consequence of implementing the proposal.

iii. Only sand that has accumulated on the beach east of the Tamaki Yacht Club since the replenishment of Mission Bay Beach be returned to Mission Bay Beach.

Sand is to be recirculated from the beach east of the Tamaki Yacht Club onto Mission Bay Beach. The monitoring programme will determine when this is necessary. It can

be assumed sand accumulating on the beach east of the Tamaki Yacht Club was transported there from Mission Bay Beach.

iv. Minimal disturbance shall be caused to the coastal marine area when works are taking place.

"Minimal disturbance" is not definable and therefore cannot be enforced.

v. The study of Mission Bay catchment and stormwater disposal be completed before further works are initiated.

This condition is not enforceable in this situation as the applicant does not have to complete the study to obtain consent for this proposal. Should an application for further works be made that involves stormwater disposal then the study may need to be completed to satisfy Council's information requirements.

Whilst the above suggested conditions are rejected for inclusion as conditions of consent it is considered appropriate to suggest that the applicant follows their intention in implementing the proposal.

J E Abbott

A brief history of Mission Bay Beach and the development of a beach east of the Tamaki Yacht Club was outlined. Concern about the performance of the proposal, and the Applicant's intention to seek approval for the originally proposed Stage II - headland - was stated.

It is noted the applicant withdrew from consideration Stage II of the proposal as the result of discussion at a pre-hearing meeting which Dr Abbot attended. Furthermore the applicant has indicated, at the pre-hearing meeting and at the hearing on 11 March 1991 their intention to consider a range of options should further works be deemed necessary.

3.6 SPECIAL HEARING COMMITTEE'S DETERMINATION

After hearing the evidence presented at the Hearing on 11 March 1992, considering the Group Manager's Report - which included a copy of all the submissions received pertaining to this application,and considering all of the applicants supporting information, the Committee members concluded that consent should be granted to parts (ii), (iii), (iv), (v), (vi) and (vii) of the proposal, as detailed in this report, subject to the Council's standard conditions and eleven special conditions detailed in this report.

The following points were material in reaching this conclusion and in establishing the terms and conditions:

i. The Committee considers the proposal complies with the purpose and principles of the Resource Management Act 1991.

ii. The proposal is considered to comply with the provisions of the Regional Planning Scheme.

iii. There is adequate compliance with the policies, objectives and criteria of the Transitional Regional Coastal Plan.

iv. It is considered that the proposal will not significantly impact on the existing uses and amenities of Mission Bay Beach and that any adverse effect on the environment will be minor in comparison to the benefit of providing a larger recreational beach.

The proposal adequately addresses all the known matters contributing to the deterioration of Mission Bay Beach and should prevent further deterioration whilst providing a larger recreational beach.

vi. The Committee notes the structures associated with the beach replenishment proposal could be removed from Mission Bay if the proposal proved to be unsuccessful or if they proved to be superfluous should further works be warranted.

vii. The Committee accepts monitoring the performance of the proposal will allow additional information to be collected that will enable a more informed decision to be made on any further works proposed.

4. PART B - RECOMMENDATION IN RESPECT OF SAND EXTRACTION OFFSHORE PAKIRI BEACH (APPLICATION NUMBER 7975)

4.1 REPRESENTATION AT HEARING 11 MARCH 1992

Submissions and evidence were heard by the Special Hearing Committee from the following parties:

Auckland Regional Council, Environment and Planning Division

Lynn Holland (Resource Scientist)

Auckland City Council

David Kirkpatrick (Counsel for Auckland City Council)
Stephen Priestley (Consulting Engineer, Beca Carter Hollings and Ferner Ltd)
Mike Larcombe (Marine Biologist, Bioresearches)
Neil Rasmussen (Senior Planner, Auckland City Council)

Submitters

R Henry (Ngati Whatua Trust Board)
Felicity Fahy (Department of Conservation)
Laly Haddon (Tangata Whenua)
Paul Miller

Written Submissions Received from submitters not attending hearing.

Rodney District Council
Eddie Watts (Leigh and Whangarei Fisherman's Association)

4.2 REPORTS, APPLICANTS SUPPORTING INFORMATION AND EVIDENCE RECEIVED BY THE SPECIAL HEARING COMMITTEE

The report by the Group Manager, Environmental Management Department, Auckland Regional Council was circulated to all parties prior to the hearing.

This report presented information on:

- the location
- the proposal
- statutory matters
- description of proposal
- alternative sources/methods
- actual/potential effect on the environment
- mitigation measures to reduce actual/potential effects
- consultation with affected parties
- proposed monitoring programme
- submissions

evaluation of proposal, environmental, tangata whenua, community and local territorial authority involvement and historical/archaeological issues

- recommendation and proposed conditions for consent

Copies of detailed supporting information received by the Council and available to all parties included the following.

Beca Carter Hollings & Ferner (1989)	"Mission Bay Beach Replenishment Environmental Impact Statement". 84 pp.
Beca Carter Hollings & Ferner (1990)	"Seabed Investigation Off Pakiri Beach for Auckland City Council". 15 pp.
Beca Carter Hollings & Ferner (1991)	"Mission Bay Beach Replenishment Environmental Impact Statement, Addendum Report". 36 pp.
Bioresearches (1981)	"Natural Environment Implications of Proposed Sand Extraction Offshore from Pakiri Beach". 16 pp.
Hilton, M J (1989)	"Management of the New Zealand Coastal Sand Mining Industry: Some Implications of a Geomorphic study of the Pakiri Coastal Sand Body". New Zealand Geographer, 45, 1, 1989, 14-25 pp.
Hilton, M J (1990)	"Processes of Sedimentation on the Shoreface and Continental Shelf and the Development of Facies, Pakiri, New Zealand" Unpublished Ph.D thesis, Department of Geography, University of Auckland. 352 pp.
Applied Geology Associates (1982)	"Coastal Sand and Shingle Resources of Auckland and Northland". Report to Auckland Regional Authority. 115 pp.
Kirk, R M (1988)	"Commercial Sand Extraction from Beach and Nearshore Systems in the Auckland Region". Report to Sand Producers Association, Auckland. 29 pp.
Pearce, P (1975)	"Site recordings in the Te Arai Point to Poutawa Stream sand dunes, North Auckland". NZHPT Archaeological Site Surveys. 16 pp.
ARWB (1991)	"Coastal Monitoring Programme Progress Report". 7 pp.
Grace, R (1991)	"Pakiri - Te Arai Sand Extraction Biological Investigations". Report jointly for McCallum Brothers Ltd and Sea-Tow Ltd. 33 pp.
DOC (1991)	"Draft Auckland Sand Management Plan". 120 pp.

Written evidence from D A Kirkpatrick, S J Priestley, M F Larcombe, N Rasmurssen, F Fahy, L Haddon, was submitted during the hearing, and from the Rodney District Council and E Watts, not represented at the hearing.

Verbal evidence was presented by R Henry and P Miller.

4.3 EVIDENCE FROM AUCKLAND REGIONAL COUNCIL STAFF

Lynn Holland summarised the Group Manager's report and answered questions from the Committee.

4.4 EVIDENCE FROM APPLICANT

D A Kirkpatrick

Deletion of the limits on sand extraction depth was requested.

Counsel then introduced submitters for the applicant.

S J Priestley

Additional information was presented on alternate methods of dredging sand and concerns raised that limiting dredging depth to the proposed 1.0 m depth would restrict the method of dredging. No physical effects, were considered likely, by increasing depth to 3.0 m, although the depth of the dredged hole will be limited by the type of sediment and by the increase in consolidation of material with depth.

The proposed monitoring requirement to survey the bathymetry of a trial area before, immediately after and at least 2 months after the dredging, to provide information on the infill rate was not considered useful in assessing the effects of the dredging operation, and was noted as expensive.

M Larcombe

Excavation to a depth of 2.0 m or greater was supported as it would limit the surface area affected by the proposed extraction which is more desirable than limiting the depth.

It was considered that holes, trenches, or depressions caused by the proposed extraction would be effectively smoothed within one year of the completion of dredging.

No risk of loss or damage to fishing equipment that might be dragged into or across a hole caused by sand excavation was concluded as likely. Although it was considered prudent to notify commercial fisherman of the location of the proposed sand extraction area, the activities taking place, and the likely effect on bottom contours.

N Rasmussen

In view of the significant distance between offshore Pakiri and Mission Bay and the differing nature of the activities proposed on these sites, it was suggested that separate coastal permits be issued for each site.

4.5 EVIDENCE FROM SUBMITTERS

R Henry

With the permission of the Chairman Mr R Henry, representing the Ngati Whatua Trust Board who have not lodged a submission, spoke during the hearing. The Ngati Whatua Trust Board supports Mr L Haddon's submission.

F Fahy

The Department of Conservation supported the sand extraction proposal, as the effect on Pakiri beach is considered negligible. Conditions were requested, including a limit on extraction depth of 1 m, and the monitoring conditions outlined in the Group Managers report.

L Haddon

Several claims were made concerning ownership of sand resource, legality of consent process, breach of Treaty of Waitangi, inadequate notification of Tangata Whenua, validity of pre-hearing meeting, and consideration of the cultural significance of the Burial Reserve and Urupa Reserve located on the beach immediately adjacent to the proposed sand removal site.

The relief sought included the consent of Tangata Whenua being required, and recommencing the notification process of the application.

P Miller

A verbal address was made to the Committee, raising the issues of fishing, toxicity of the sands, and the cost of the project.

Rodney District Council

With the permission of the Chairman a written submission was placed before the Committee and read out by the Committee Secretary for Rodney District Council who lodged a late submission.

The District Council's initial concerns for possible beach erosion have been satisfied, but Council wish to maintain its role as a submitter for several reasons. Firstly, further applications are expected and Council does not wish to appear inconsistent in their treatment of applications. Monitoring of the extraction site should be extended to cover ecological changes, and to cover a longer (unspecified) time period. The District Council regards the Pakiri beach monitoring programme by the Auckland Regional Council as critical and should be continued.

E Watts

A written submission was placed before the Committee, during Part A, from Mr E Watts representing the Leigh and Whangarei Fishermans Association, who had not lodged a submission, requesting that the meeting be adjourned to consider the interests of the Association.

4.6 APPLICANTS RIGHT OF REPLY

D A Kirkpatrick

Several points were clarified. Firstly, the location of the sand extraction area can be moved, within limits. Secondly, the applicant has agreed to notify the scallop fishermen of any proposed dredging, the area affected, timing and likely depth. This will enable the scallop fisherman to fish before any dredging takes place. In relation to dredging methods it was submitted that any consent conditions should not restrict the determination of the method of dredging by the tender process.

In relation to the concerns for contamination, reference was made to statements in evidence stating that no contaminants are expected to be associated with sand extracted at the proposed location.

In relation to the concerns of the tangata whenua, the following were noted.

I. The Ngati Wai Trust Board was directly notified and their notification directly relayed to Mr Haddon who lodged a written submission, dated 23.12.91.

II. The initial submission of Mr Haddon raised primarily environmental concerns and does not mention any claim under the Treat of Waitangi Act 1976.

iii. The Waitangi Tribunal claim by Mr Haddon and others dated 9.3.92, seeks compensation for royalties in relation to sand extraction which are not within the control of the Auckland Regional Council, and are not of relevance to this hearing.

iv. The Tangata Whenua also seek to stop any consent to extract sand from within their tribal area, except with their consent.

v. The sand which is sought to be taken is the property of the Crown (Section 7, Territorial Sea and Exclusive Economic Zone Act 1977).

4.7 SPECIAL HEARING COMMITTEE'S RECOMMENDATION

After hearing the evidence presented at the Hearing on 11 March 1992, considering the Group Manager's Report - which included a copy of all the submissions received pertaining to this application, and considering all of the applicants supporting information, the Committee members concluded that it should be recommended to the Minister of Conservation that consent is granted to the proposal, as detailed in this report, subject to the Council's standard conditions and seventeen special conditions detailed in this report.

The following points were material in reaching this conclusion and in establishing the terms and conditions:

i. The Committee considers the proposal complies with the purpose and principles of the Resource Management Act 1991.

ii. The proposal is considered to comply with the provisions of the Regional Planning Scheme.

iii. There is adequate compliance with the policies, objectives and criteria of the Transitional Regional Coastal Plan.

iv. The proposal is considered to comply with the policies, objectives and criteria of the Auckland Sand Management Plan.

v. It is considered that the proposal will not significantly impact on the Pakiri coastal environment, including the nearshore sediment budget, coastal stability, and ecological values.

vi. No significant visual or audible impact onshore is likely due to the 3 to 4 km distance offshore and operation during winter months.

vii. The proposal will destroy ecological habitats at the extraction site. However the extraction site is not located in an area of sensitive or rare and endangered ecological habitats. Nor is the activity considered to cause irreparable damage. Existing habitats are expected to recolonise over time.

viii. Turbidity levels are to be monitored during operations as they may influence surrounding habitats and fish life.

ix. Sand extraction operations may entrain or destroy marine life. A 50 mm screen is to be used during operations to return coarse shell and other marine organisms to the seabed. It is further recommended that a layer of original sand type remain so that bottom species can recolonise.

x. Due to the uncontaminated nature of the sand resource no chemical impacts or toxicity of sand is expected from this proposal.

xi. Extraction of sand will form "holes" in the seabed which are likely to take some time to naturally infill due to low rates of sediment transport. This is not expected to significantly influence sediment transport patterns or alter existing habitat conditions, but will be monitored during sand extraction operations.

The depth of holes will be limited to 2.0 m to prevent significant changes to bathymetry, while allowing for a reduction in surface area affected in comparison to a limit of 1.0 m depth.

xii. No historical or archaeological sites are known to exist in the area of the proposed offshore extraction. However it is recommended that if uncovered, e.g. shipwrecks, they are to be reported to the New Zealand Historic Places Trust and left undisturbed.

xiii. The extraction site area will be marked with buoys, prior to commencement of extraction, for the duration of operations and for such further period as required under the monitoring programme, to enable all recreation and commercial fishery users to easily identify affected area.

It is further recommended that the Federation of Commercial Fishermen are given sufficient notification of extraction operations to enable their members to fish the area prior to extraction.

xiv. The extraction site has been relocated 1.5 km northwest of the area investigated for the proposal, in recognition of the metaphysical concerns expressed by submitters for the Poutawa Stream outlet beach area.

xv. The tangata whenua claim for compensation for royalties in relation to sand extraction is not within the control of the Auckland Regional Council.

xvi. The committee are satisfied that the legality of the consent proceedings is not in question and that all requirements under the Resource Management Act 1991 have been met.

PART A - DECISION IN RESPECT OF MISSION BAY BEACH REPLENISHMENT AND ASSOCIATED WORKS (APPLICATION NUMBER 7976)

Consent is granted to carry out the activities and works detailed below:

CONSENT HOLDER:	AUCKLAND CITY COUNCIL
DATE OF EXPIRATION OF CONSENT:	(i) For the discharge authorised by (i) below, 2 years from the date of commencement of the extraction operation; (ii) For the works and activities authorised by (ii) to (vi) below, 30 June 2025.
LOCATION OF SITE:	Mission Bay Beach, Auckland
MAP REFERENCE:	NZMS 260 R11 - 737823

PURPOSE OF CONSENT:

(i) To discharge sand and water extracted from Pakiri onto the Mission Bay Beach;
(ii) To place rock rip rap along the existing seawall at the eastern end of the beach and to move the existing rock groyne eastward;
(iii) To extend the Selwyn Creek channel by constructing a stormwater separation wall at the western end of the beach;
(iv) To recirculate sand from the beach east of the Tamaki Yacht Club (TYC) to be placed onto Mission Bay Beach;
(v) To periodically clear sand from the Selwyn Creek channel;
(vi) To occupy the land required to carry out activites in works in (ii) to (iii) above.

SPECIAL CONDITIONS

1. Final design, specifications, drawings and construction method details of the separation wall, replenishment work, rip-rap along the seawall at the eastern end of the beach, rearrangement of the groyne at the eastern end of beach, recirculation programme and monitoring programme be submitted for the approval of the Group Manager, Environmental Management Department, Auckland Regional Council before commencement of any of the activities and works.

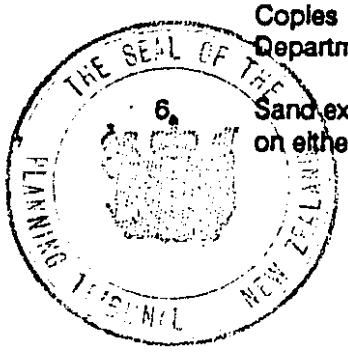
2. That the works shall be undertaken generally in accordance with the plans submitted for approval of the Group Manager, Environmental Management Department, Auckland Regional Council. The distance that the separation wall protrudes from the existing seawall protecting Selwyn Domain shall not exceed the dimensions identified in the application.

3. The consent holder shall notify the Group Manager, Environmental Management Department, Auckland Regional Council, of the commencement date of sand extraction.

4. That sand as coarse or coarser than the native beach material (0.5mm mean grain size) is to be used for sand replenishment and "top-up" purposes at Mission Bay.

5. That a log of the volume of sand extracted from the mouth of Selwyn Creek, the date and the contractor involved is to be kept by the applicant. The log shall also include information on the weather and wave conditions preceding and leading to the blockage of the stream mouth. Copies of the log shall be forwarded to the Group Manager, Environmental Management Department, Auckland Regional Council within 1 month of each extraction event.

6. Sand extracted from the stream mouth shall not be removed from the area and shall be placed on either Mission Bay Beach or the beach east of the Tamaki Yacht Club.



7. The right of occupation, as defined by Section 12(4) and stated in Section 122 of the Resource Management Act 1991 (RMA), granted to the Applicant shall be limited to the area identified in final specification drawings, in accordance with special condition 1 above.

8. The consent holder shall pay any administration charge fixed by the Auckland Regional Council for the administration, monitoring, and supervision of this consent, and for the carrying out of the Council's resource management functions (SS. 36 and 108 RMA 1991).

9. The consent holder shall advise the Group Manager, Environmental Management Department, Auckland Regional Council of the date of commencement and completion of the proposed works.

10. Prior to the commencement of the work the consent holder shall send a copy of the approved plans to the Hydrographer, Royal New Zealand Navy, P O Box 33-0341, Takapuna, Auckland 9, and advise him if subsequently the proposal is abandoned.

11. The noise level from the construction work shall not exceed 50 dBA, measured as an L10 value, as measured at the seawall fronting Selwyn Domain. No construction work shall be undertaken during weekends, at which times the construction area shall be cordoned off.

12. The consent holder shall remain liable under the Resource Management Act for any breach of conditions of consent which occur before the expiry of the consent and for any adverse effects on the environment which become apparent during or after the expiry of the consent (S.108(6)(c) RMA 1991).

ADVICE NOTE:

In accordance with Section 112 of the Resource Management Act, the consent holder shall pay to the Crown the resource rental as specified by regulation made under Section 360 (1)(c) of the Act.

FURTHER RECOMMENDATION

That it be brought to the attention of the consent holder that:

(i) the replenishment of Mission Bay Beach should take place over as short as time as possible, and within two years of the commencement date of the dredging operation of sand from Pakiri, in order to maximise retention of sand on Mission Bay Beach;

(ii) as far as practicable works on the replenishment will take place from the sea rather than the land in order to minimise disturbance to the coastal environment;

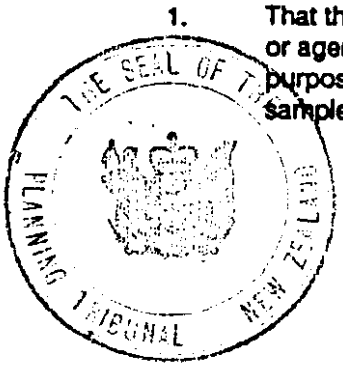
(iii) only sand that has accumulated on the beach east of the Tamaki Yacht Club since the replenishment of Mission Bay Beach be returned to Mission Bay Beach;

(iv) works undertaken should be carried out in such a manner that any adverse disturbance to the coastal marine area will be minimal.

(v) the study of the Mission Bay catchment and stormwater disposal be completed before further works are initiated.

STANDARD CONDITIONS

1. That this resource consent is granted by the Auckland Regional Council, subject to its servants or agents being permitted access to the relevant parts of the site at all reasonable times for the purpose of carrying out inspections, surveys, investigations, tests, measurements or taking samples.



2. That the Auckland Regional Council may at any time on the giving of not less than 3 months notice in writing serve notice on the consent holder of its intention to review any of the conditions of this consent for any of the following purposes:

   I. To deal with any adverse effect on the environment which may arise from the exercise of the consent and which it is appropriate to deal with at a later stage; or

   II. To require a discharge permit holder to adopt the best practicable option to remove or reduce any adverse effect on the environment; or

   III. To deal with any other adverse effect on the environment on which the exercise of the consent may have any influence.

FOR PART B - RECOMMENDATION IN RESPECT OF SAND EXTRACTION OFFSHORE PAKIRI BEACH (APPLICATION NUMBER 7975)

(I) It is recommended to the Minister of Conservation that consent be granted to carry out the activities and works detailed below:

CONSENT HOLDER:	AUCKLAND CITY COUNCIL
PURPOSE OF CONSENT:	Sand extraction offshore Pakiri Beach.
COMMENCEMENT DATE:	The date of commencement of extraction operations.
DATE OF EXPIRATION OF CONSENT:	Two years from commencement of the extraction operation.
LOCATION OF EXTRACTION SITE:	3 to 4 km offshore Pakiri Beach, centred on a point 3 km south of Te Aral Point (NZMS 260 R08 632572)
MAP REFERENCE:	NZMS 260 R08 632572
QUANTITY:	30,000 m^3 sand of 0.5 mm or greater mean size range, deposited at Mission Bay beach.

(II) that the consent be subject to the Regional Council's standard conditions and the following special conditions:

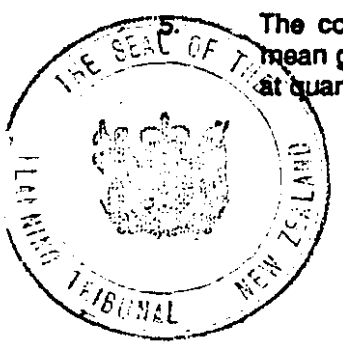
1. The consent holder shall notify the Auckland Regional Council of the commencement date of sand extraction.

2. The consent holder shall pay any administration charge fixed by the Auckland Regional Council for the administration, monitoring, and supervision of this consent and for carrying out of the Council's resource management functions (SS. 36 and 108 RMA 1991).

3. The sand extracted shall be used solely for the purpose of replenishment of Mission Bay beach, under consent number 917976.

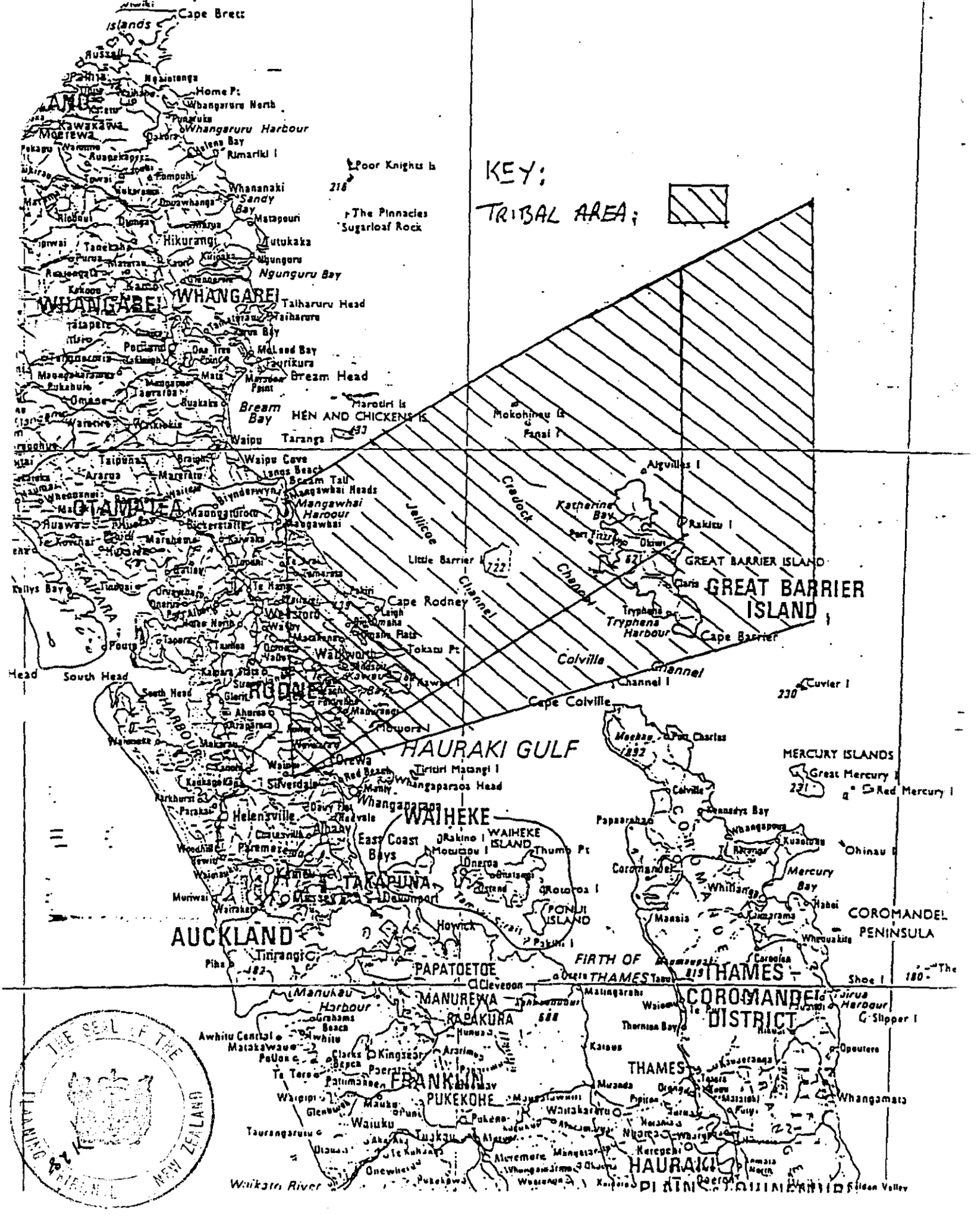
4. The consent holder may not transfer the whole or any part of the holder's interest in the permit to any other person unless the written approval of the Auckland Regional Council is first obtained (S.135 RMA 1991).

5. The consent holder shall keep records and a map documenting the volume, location, and mean grain size of sand extracted and make them available to the Auckland Regional Council at quarterly intervals from the commencement date of this coastal permit.



ATTACHMENT H

APPENDIX C



ADVICE NOTE:

In accordance with Section 112 of the Resource Management Act the consent holder shall pay to the Crown a royalty as specified by regulation made under Section 360(1)(c) of the Act.

FURTHER RECOMMENDATIONS

That it be brought to the attention of the consent holder that:

1. Sand extraction should allow a layer of original sediment type to remain so that bottom species can recolonise.

2. No historical or archaeological sites are known to exist in the area affected by extraction operations, but if uncovered, e.g. shipwrecks, should be reported to the New Zealand Historic Places Trust and left undisturbed.

3. The Federation of Commercial Fisherman should be given sufficient advance notification of the due date for commencement of the extraction operations and the area to be affected, so that their members shall have the option of fishing the dredge area immediately prior to extraction operations.

STANDARD CONDITIONS

1. That this resource consent is granted by the Auckland Regional Council, subject to its servants or agents being permitted access to the relevant parts of the site at all reasonable times for the purpose of carrying out inspections, surveys, investigations, tests, measurements or taking samples.

2. That the Auckland Regional Council may at any time on the giving of not less than 3 months notice in writing serve notice on the consent holder of its intention to review any of the conditions of this consent for any of the following purposes:

   i. To deal with any adverse effect on the environment which may arise from the exercise of the consent and which it is appropriate to deal with at a later stage; or

   ii. To require a discharge permit holder to adopt the best practicable option to remove or reduce any adverse effect on the environment; or

   iii. To deal with any other adverse effect on the environment on which the exercise of the consent may have any influence.

D R Cholmondeley-Smith, JP
CHAIRMAN

Decision No. W 102/97 ORIGINAL

IN THE MATTER	of the Resource Management Act 1991
AND	
IN THE MATTER	of three references pursuant to Clause 14 of the First Schedule of the Act
BETWEEN	**WELLINGTON INTERNATIONAL AIRPORT LIMITED**
	(RMA 66/96)
AND	**BOARD OF AIRLINE REPRESENTATIVES OF NEW ZEALAND INC**
	(RMA 67/96)
AND	**RESIDENTS AIRPORT NOISE ACTION GROUP INC**
	(RMA 83/96)
	Appellants
AND	**WELLINGTON CITY COUNCIL**
	Respondent

BEFORE THE ENVIRONMENT COURT

Her Honour Judge Kenderdine presiding
Commissioner R G Bishop
Commissioner F Easdale
Commissioner J D Rowan

HEARING at WELLINGTON on the 4th, 5th, 6th, 7th, 18th, 19th, 20th and 21st days of August 1997

COUNSEL

Mr B Bornholdt, Mr I Gordon and Mr C J Bodle for Wellington International Airport Ltd (WIAL)
Mr D A Nolan and Mr M J Williams for Board of Airline Representatives of New Zealand Inc (BARNZ)
Mr K Robinson and Mrs M Harris for Residents Airport Noise Action Group Inc (RANAG)
Mr Hyder and Ms K Edmonds for New Zealand Post Properties Ltd, appearing pursuant to s.274 of the Act
Ms B Arthur and Mr N Lucie-Smith for Minister of Defence, appearing pursuant to s274 of the Act
Mr C Mitchell, Mrs S Dossor and Mr J Wooley for the Wellington City Council

TABLE OF CONTENTS

RECORD OF DETERMINATION OF APPEALS AND DECISION

Background

This decision involves references under clause 14 of the First Schedule to the Resource Management Act 1991 ("the Act") challenging some of the provisions of the Proposed Wellington City District Plan relating to Wellington International Airport.

A hearing of submissions and further submissions on the provisions of the proposed plan took place in 1995 before two independent commissioners. Their decision was adopted by the Wellington City Council ("the council"). References were lodged by the Board of Airline Representatives of New Zealand Incorporated ("BARNZ") representing all of the airlines operating at Wellington Airport, by the Residents Airport Noise Action Group Incorporated ("RANAG") which represents a number of local residents living in the vicinity of the airport and several community groups, and by Wellington International Airport Limited ("WIAL"), the owner and operator of Wellington International Airport. New Zealand Post Properties Limited and the Minister of Defence joined the proceedings as parties pursuant to s.274 of the Act.

These references required the Environment Court to consider for the first time the district plan rules governing the current and future use of an airport in New Zealand since the introduction of both the Act and the New Zealand Standard NZS 6805:1992 "Airport Noise Management and Land Use Planning" ("NZS 6805").

The References

Each party's reference (appeal) is summarised as follows:-

WIAL

The WIAL appeal raised two issues, both of which arise from the proposed rule 11.1.1.1.7 dealing with engine testing.

1. WIAL sought replacement of the nine hour averaging rule with a more practicable and enforceable control.

2. WIAL also sought removal of an inconsistency between the text of the rule and the map to be used.

By the time of the hearing, the first of these issues was resolved. A proposed replacement rule was to be put before the Court, however RANAG had not indicated their position on this.

With respect to the second issue, we were told that WIAL and the council had agreed that the inconsistency should be removed and a proposed amendment was to be submitted.

BARNZ

The BARNZ appeal was combined with Air New Zealand Limited, although separate evidence was prepared and some separate submissions were made. Where Air New Zealand presented separate submissions this has been noted. The BARNZ appeal involved three issues.

1. The original BARNZ appeal sought to make new residential development within the airnoise boundary a prohibited activity. BARNZ at the time of hearing proposed that any new

residential development be made non-complying. Meanwhile the council regarded new residential development within the airnoise boundary as a permitted activity, subject to compliance with a noise insulation standard.

2. BARNZ also appealed the precise positioning of the airnoise boundary. In submissions before the Court, BARNZ sought to move the airnoise boundary in two areas. It sought to extend it to the east of the airport to include houses on Kekerenga Street. It also sought to retract the airnoise boundary on the western side of the airport around Salek Street.

3. The third issue related to proposed rule 11.1.1.1.9 which exempts ground power units (GPUs) and auxiliary power units (APUs) from compliance with the noise standards for land based activities until 31 December 1998. From that date APUs would still be exempted when aircraft are under tow and for the first 30 minutes after engine shut down. BARNZ now sought to extend that exemption to a period of 60 minutes before and 90 minutes after flight.

RANAG

The RANAG appeal encompassed issues ranging over a number of topics.

RANAG requested that the proposed prohibition on Boeing 737-200 hush-kitted jets after December 1997 be reinstated. This rule had been deleted by the council in relation to the proposed plan provisions.

RANAG also raised the issue of the positioning of the airnoise boundary in order to reduce the noise experienced by residents in the area.

The proposed rule 11.1.1.1.6(d) to (g) sets out a number of exceptions to the 90 day rolling average noise bucket. Of these exceptions the most contentious is military aircraft movements to which RANAG objected.

RANAG opposed the number of exceptions to the night curfew, with particular emphasis on military aircraft, and night flying exemption aircraft.

RANAG took issue with proposed rule 11.1.1.1.3 which is the ban on non-noise certified or chapter 2 aircraft.

RANAG requested engine testing, under proposed rule 11.1.1.1.7, only be carried out within an acoustically insulated hangar.

RANAG sought increased controls on APUs and GPUs and the removal of the exception in proposed rule 11.1.1.1.9.

RANAG merely listed rule 5.1.3.9 which requires new residential developments within the airnoise boundary to meet specified noise insulation standards. It then made a generalised submission under relief sought seeking to ensure that the plan provisions are coherent and integrated. It considered the provision as stated was unreasonable and incapable of clear definition as no agreed standard of insulation exists.

Finally, proposed policy 10.2.2.6 relates to a noise management plan which will be developed to "assist all interested parties in complying with the objectives and rules". This plan is to be prepared by a representative Wellington Airnoise Management Committee. RANAG's appeal opposed any suggestion that the council could abdicate its regulatory and enforcement responsibilities in favour of such a committee.

Preliminary

This record and decision is divided into two parts. Part I records the process by which the consent orders were arrived at and the consent orders themselves. It also identifies some of the issues that were identified in accompanying memoranda to the consent orders.

Part II contains the one remaining issue before the Court after the consent orders were filed - namely the appeals by BARNZ and WIAL to the effect that any new residential development within the airnoise boundary should be given a non-complying status in the Suburban Centre area provisions of the proposed plan within the airnoise boundary. It was their case that this status would clearly demonstrate to the public that the council does not encourage or envisage housing stock increasing in this limited area. This is to be contrasted with the council's change in approach to the issue requiring such development to be given a discretionary activity (unrestricted) status. Currently new residential development of less than 3 units at ground level is a permitted activity subject to design guide provisions, and multi-unit development is a discretionary activity (restricted).

PART I

RECORD OF DETERMINATION OF APPEALS

General Statement

The hearing commenced on Monday 4 August 1997 when the case for the council proceeded. The evidence of all the parties was called in by the Registrar and read by the Court over the intervening period so that we were fully informed. It soon became apparent from reading and hearing some of the evidence of the council as well as the evidence of one of the RANAG witnesses that there was the need for parties to be given an opportunity for further negotiation and discussion. With the consent of all involved, the further hearing of the references was adjourned on Thursday 7 August 1997 to allow for that process to occur. The Court was kept informed of progress and on Tuesday 19 August 1997 the Court was presented with a memorandum from all counsel inviting the Court to make consent orders in the form of a draft attached to the memorandum. Further memoranda were tabled by counsel for RANAG and counsel for WIAL and BARNZ in response. At that stage RANAG withdrew from proceedings.

The Court, in a previous Minute to the parties dated 21 May 1997 had invited the parties and RANAG in particular to apply for mediation of the issue should they feel so inclined at any time before the hearing. This did not occur at that time but it is to the parties' considerable credit that this approach was eventually taken. It was desirable in that it represented considerable savings in both hearing time (estimated at 3 - 4 weeks) and costs to the parties, as well as a refinement to the issues which finally came before the Court. The parties, in their extensive negotiation/mediation meetings, resolved the majority of the issues before them.

Because of the importance of these issues the Court was also requested, at the time of filing the draft consent orders, by counsel for all the parties to record the background to the way in which the matters before those parties had been resolved. This was to ensure that this background is placed on record for the future. We have added a commentary which follows the consent orders and further explains the agreements which have been reached and the basis on which the parties sought orders by consent.

The basis for the agreement was an acceptance among all the parties that the airport is not only of vital importance to the city, but is also of significant regional and national economic importance. All

the parties accept that this local, regional and national significance requires that adequate provision be made for the growth, safe operation, and continued commercial viability of the airport.

The parties further accept the importance of provisions which maintain and enhance the amenities and viability of the residential communities which surround the airport. Finally, in this regard, the parties agree that the relationship between the airport and the residential communities needs to be based on certainty of future expectations and an efficient and equitable system for discussing and resolving issues and concerns as they arise.

The parties accept that the establishment of future certainty is an important function of the district plan provisions. The establishment of the framework within which outstanding issues and concerns can be resolved is at least equally important, but falls outside of the scope of the district plan. Section 10 of the proposed district plan envisages the establishment of a Wellington Airnoise Management Committee. This committee is to include representatives of WIAL, BARNZ, RANAG, the New Zealand Defence Force ("NZDF") and the council. The parties have agreed that a number of issues before the Court in these proceedings ought to be considered by the committee such as possible future refinements to the location of the airnoise boundary. If the location of the airnoise boundary did change Map 39 would need to be amended accordingly.

The NZDF will maintain a "good neighbour policy" in relation to its operations at Wellington International Airport. It will use its best endeavours to replace the existing Boeing 727-22C with an aircraft which meets rule 11.1.1.1.3 by being neither a non-noise certified jet aircraft nor a chapter 2 jet aircraft. The NZDF will bring the concerns of the residents about this noise issue to the attention of Foreign Defence Forces and to the attention of government agencies when appropriate.

The NZDF will aim to obtain replacement aircraft within five years, but cannot guarantee that this is possible. The obtaining of replacement aircraft is dependent on both finance from government and suitable aircraft being available.

As a result of the draft consent orders filed, in residential areas with the airnoise boundary all new dwellings are to achieve noise attenuation and new multi-unit residential activity is now proposed as a discretionary activity (unrestricted). This will effectively change multi-unit development from its current discretionary activity (restricted) status allowing proposals of this category to be scrutinised at the planning stage by any concerned party.

With the above in mind, it is important to record that there are basically five types of control comprising the package of airnoise provisions. Basically, these controls consist of an airnoise boundary, a ban on non-noise certified and chapter 2 jet aircraft, a curfew, ground noise controls, and land use controls. In relation to these matters, the parties have agreed in general as follows:

- Airnoise Boundary:
  - Located as proposed by WIAL, BARNZ and the Wellington City Council, see Map 39 included in this decision.
  - There is to be a separate arrangement for New Zealand Defence Force aircraft
- Chapter 2 ban:
  - Deletion of provision for calibration flights
- Curfew:
  - New Zealand Defence Force military aircraft will comply
  - Noise levels for night flights reduced
- Ground noise controls:
  - Engine testing noise to be assessed and monitored as proposed by WIAL, BARNZ and the council which includes further controls on night testing
  - APU control as proposed by BARNZ

S.E.K.

- Land use controls:
  - In Residential areas - all residential activity is permitted, except that three or more residential units on a site is to be a Discretionary (Unrestricted) activity.

Parts 4 and 5 of the proposed district plan are to be amended as shown in the consent orders.

Rule 5.1.3.10 is to be amended to encompass a new heading with the agreement of the relevant parties on 17.11.97.

Parts 10 and 11A of the proposed district plan are to be amended as shown in the consent orders.

Map 39 is to be amended as shown in the consent orders.

THE CONSENT ORDERS

UPON READING the notices of reference and the replies of the respondent **AND UPON READING** the briefs of evidence filed with the Court **AND UPON HEARING** counsels' submissions and some of the evidence-in-chief **AND UPON READING** the memoranda of counsel and the draft consent orders filed herein **THIS COURT HEREBY ORDERS BY CONSENT** that the Proposed Wellington District Plan be amended in accordance with the provisions set out below:

AMENDMENTS TO PROPOSED WELLINGTON CITY DISTRICT PLAN

1. Section 10, 10.2.2.6 Methods

Noise Management Plan

Delete the final three paragraphs of text (commencing "A noise management plan (NMP) will be ...") and substitute:

A noise management plan (NMP) will immediately be implemented by WIAL to assist all interested parties in complying with the objectives and rules in the District Plan.

The noise management plan will include

- **a statement of noise management objectives and policies**
- **details of methods and processes for remedying and mitigating adverse effects of airport noise including but not limited to**
  - **improvements to Airport layout to reduce ground noise**
  - **improvements to Airport equipment (including provision of engine test shielding such as an acoustic enclosure for propeller driven aircraft) to reduce ground noise**
  - **aircraft operating procedures in the air and on the ground**
- **procedures for monitoring and ongoing review of the plan**
- **dispute resolution procedures**
- **a programme for immediate and ongoing refinement by way of shrinkage of the location of the ANB, with priority to be given to those areas which through further monitoring are found not to be exposed to forecast L_{dn} 65 dBA, with the intent that the programme be completed within two years**
- **consideration of land use measures which may mitigate adverse effects through changes to controls**
- **consideration of any need for insulation of existing houses within the ANB; the extent to which such insulation is appropriate, and the ultimate responsibility for cost**

- details of methods and processes for monitoring and reporting compliance with the District Plan rules, including but not limited to
  - airnoise boundary and activity ceilings provided in the rules
  - engine testing
  - APUs/GPUs
  - curfew

- details for certification by WIAL of night curfew exempt aircraft.

A representative Wellington Airnoise Management Committee will as soon as practicable be established. The Committee will draw up terms of reference and a planning timeframe. Until this Committee is established, its functions will be exercised by the existing Standing Committee with the addition of a representative of the New Zealand Defence Force.

Notification of the Committee's terms of reference and planning timeframe is to be provided to the Council. The Council will use its best endeavours to support the Committee and may undertake independent audits of the parties' progress towards implementation of identified methods and processes. The Council will also ensure that it maintains direct access to any relevant data necessary for the effective operation or enforcement of these rules.

2. Rule 11.1.1.1.2

Delete rule 11.1.1.1.2 and substitute the following:

11.1.1.1.2 The following aircraft operations are excluded from the calculation of the rolling 90 day average in rule 11.1.1.1.1:

- Aircraft landing in emergency
- The operation of emergency flights required to rescue persons from life-threatening situations or to transport patients, human vital organs or medical personnel in a medical emergency
- The operation of unscheduled flights required to meet the needs of a national civil defence emergency declared under the Civil Defence Act 1983
- Military aircraft movements which shall be managed in compliance with rule 11.1.1.1.2A.

3. Rule 11.1.1.1.2A

Add after rule 11.1.1.1.1.2 the following new rule 11.1.1.1.2A:

11.1.1.1.2A The following conditions shall apply to New Zealand Defence Force military aircraft:

(a) New Zealand military transport aircraft operations shall be managed so that the following 90 day average 24 hour night-weighted sound exposure does not exceed a Day/Night Level (Ldn) of 55 dBA outside the Airnoise Boundary shown on District Plan Map 39.

Aircraft noise will be measured in accordance with NZS 6805:1992 and calculated as a 90 day rolling average.

All terminology shall have the meaning that may be used or defined in the context of NZS:6805. The level of noise from aircraft operations, for comparison with L_{dn} 55 dBA, is calculated from the total amount of noise energy produced by each aircraft event (landing or take-off) over a period of 90 days. This method of control does not directly control individual aircraft events, but does so indirectly by taking into account their contribution to the amount of noise generated in a 24 hour period.

(b) Movements of New Zealand military combat aircraft shall be limited to 80 per year.

(c) For the purpose of this rule:

- **Military transport aircraft means any fixed wing transport or logistics aircraft including Andover, Boeing 727, Hercules, Orion and Airtrainer (and their replacements).**
- **Military combat aircraft means any fixed wing strike or training aircraft including Macchi and Skyhawk (and their replacements).**
- **Movements of New Zealand military combat aircraft equate to:**

  landing = 1 movement
  takeoff = 1 movement
  touch-and-go = 2 movements
  low level pass = 2 movements

4. **Rule 11.1.1.1.3**

Amend rule 11.1.1.1.3 by deleting the final two bullet points and substituting the following:

- **military aircraft which shall be subject to rule 11.1.1.1.2A.**

5. **Rule 11.1.1.1.6**

Delete rule 11.1.1.1.6 and substitute the following:

11.1.1.1.6 The following are exceptions to rule 11.1.1.1.5:

(a) disrupted flights where operations are permitted for an additional 30 minutes;

(b) in statutory holiday periods when operations are permitted for an additional 60 minutes;

(c) aircraft using the Airport as a planned alternative to landing at a scheduled airport, but which shall not take off until otherwise permitted under rule 11.1.1.1.5;

(d) aircraft landing in an emergency.

(e) the operation of emergency flights required to rescue persons from life-threatening situations or to transport patients, human vital organs or medical personnel in a medical emergency.

(f) the operation of unscheduled flights required to meet the needs of a national or civil defence emergency declared under the Civil Defence Act 1983.

(g) Foreign military aircraft carrying heads of state and/or senior foreign dignitaries.

(h) No more than 4 aircraft movements per night with noise levels not exceeding 65 dBA L max (1 sec) at or beyond the airnoise boundary.

For the purpose of (b), statutory holiday period means:

(i) The period from 25 December to 2 January, inclusive. Where 25 December falls on either a Sunday or a Monday, the period includes the entire or previous weekend. Where New Year's day falls on a weekend, the period includes the two subsequent working days. Where 2 January falls on a Friday, the period includes the following weekend.

(ii) The Saturday, Sunday and Monday of Wellington Anniversary weekend, Queens Birthday weekend and Labour weekend.

(iii) Good Friday to Easter Monday inclusive.

(iv) Waitangi Day.

(v) Anzac Day.

(vi) Where Waitangi Day or Anzac Day falls on a Friday or a Monday, the adjacent weekend is included in the statutory holiday period.

(vii) The hours from midnight to 6.00 am immediately following the expiry of each statutory holiday period defined in (I) to (vi) above.

The purpose of (h) is to allow certain quiet aircraft to operate at Wellington Airport during the curfew. The 65 L max (1 sec) dBA noise limit has been based on noise levels from aircraft that have been found to be acceptable for operating at night at Wellington. The level does not purport to be the upper limit necessary to avoid sleep disturbance.

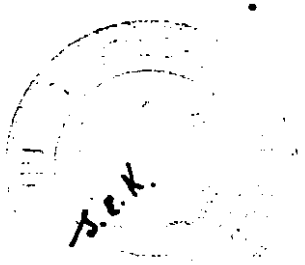
6. *Rule 11.1.1.1.7 Engine testing*

Delete rule 11.1.1.1.7 and substitute the following:

11.1.1.1.7 <u>Engine testing</u>

(a) Aircraft propulsion engines may be run for the purpose of engine testing:

- during the hours of 0600 to 2000
- to carry out essential unscheduled maintenance between 2000 hrs to 2300 hrs
- to operate an aircraft within flying hours but provided the engine run is no longer than required for normal procedures, which for the purpose of this rule shall provide solely for short duration engine runs by way of flight preparation while the aircraft is positioned on the apron.



(b) No person shall start or run any aircraft propulsion engine for the purposes of engine testing on the hardstand area south and west of the Air New Zealand hangar at any time. This area is depicted by the shaded portion of Map 39.

(c) Restrictions on engine testing room 2300 hrs to 0600 hrs do not apply if engine testing can be carried out in compliance with all of the following:

(i) Measured noise levels do not exceed Leq (15 mins) 60 dBA at or within the boundary of any residentially zoned site.

(ii) Measured noise levels do not exceed Lmax 75 dBA at or within the boundary of any residentially zoned site.

(iii) Noise levels shall be measured in accordance with NZS 6801:1991 "Measurement of Environmental Sound".

(iv) The total number of engine tests events to which rule 11.1.1.1.7(c) applies shall not exceed 18 in any consecutive 12 month period.

(v) The total duration of engine test events to which rule 11.1.1.1.7(c) applies shall be no more than 20 minutes.

7. Rule 11.1.1.1.9 Ground Power Units and Auxiliary Power Units (GPUs/APUs)

Delete rule 11.1.1.1.9 and substitute the following:

11.1.1.1.9 Ground power and auxiliary power units (GPUs/APUs)

(a) GPUs are exempt from controls otherwise imposed by rule 11.1.1.8 until 31 December 1998. After 31 December 1998 GPUs must comply with the noise limits in rule 11.1.1.1.8.

(b) With the exemption of:

- aircraft under tow
- the first 90 minutes after the aircraft has stopped on the gate
- 60 minutes prior to scheduled departure
- the use of APUs to provide for engine testing pursuant to rule 11.1.1.1.7.

APUs must comply with the noise limits in rule 11.1.1.1.8.

8. Planning Map 39

Delete Map 39 and substitute the new Map 39 attached to the end of these consent orders.

9. Clause 4.2 - Residential Objectives and Policies

Amend clause 4.2.1.1 by adding before the final paragraph of the explanatory text the following:

However within the Outer Residential area adjoining Wellington International Airport there is a need to recognise the potential effects of airport noise on new residential development and conversely, the potential constraints which new residential

development might seek to impose on the efficient use and development of the airport. The rules relating to residential development near the airport (being the land inside the airnoise boundary depicted on Map 39) reflect these issues. Reference will also be made to the objectives and policies in section 10 of this plan when considering resource consent applications for residential development within that area.

10. **Rule 5.1.3.10 - Residential Buildings within the Airport Airnoise Boundary.**

Delete the first paragraph of rule 5.1.3.10 and substitute the following:

Any new residential dwelling inside the airnoise boundary depicted on Map 39 must be designed and constructed so as to achieve an internal level of 45 dBA L_{dn} inside any habitable room with the doors and windows closed.

11. **Rule 5.3.4: Three or more household units**

Delete rule 5.3.4 and substitute the following:

The construction of residential buildings, including accessory buildings, where the result will be there or more household units on any site is a Discretionary Activity (Restricted), except in a Hazard Zone (Faultline) or inside the airnoise boundary depicted on Map 39 in respect of:

12. **Rule 5.4.6: Three or more household units inside the airnoise boundary.**

Add the following new rule 5.4.6:

The construction of residential buildings, including accessory buildings, where the result will be three or more household units on any site inside the airnoise boundary depicted on Map 39, is a Discretionary Activity (Unrestricted).

Assessment Criteria

In determining whether to grant consent and what conditions, if any, to impose, Council will be guided by the following criteria:

5.4.6.1 **Compliance with relevant conditions in rules 5.1.1, 5.1.3 and the assessment criteria for multi-unit development in rule 5.3.4.**

5.4.6.2 **Whether the proposed development is proposed to be designed and constructed so as to achieve an internal level of 45 dBA L_{dn} inside any habitable room with the doors and windows closed.**

5.4.6.3 **The location of the site in relation to the airport and the airnoise boundary, and the likely exposure to airport noise.**

5.4.6.4 **Whether the location of the site and likely exposure to airport noise will lead to an unreasonable level of amenity to future occupiers.**

5.4.6.5 **Whether in the circumstances the development is likely to lead to potential conflict with the adverse effects on airport activities.**

Multi unit residential development within the airnoise boundary may be acceptable in some circumstances. In order to adequately assess the effects on prospective owners and occupiers and any adverse effects of airport noise, and to consider potential further constraints or other adverse effects on activities at the airport, each proposal will be considered against these assessment criteria. Applications for resource consents will in general be notified.

The certification of an approved acoustical engineer will be accepted as evidence that designs meets the insulation standard in 5.4.6.2. A list of approved acoustical engineers shall be agreed between the Council and the Airnoise Management Committee and shall be made available on request by the Council.

Conclusion

Appeal RMA 66/96 by WIAL is allowed to the extent that the decisions sought are included in the orders listed above, and is otherwise dismissed apart from the Suburban Centre appeal to be separately determined in Part II of this decision.

Appeal RMA 67/96 by BARNZ is allowed to the extent that the decisions sought are included in the orders listed above, and is otherwise dismissed apart from the Suburban Centre appeal to be separately determined in Part II of this decision.

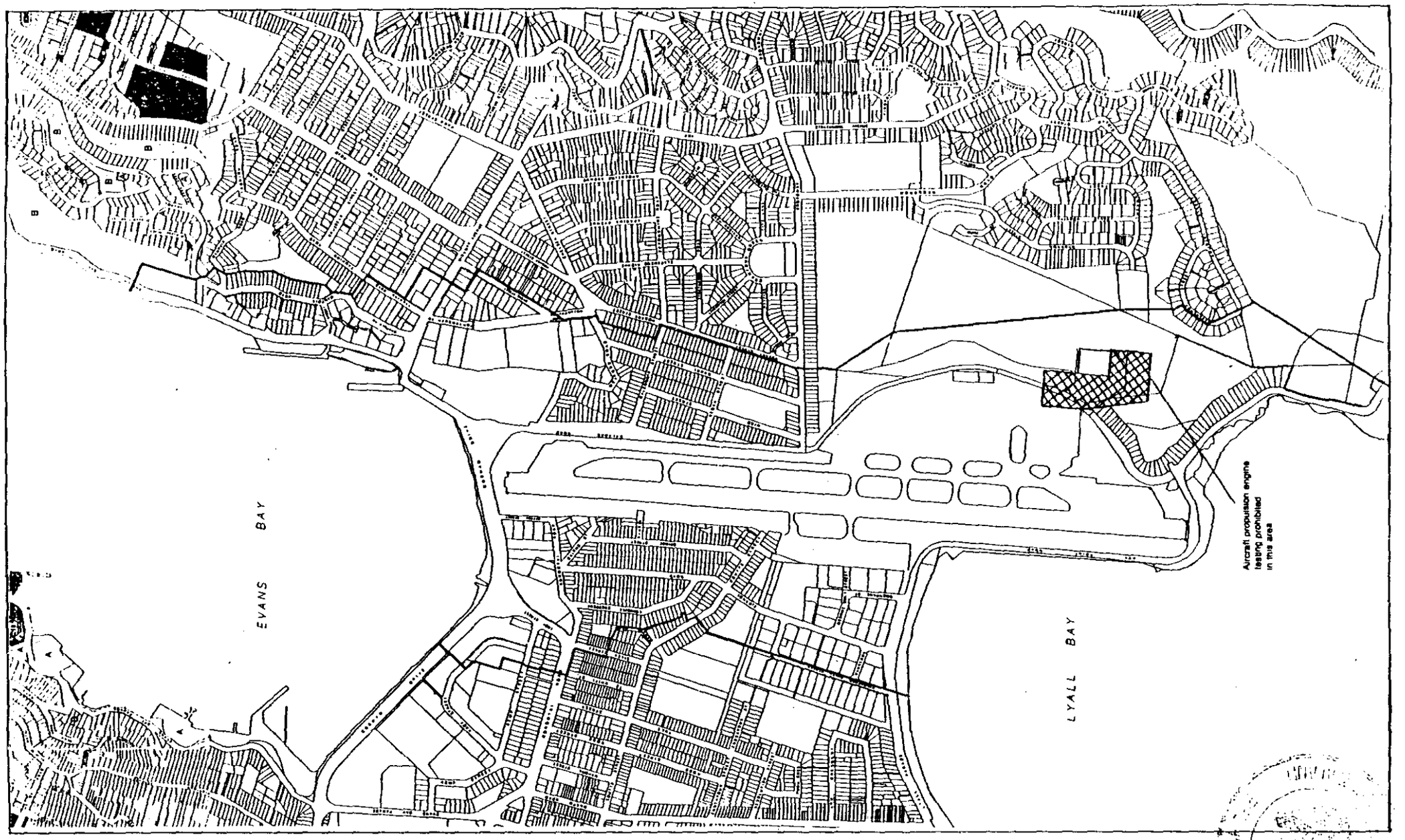
Appeal RMA 83/96 by RANAG is allowed to the extent that the decisions sought are included in the orders listed above, and is otherwise dismissed.

There is no order as to costs

DATED at WELLINGTON this 19th day of November 1997

S E Kenderdine
Environment Judge

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND



WELLINGTON INTERNATIONAL AIRPORT AIR NOISE BOUNDARY
Refer to Rule 11

COMMENTARY

The Residents' (RANAG) Memorandum

The Residents Group was represented by counsel, Mr K Robinson, assisted by Mrs Maxine Harris, Chairperson of RANAG. Evidence was tabled (and read by the Court) from Mrs Harris; Mrs Rosina Bedford, a former resident of the area who worked extensively in RANAG as a Secretary to achieve a more satisfactory noise environment for the residents; Mrs Mary Beth Weeber, President of the Kilbirnie, Lyall Bay, Rongotai Progressive Association who worked to achieve the same end; Mrs Rosa Margaret Carrick, a supporter of RANAG who researched the effects of excessive noise on the residents and made many submissions on the issue to the local authority; Mrs Elise Webster, a resident of Moa Point Road who gave an overview of the situation; Mr Peter Waring Saxton, a resource management consultant who made general comments on the noise control rules and detailed the adverse environmental effects on the residents within the airport noise boundary. Mr Stanley James Andis, President of the Strathmore Park Progressive and Beautifying Association was heard out of sequence and cross-examined.

As previously noted, RANAG's counsel tabled a further memorandum (a process agreed to by the parties) on the understanding that the points made would become part of the Court's record regarding the consent orders. The following is a summary of what that memorandum contained along with the response to it from the relevant parties. On reflection we considered that these qualifying memoranda to the draft consent orders were more appropriately recorded in the following summaries rather than as recitals.

Airnoise Boundary - Rule 11.1.1.1

The airnoise boundary has been positioned to allow for the proposed activities of the airport within the plan period on the basis of projections advanced by WIAL and accepted by BARNZ. RANAG sees the projections as optimistic in the light of past history, its understanding of current statements by Air New Zealand on the state of air transport industry, and its knowledge of developments in communication technology. As RANAG do not have the data, or the expertise to assess the airnoise boundary RANAG welcomes the provision in the noise management plan for further refinement of the airnoise boundary and it notes that this work is to be completed within two years.

RANAG questioned the jurisdiction to include Kekerenga Street within the airnoise boundary (which was disputed by BARNZ and WIAL, given the wording of BARNZ's submissions), but the issue was not pursued, since Kekerenga Street is one of the streets which falls within the area which, on a future re-measure, may fall outside the airnoise boundary.

Night Flying Operations - Rule 11.1.1.1.5 and 6

RANAG stated that this is a matter which has been, and remains, of the greatest practical concern to RANAG's supporters. The changes which have been agreed to in relation to paragraph (h), and the deletion of paragraph (i), of rule 11.1.1.1.6, are intended to allow for only the quietest operations, and for a limited number. They are not intended to be construed as an abandonment of the curfew, which the residents regard as being of great importance.

Engine Testing - Rule 11.1.1.1.7

RANAG notes that further allowance of engine testing during curfew hours has been a source of real concern to many residents, and they hope and expect that the new rule will be applied

with their comfort particularly in mind, and they especially welcome the potential provision in the noise management plan for the construction of a "hush house" type facility for these aircraft. They wish to record that its construction will be a matter of priority for residents' representatives on the Noise Management Committee.

Ground Power Units and Auxiliary Power Units - Rule 11.1.1.1.9

RANAG recognised the fact that WIAL, as part of its redevelopment, is taking effective steps about the GPUs. However, with respect to APUs, RANAG has some reservations about the length of time it is necessary to operate the APUs but does not have the detailed knowledge upon which to base its comments.

Noise Management Plan

RANAG wish to record their hope that the noise management plan would prove to be a valuable tool particularly as a forum for the exchange of information and co-operation between parties.

Replacement of Boeing 737-200s

RANAG expressed its concern about the timetabled introduction of the B737-300 planes to replace the current B737-200 hush-kitted planes, given the delays which have occurred in the past. RANAG had sought a rule in the proposed plan requiring the replacement of the hush-kitted B737-200s by the end of 1997 but RANAG could not afford the sort of discovery required to determine whether such replacement is feasible based on financial issues and airline operational practice. Therefore this issue was not pursued.

Land Use Controls and Insulation

RANAG's concerns on the issue of land use controls and noise insulation requirements centred around the costs to be borne by the residents in the areas affected, and the perceived lack of consultation with the residents as to the land use controls to be imposed and did sign this part of the consent orders because they had not been averted to in their submissions. At present residents in Residential and Suburban Centres zones within the airnoise boundary have the same rights to develop their property as others in such zones elsewhere around Wellington. If the proposed amendments are put in place, these residents will no longer have those equal rights, with further restrictions being imposed on them due to their noisy neighbour.

However, RANAG did not feel it had the resources to pursue this matter in Court, nor was it to take part in the hearing of the final issue left for the Court to resolve, being the status of residential development within the Suburban Centres zone within the airnoise boundary.

BARNZ's Response

Airnoise Boundary - Rule 11.1.1.1

BARNZ had undertaken an independent assessment of the location of the airnoise boundary, in co-operation with WIAL, and had directed considerable resources for further noise measurement and monitoring prior to the hearing which resulted in the revised airnoise boundary based on an L_{dn} 65 dBA contour which was accepted by all the parties.

It was clear from BARNZ's original submissions on the proposed plan that the airnoise boundary should be altered to include Kekerenga Street, and these submissions had been in the

public arena since 1994. Therefore there was no question as to the jurisdiction to alter the location of the airnoise boundary as proposed.

Night Flying Operations - Rule 11.1.1.1.5 and 6

BARNZ understands that the noise limit set (65 dBA Lmax) has been chosen to accommodate the exemption of quieter aircraft and it does not purport to be the upper limit required to protect sleep disturbance.

Engine Testing - Rule 11.1.1.1.7

BARNZ commented that its members, including non-jet operators, undertake very few and infrequent tests at Wellington.

Ground Power Units and Auxiliary Power Units - Rule 11.1.1.1.9

BARNZ stated that its members are planning to upgrade its GPUs to comply with the noise controls set out in the district plan. BARNZ also stated that APUs comply with the noise controls in the district plan, except in certain climatic conditions where they are marginal.

Land Use Controls and Insulation

BARNZ stated that one must consider both the investment of the airlines in reducing noise from 1988 levels, and the fact that many residents have moved to the area in the knowledge that the airport creates noise, when determining who should bear the cost of noise insulation of residential structures.

Air New Zealand Limited's Response

Replacement of Boeing 737-200s

Air New Zealand noted that it has invested $50 million to hush-kit its B737-200 fleet, and this step reduced total noise at Wellington by 5 dBA. Air New Zealand also noted that the total reduction in overall airport noise from a replacement of half the hush-kit fleet with the B737-300 would be less than 1 dBA L_{dn} .

WIAL's Response

With respect to the location of the airnoise boundary, it was WIAL's view that considerable effort had gone into assessing where the airnoise boundary could be adjusted, and this was noted in Mr Gordon's rebuttal evidence.

Otherwise WIAL noted and adopted the stance taken by BARNZ in response to the matters raised by RANAG. WIAL did not comment on Air New Zealand's response.

Land Use Controls and Insulation Issues:

Counsel for RANAG, at the time of tabling their memorandum accompanying the draft consent orders, invited the Court not to deal with the issues of land use controls and insulation but to refer them back to the council because they impose a cost on property owners whether residential or commercial within the airnoise boundary. Counsel submitted the controls were not part of the proposed plan and seem to have arisen largely as a result of BARNZ's submissions. Counsel submitted that the property owners most affected appear not to have been effectively consulted in

spite of what seems to be a potentially considerable loss of development value and implications from s.85 of the Act. Attached to his memorandum was a letter from Mr Doherty, a valuer, dated 12 August 1997, outlining purely indicative potential impacts on property values.

The relevant provisions of s.85 of the Act are set out below:

> **Section 85. Compensation not payable in respect of controls on land -**
>
> **(1) An interest in land shall be deemed not to be taken or injuriously affected by reason of any provision in a plan unless otherwise provided for in this Act.**
>
> **(2) Notwithstanding subsection (1), any person having an interest in land to which any provision or proposed provision of a plan or proposed plan applies, and who considers that the provision or proposed provision would render that interest in land incapable of reasonable use, may challenge that provision or proposed provision on those grounds -**
>
> **(a) In a submission made under Part I of the First Schedule in respect of a proposed plan or change to a plan; or**
>
> **(b) In an application to change a plan made under clause 21 of the First Schedule.**
>
> ...
>
> **(6) In subsections (2) and (3), the term "reasonable use", in relation to any land, includes the use or potential use of the land for any activity whose actual or potential effects on any aspect of the environment or on any person other than the applicant would not be significant.**
>
> ...

In his memorandum Mr Robinson submitted that the matters referred to surfaced during the course of this hearing and unfortunately had not been adverted to in any direct way by his clients largely because there was little or no reference to them in the proposed plan.

It may be noted that Section 85(2) requires a submission to be made under Part I of the First Schedule: see Clause 6 of the schedule. The summary of these submissions is then notified by the council pursuant to Clause 7. Any person may make a further submission to the council on the provisions of the proposed plan, but only in support of or in opposition to those original submissions made under Clause 6.

RANAG did not make any such submissions in relation to compensation. RANAG simply considered the noise insulation provision incapable of clear definition and the issue was not pursued any further. So unless RANAG makes an application to change the plan under Clause 21 of the First Schedule, s.85 does not apply.

As to the issue of insulating existing dwellings or businesses within the airnoise boundary pursuant to s.85 we consider that that is an issue which should be directed at the Airport Noise Committee managing noise emissions through the noise management plan: see Section 10.2.2.6, Airport Precinct which specifies that the plan will include

- details of methods and processes for remedying and mitigating the adverse effects of airport noise (see further discussion on noise management plan pp 45 - 46).

Even if it had been raised in the reference, it is doubtful whether this Court could have made a ruling on the compensation issue as pursued by RANAG. As stated in Leith v Auckland City Council [1995] NZRMA 400 the Resource Management Act, unlike its predecessor the Town and Country

Planning Act 1977, does not provide for compensation to be paid. While a local authority is able to provide financial incentives, it does so in its executive capacity, and not as a planning authority. The Environment Court does not have the authority to interfere with a local authority exercising its executive functions. Consequently, it was held in Leith (p420) "that the Tribunal has no authority to interfere with local authorities in such matters, either directly by ordering the offering of incentives, or indirectly by directing amendments to district plans on the basis of the existence or absence of any policy to grant incentives".

The Court was also invited to consider the matters pursuant to Clause 15(2) of the First Schedule or s.290(2) or s.293(2) of the Act and refer them back to the council. It was submitted the Court had the jurisdiction to do so pursuant to those provisions. It is clear from Mullins v Auckland City Council A 35/96 that the Court is able to use its powers under Clause 15(2) to address a s.85 issue which is raised in a reference made pursuant to Clause 14.

The other relevant statutory provisions are set out below:

Clause 15. Hearing by the Environment Court

...

(2) Where the Court holds a hearing into any provision of a proposed policy statement or plan (other than a regional coastal plan) that reference is an appeal, and the Court may confirm, or direct the local authority to modify, delete, or insert, any provision which is referred to it.

...

Section 290. Powers of Environment Court in regard to appeals and inquiries -

...

(2) The Environment Court may confirm, amend, or cancel a decision to which an appeal relates.

...

Section 293. Environment Court may order change to policy statements and plans -

...

(2) If on the hearing of any such appeal or inquiry, the Court 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, it may adjourn the hearing until such time as interested parties can be heard.

...

In response to RANAG's request, BARNZ submitted that the issue of the airnoise boundary and land use controls had been in the public arena since 1994 when BARNZ lodged its first submissions to the council requesting that no residential activity be allowed within the airnoise boundary. If RANAG chose not to pursue the point before now then that was its option. At this stage of proceedings it cannot be entertained by the Court.

We accept the Court has legal difficulty in proceeding as RANAG has requested. As Mr Bornholdt rightly submitted on behalf of WIAL at the outset of proceedings when the issue first arose (submissions with which the Court at the time concurred) RANAG and associated parties did not challenge issues relating to land use controls within the airnoise boundary in their reference. No relief was sought in that regard. RANAG's submission that the airnoise boundary as a land use control issue has only surfaced in the course of the hearing is quite incorrect. The evidence

established that the residents were involved in the drafting of the New Zealand Noise Standard NZS 6805 which included the concept of the airnoise boundary. The issue has been extensively debated since submissions were lodged in 1995.

The Court is an appellate body which, in this instance, deals only with matters referred to it under Clause 14 of the First Schedule to the Act which arise out of the council's decision on submissions. There are two difficulties with doing as Mr Robinson suggested. Firstly, the proposed changes to the plan rules and the concept of the airnoise boundary were brought to the public arena some time ago, they are not new; and secondly, RANAG has failed to respond to these issues in its original submissions and reference to the Court. This creates a problem of lack of notice to interested parties with respect to the issues RANAG now wishes to raise, quite apart from other legal difficulties canvassed by us at length in Telecom New Zealand Limited v Manawatu-Wanganui Regional Council W 66/97 pp 5 - 10. We find as a matter of law the course suggested by RANAG does not come within the provisions of Clause 14 of the First Schedule of the Act.

As to Clause 15(2) of the Act which refers to the Court's powers to modify, delete, or insert any provision referred to it, there was no suggestion by RANAG in its submissions that the proposed land use controls (which in effect are the provisions referred to) should require any of these modifications. In fact RANAG specifically excluded amendments to Parts 4 and 5 of the proposed district plan in endorsing the consent memorandum in confirmation. Therefore the process used in Mullins (see above) is not applicable in the current situation.

As to s.290(2) of the Act we consider in this record there is no reasonable case for changing or revoking any provision of the plan other than as set out in the consent orders. What RANAG has suggested is outside any of the original submissions. Such matters are more properly considered in the processes to be triggered by the airnoise management plan as RANAG itself acknowledges this will become a valuable tool for co-operation between the parties.

PART II

Unresolved Issues

The issue which remained unresolved by these orders was the appeal by BARNZ which sought to make new residential activity a prohibited activity in the Suburban Centres zone within the airnoise boundary. As a result of the negotiation/mediation, BARNZ amended its appeal to require new residential development to become non-complying in that area. In the event WIAL supported this amended approach. The council's new position (also taken as a result of the negotiation process) was for all new residential use to become a discretionary activity (unrestricted).

The hearing then proceeded with these new objectives in mind.

Historical Background

To understand the issues behind this part of the BARNZ and WIAL appeals it is necessary to briefly traverse the history of the airport and the environmental controls which have encompassed its use until now.

Prior to and immediately after the Second World War there was a small airfield between the suburb of Rongotai and the shoreline of Lyall Bay. At that time there were few large civilian aircraft, and the rare international services used flying boats which could land on Evans Bay. As late as 1948 Wellington was regarded as unsuitable for the development of a major land airport.

In the early 1950s, however, the Government decided to build a modern airport at Rongotai. To the north of the existing airfield, much of the suburb of Rongotai was to be cleared, and to the south, several hundred metres of Lyall Bay would be reclaimed for a runway. To the west, a large area of land had been developed for the New Zealand Centennial Exhibition in 1940, and the land again became available when the Exhibition buildings were destroyed by fire in 1948. In the 1950s, the land was developed by the council as an industrial estate. The airport, more or less in the shape we know it now, was completed in 1959. The industrial development on the Exhibition land continued through the 1960s and 70s.

The surrounding suburbs of Rongotai, Kilbirnie and Lyall Bay to the west, and Miramar to the east, were fairly well established in the first three decades of the century, though sparsely populated. The suburb of Strathmore (to the south of Miramar and the east of the airport) was largely developed after the war along with the development of the airport. Miramar grew up as a district area. Many of the houses were built by the Government. Substantial subdivisions have continued on the hills of southern Strathmore over the last few years.

Both of the well established suburbs to the east and west of the airport were mixtures of residential, commercial and industrial uses. The industrial areas are less of a feature now. Miramar was formerly a part of the port area, and contained the city's gasworks, a brick works and oil depots. Kilbirnie contained a council transport depot and workshop. To the extent that historical context is important, it must be acknowledged that these suburbs were traditionally industrialised, albeit that the effects at that time might have been quite different to those of a modern airport.

The proposed district plan shows that the airport area is surrounded by four different 'zones'. The largest neighbouring zone is Residential reflecting the suburbs of Rongotai, Lyall Bay, Strathmore and Miramar. The Suburban Centres area consists largely of industrial properties. Some are located close to the airport for business reasons. The open space areas are mostly the coastal strip between the road and the sea.

The current surrounding land uses can be split into four general areas as follows:-

- To the north-east are the offices of Wellington International Airport Limited and the Miramar and Burnham wharves. Through the Miramar cutting there is the Suburban Centre area of Miramar including retail, industrial and warehousing uses.

- To the east of Calabar Road and north of properties in Broadway are residential properties and Miramar South School.

- To the south-east is the Miramar Golfcourse and elevated above the airport are residential properties in Strathmore. Currently under construction in this area is the Moa Point Sewerage Plant.

- To the west are industrial properties and several residential streets. There is a further suburban centre area with industrial and warehousing uses. The residential properties in this area are primarily located on the flat land with the exception of some of those in Titirangi Road and Lonsdale Crescent which are on an elevated knoll which also contains the Civil Aviation Authority Tower. Some houses in Bridge Street and the eastern end of Coutts Street back on to the airport.

More recently there have also been boundary adjustments between the Miramar Golfcourse and the airport. Future developments at the airport include the new domestic facility.

The airport sits on an isthmus and the land surrounding it is bordered by Evans Bay at one end and Cooks Strait and Lyall Bay at the other. Thus many of the areas surrounding it have sea views and a variable landform with some relatively flat areas in between.

History of Environmental Controls

Wellington's first district scheme was made operative in 1972. In this 1972 scheme, the land shown designated for "airport" is almost identical to the current proposed district plan Airport Precinct (the only significant changes are that the precinct now includes some industrial land to the west and excludes the land to the east which has now been developed for the Moa Point wastewater treatment plant). The 1972 scheme was reviewed in 1979, and this review became operative in 1985. The 1985 operative district scheme is now the transitional district plan.

The transitional district plan similarly designated land for "airport", and the brief commentary on this designation in scheme statement (section 12) raises some interface issues, but noise is not explicitly one of them. If airport noise was generally regarded as a significant environmental issue for the city in 1979, one might have expected it to have been more prominently dealt with in the transitional plan. But the time it was notified in 1979 and/or adopted in 1985, airport noise had achieved considerable prominence and importance. There were a number of reasons for this. The airport undoubtedly became significantly noisier ten years ago with the advent of Ansett New Zealand into the domestic market. Not only was there a very substantial increase in the number of fights, but Ansett began its operations with old and noisy Boeing 737-100 planes. After a relatively short time, Ansett replaced these with the new, and very much quieter BAe 146 planes marketed as "Whisper Jets". Those were significantly quieter than both the 737-100s that they replaced and, perhaps more importantly, the 737-200s flown by Air New Zealand.

In the late 1980s, there was considerable pressure on the council to regulate to control aircraft noise. It concluded that even if it could change the transitional district plan in the face of an existing designation, there was likely to be a very lengthy hearing and appeals process. The council ultimately resolved to deal with the problem by way of two bylaws. The first would control engine testing. The second would control noisy aircraft. The proposed bylaw on noisy aircraft would both extend the "curfew" (then applying under a Civil Aviation Safety Order) to run from 10.00 pm to 7.00 am, and would require a phase out of "non chapter 3" aircraft. Non chapter 3 aircraft is a noise certification standard used by the US Federal Aviation Authority for jet aircraft. Series 100 and 200 Boeing 737 and 727 are not chapter 3 aircraft. But series 300 and higher, and series 200 hush-kitted are chapter 3 aircraft, as are the BAe 146 and Boeing 767. Jet aircraft flights scheduled into Wellington by Air New Zealand and Ansett involve only chapter 3 aircraft. Only the Crown (through the Ministry of Defence) routinely flies non chapter 3 aircraft into Wellington. The Crown is not bound by the bylaw.

The two bylaws were ultimately enacted and consolidated and remain in force. There are restrictions on engine testing and the use of Ground Power Units (GPUs) and Auxiliary Power Units (APUs) during the night, and there is an operational curfew and (since the end of 1994) a ban on the scheduling of non chapter 3 aircraft.

The current curfew restrictions at WIAL were set under the Civil Aviation Safety Order NZ (CASO 2) which sets the following hours for aircraft landing and take offs:

- domestic operations must not occur between midnight and 6.00 am
- international operations must not occur during the hours:
  - midnight to 6.00 am for departures
  - 1.00 am to 6.00 am for arrivals

with exceptions for late-running, and emergency flights.

This order was deleted as at March 1997.

This 'curfew' has been modified to some degree since its introduction in 1975 (at that time, essentially for engine testing). Resident groups were concerned at the perceived erosion of their night time peace, and concerned that such erosion might continue with either an across the board shortening of the curfew, or an expansion of the exceptions.

Airlines generally accepted the curfew, noting as an aside that there was normally little demand for scheduled domestic operations within that time. Changes to the wording of the proposed rules will better define the situation; but it is clear that extensions to the curfew, either permanent or casual, should be made only with compelling cause. There was evidence that in particular international flights must have regard to the existence of overseas curfews, and in order to maximise the efficient use of aircraft, so that flights are likely to be scheduled to the limit of the times permitted.

There was an acceptance by all parties that a curfew was probably an essential consequence of the situation of Wellington Airport because of its proximity to residential dwellings.

The Airport Noise Provisions and Noise Standard NZS 6805

In 1992 the New Zealand Standards Association developed a standard for use by local authorities in regulating airport noise. This Standard (NZS 6805:1992) is a key part of the proposed district plan provisions for the control of aircraft generated noise. The Standard was published after several years of preparation, including consultation with a number of interest groups including RANAG. Its aim is to provide a mechanism to manage the potential adverse effects from the airport, such as noise, while recognising the need to operate a major resource with national significance.

NZS 6805 anticipates the use of the airnoise boundary concept as a means whereby local authorities may establish compatible land use planning around an airport and set limits for the management of aircraft noise at airports. Its adoption was seen by the expert noise consultants as a significant step forward with acoustic planning around airports. It is based on the Day/Night Sound Level (L_{dn}) which measures the cumulative 'noise energy' that is produced by all flights during a typical day, evenly measured over a rolling 3 month period, with a 10 dBA penalty applied to night flights to make allowance for the greater disturbance these represent. It was explained that the L_{dn} measurement is used extensively overseas for noise assessment and it has been found to correlate well with community response to aircraft noise.

The total package in NZS 6805 involves fixing two noise boundaries, the main airnoise boundary around the airport and, further out, an outer control boundary. The airnoise boundary is the location where, given the parameters of airport activity, topography and so on, it is projected that a limit of L_{dn} 65 dBA will fall. It thus becomes the location beyond which that noise level shall not be exceeded. The noise boundary, as calculated, will be in the form of a 'noise contour' but an airnoise boundary will be drawn having regard to roads and property boundaries. The outer control boundary is to be drawn with regard to the projected L_{dn} 55 dBA criteria, similarly adapted to physical boundaries. The outer control boundary is not in itself an airnoise compliance boundary, but is intended for land use controls.

NZS 6805 sets out (in Tables 1 and 2) recommendations for land use control with regard to an airnoise boundary and outer control boundary. Inside the airnoise boundary at L_{dn} 65 dBA, new noise sensitive uses (including residential) are prohibited unless a district plan permits such use subject to appropriate sound insulation and alterations or additions to existing noise sensitive uses (including residential) should include appropriate sound insulation. At the L_{dn} 70 dBA contour it is recommended consideration be given to purchasing homes or relocating residents and re-zoning the area to non-residential use only. Within the L_{dn} 75 dBA contour the standard records that there is a

high possibility of adverse health effects. Land is not to be used for residential or other noise sensitive uses. These recommendations have not been adopted relative to the proposed district plan.

The concept of development of an airnoise boundary was described to the hearing as a 'noise bucket' which is useful in further discussing the management of airport noise. In simple terms, implication of the use of a 'noise bucket' as a management tool are that:

- the quieter an aircraft, given an equal number of events (take-off or landing), the longer it takes to fill the bucket
- as noise levels double with each 10 dBA, noisier aircraft will fill the bucket more quickly
- if the bucket fills too quickly within a defined time period, the airline has to take remedial action
- a penalty will be applied to noise events at particular times eg. at night.

The effective operation of this concept requires:

- reliable and consistent measuring at a points agreed to by all concerned parties
- the ability to relate a particular noise event to a defined aircraft movement
- the effective monitoring of results to ensure that there is early warning of significant variances from forecast trends.
- the availability of results, in reasonable detail, for all concerned parties.

The location of the airnoise boundary, that is the line outside of which the noise dose may not overflow, will determine the extent of noise emission from the airport. An airnoise boundary set closer to the airport than noise levels generated by its current activity could require immediate measures to reduce that noise and could curtail the activity of the airport as a result. By setting the airnoise boundary further out, expansion of airport activity is possible, but the adjacent population will be exposed to higher levels of noise.

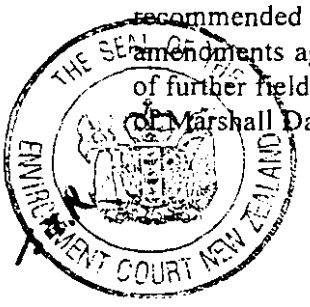
There is reference in the NZS 6805 to matters the local authority may take into account in considering whether the airnoise boundary and outer control boundary will be a reasonable basis for land use planning. Specifically it recommends that,

> **"... the local authority should incorporate into its district plan a map showing the projected sound exposure contours, or showing the contours in a position further from, or closer to the airport, if it considers it more reasonable to do so in the special circumstances of the case."**
> (NZS 6805, part 1.4.3.8)

This direction has been incorporated into the provisions of the proposed district plan **Map 39**, and was determined on projections made in 1993 and 1994, based on 1992 data, and representing the airport operating at a capacity or close to capacity situation, based on expected developments in aircraft use and accepting regulatory, marketing and operational constraints.

Over the last two or three years, and especially with the implementation of the current noise monitoring programme, the quality of data input into these assumptions changed quite significantly, which then led to further refinement of where the airnoise boundary will fall, based on the above assumptions.

After consideration of submissions, in particular that from WIAL, the council's analysts recommended several changes to Map 39. In the evidence before us the parties requested further amendments again. These more recent modifications made to the airnoise boundary were the result of further field measurements undertaken by Mr M Hunt, acoustic consultant to WIAL and Mr C Day of Marshall Day Associates for BARNZ (peer reviewed by Mr N Hegley, acoustic consultant for the



council). These modifications are set out in Figure 10 taken from Mr Day's evidence-in-chief and attached to this decision as Appendix I.

A high level of confidence was expressed at the hearing that the airnoise boundary as now proposed (in particular by WIAL and BARNZ), would represent an achievable 'noise dose' for Wellington Airport operating at predicted capacity. As Mr Hegley deposed, it is the total daily noise dose received by the residents that is important, not individual events.

The projected L_{dn} 65 dBA contour, in all cases, falls well inside the estimated equivalent 1988 L_{dn} 65 dBA contour, and consequently there are now far fewer houses that are inside this area. The projected L_{dn} 65 dBA contour falls outside the calculated 1995 L_{dn} 65 dBA contour line. Acceptance of the proposed noise dose for Wellington Airport in the period up to the year 2020 (see Appendix I) therefore represents a slight overall increase of noise from that experienced at present, but retention into the future of a situation significantly better than that experienced in 1988. (We note the projection goes well beyond the life of the proposed plan.)

The plan does not define an outer control boundary, although this was the subject of submissions. It was not recommended by the Hearing Commissioners and its omission was not under challenge before this Court.

While NZS 6805 forms the basis of the airport noise provisions in the proposed plan, the plan provisions differ in relation to the land use planning measures in recognition of the fact that the area on either side of the airport is an existing residential neighbourhood.

There are two designations in relation to the airport, both of them administered by WIAL as the Requiring Authority. One relates to airport land itself and the other to airspace in the vicinity of the airport. The proposed Airspace Designation has restrictions to limit the construction of any structures which may inhibit its safe and efficient operation. A hearing has recently been held on this designation and a recommendation from the Hearings Committee to the Requiring Authority at the time of hearing these appeals was awaited. In respect of the land designation, there were several legal and practical difficulties associated with its promotion but the Court was advised the designation would be withdrawn once they were resolved. The plan provides that when the Airport designation is withdrawn it will be replaced by the Airport and Golfcourse Recreation Precinct (Section 10.1)with its own objectives, policies and rules administered by the council as the territorial local authority.

The Wellington Airport, the NZS 6805 and Other New Zealand Airports

Other councils around New Zealand have applied the NZS 6805 to their airports such as Christchurch City, Manukau City and Queenstown-Lakes District. In Christchurch the airport was created in a rural area. We understand it was therefore possible for the council to impose land use controls as recommended in NZS 6805. Within the L_{dn} dBA 65 noise contour, new residential development is a prohibited activity.

Auckland International Airport has partially imposed NZS 6805. That facility has an existing buffer of predominantly rural land with limitations on new residential activities. New noise sensitive development in the proposed plan is a controlled activity between the outer control boundary and the airnoise boundary. New noise sensitive activities and extensions to existing properties are discretionary activities within the airnoise boundary.

In Queenstown the airport is surrounded on two sides by rural land and the other two sides by residential. Within the airnoise boundary of the proposed Residential area, new residential development is a non-complying activity but visitor accommodation and recreational uses are

permitted. subject to achieving noise attenuation. In the existing Residential area new residential uses are controlled within the outer control boundary.

We understand BARNZ has appealed some of these decisions.

Other Provisions of the Proposed District Plan

One of the main approaches the council has taken in drawing up its proposed district plan is a simplification of zoning. There were 45 zones in the Wellington City Council Transitional District plan. These included almost 30 different residential areas and 16 zones covering suburban, retail and industrial areas in the city.

The proposed district plan is restructured into different areas including two principal Residential areas (Inner and Outer areas), one Central area, and one Suburban Centres area.

The council has taken an effects based approach in respect of former commercial areas. In the Central area and in the Suburban Centres area any activity is permitted subject to additional performance based conditions, with the exception of those activities listed in the Third Schedule to the Health Act 1956. Multi-unit residential development is also subject to a Design Guide where three or more units are proposed. In the Airport and Golfcourse Precinct activities that relate to the primary functions of the precinct and activities ancillary to those functions are permitted.

We have set out below only those provisions of the proposed plans that have relevance to the issues remaining before the Court. Because the Suburban Centres area within the airnoise boundary is proximate to the Airport Precinct we set out those provisions also.

General Objectives and Policies

Section 1.2 "**Significant Resource Management Issues for Wellington**" sets out the General Principles of Sustainability. They include ... **Diversity, Efficiency, Finite Resources, Equity, Precautionary Approach**. The summation of these identifies that:

> "These principles do not mean that society is restrained from moving forward. They mean that where change or development occurs, sustainability and what it entails must guide the management process."

Under Section 1.3 **"Working toward Achieving a Sustainable Wellington City"** includes various statements such as **Managing Adverse Effects of Human Activities on the Environment** which records that human impacts can be managed by establishing environmental limits for the effects of development. Another, **Enabling People to Meet their Needs**, records that the plan makes provision for activities that enable people to meet their needs and aspirations while at the same time it aims to ensure that the environment can sustain the needs and aspirations of future generations. It records the plan provides a level of certainty to the community about what can happen in their environment and gives people the ability to influence how things occur. Under the heading **Future Generations**, the plan records that just as we benefit from the city's heritage so we must ensure that future citizens inherit a clean, conserved, functioning environment in a viable economy. Under the heading **Efficient Resource Use** it notes that sustainable management requires the city to use natural and physical resources in an efficient manner. Improving the way resources are used can lessen adverse environmental effects.

The conclusion to Section 1.3 is that sustainable management in Wellington is about maintaining the balance between development and the need to protect natural and physical as well as human environments.

Section 1.4 identifies that one of the issues for the City is "**Integrated Management of the Environment**". That states:

> "Numerous other institutions and policies influence, and in some cases dictate, the direction the Council takes managing the environment or controlling adverse effects. Other influences range from community aspirations to Government legislation. To achieve sustainable management, and to maintain it, means managing all these diverse aspects in an integrated manner. Integrated management is the foundation on which sustainability can be built."

Section 1.6.1 sets out identified "**Qualities and Values**" associated with Wellington. They include an **Efficient City**, **Amenity**, a **Health/Safe City**, an **Accessible City**, a **Natural Environment**. Section 1.6.2 sets out '**Specific Issues**' for sustainable management including **Containing Urban Development, Managing Rural and Coastal Areas, Protecting Open Space, Maintaining the Quality of Living Environments, Providing Areas to Facilitate Economic Growth and Development, Maintaining and Enhancing the Quality of the Built Environment, Maintaining and Enhancing the Quality of the Natural Environment, Lessening Hazards.**

Section 1.6.3 **District Plan Objectives** for managing the city state:

> "The significant resource issues identified above have been used to define objectives that describe the direction that Council intends to take in the management of the City. These are expressed for each part of the City in the relevant part of this Plan.
>
> The objectives listed here provide a template that has been applied to each area of the City. They provide a link between the resource management issues and the more specific provisions of the Plan. Ultimately they allow the rules to be traced back to their role, under the Act, of promoting sustainable management."

The objectives we consider relevant in these appeals are as follows:

> "• To maintain and enhance the amenity values of the City. (Q2, S3, S4, S6)
>
> • To maintain and enhance the physical character of Wellington ... (Q2, S4, S6)
>
> • To promote the efficient use of natural and physical resources within Wellington. (Q1, Q4, S1, S5, S6)
>
> • To encourage most new residential development to take place within existing developed parts of the City, and ensure that new subdivisions, where developed, are on suitable sites and are well designed and adequately services. (Q1, Q4, S1)
>
> • To manage the actual and potential effects of contamination, waste disposal and pollution. (Q3, S7, S8)
>
> • To promote the development of a safe and healthy city. (Q3, S4, S6, S8)"

Section 1.8 sets out **The Plan's Components**. Section 1.8.1 **Objectives and Policies** are further defined as follows:

> "Objectives within the Plan set out the direction Council intends to take in relation to any particular issue. Its methods do the same, on a more specific level. Both Objectives and Policies allow the Plan's rules to be interpreted in the context of what Council is trying to achieve and what environmental outcomes are being sought.
>
> The objectives and policies will guide decision-making when the granting of resource consents is being considered or when Plan changes are contemplated. Because integrated management is essential to the proper working of the Plan, they will also have influence on other Council policies."

The Objectives listed in section 1.6.3 are described in section 1.8.5 of the proposed district plan as:

J.E.K.

> ".... the environmental outcomes the Council seeks to attain and the policies are the ways the objectives or outcomes will be achieved. The rules provide the means for Council to carry out its functions under the Act and to achieve the objectives and policies of the Plan."

The plan identifies methods for achieving such environmental outcomes under its heading **Objectives, Policies, Rules**. Section 1.8.2 "**Methods**" puts the relationship between regulation in the form of rules in the plan and other methods of achieving outcomes into context. This states:-

> "In many cases, the method used in the District Plan to achieve objectives and policies will be the setting of rules to control land use. Resource consents (and their associated conditions) are a crucial tool for the management of the effects of development. Integrated management of the environment will, however, require the use of other mechanisms to help achieve environmental outcomes, particularly in cases where a rule may not be the best solution.
>
> Council will use advocacy, the provision of information, education and incentives (including economic incentives such as financial contributions, or rates relief) where appropriate. Often these approaches are backed up by District Plan rules. Council also has the ability to use other regulatory means (for example, bylaws) and its operational activities to influence the use, development or protection of natural and physical resources."

Section 1.8.4 **Rules** states that the rules in the plan are intended to protect the environment from the adverse effects of activities. The plan uses the following categories: Permitted, Controlled, Discretionary (Restricted), Discretionary (Unrestricted). It records:

> "Broadly speaking, the rule types are listed in order of increasing actual or potential adverse effects. Resource consents (land use consents or subdivision consents) are not required for Permitted Activities but are required for all others. Discretionary activities have been divided into those where Council has chosen to restrict the exercise of its discretion to certain matters, and those where there is no restriction on the exercise of Council's discretion: these are identified in the plan as Discretionary Activities (Restricted), and Discretionary Activities (Unrestricted). Where rules in the Plan are contravened, applications will be deemed to be Non-complying.
>
> The Resource Management Act also allowed for a Prohibited category to be used. This category has not been used in this District Plan.
>
> .....
>
> The rules will also state which applications will be notified. Applications for resource consents will be publicly notified where Council is of the opinion that community input into any decision is necessary. Where Council thinks that the effects of an activity are not significant or immediate neighbours are unaffected, or where the matter under consideration involves the administration of city infrastructure, the rules may state that notification will not be needed. This may also apply in cases where Council is acting on behalf of the wider community to achieve a better quality environment, such as urban design issues, or to enable the efficient administration of the Plan."

Residential Areas

Section 4 of the plan sets out the objectives and policies which apply to residential areas. Before the consent orders were filed, the residential provisions applying to the properties adjoining the airport were the same as those applying in (for example) Karori or Tawa. Residential activities were a permitted activity in the residential areas within the airnoise boundary subject only to a Design Guide for Multi-Unit Housing. Now new residential development of up to two units in the Outer Residential zone within the airnoise boundary is permitted subject to the insulation rule and developments of three units are more on sites in the Outer Residential zoned land within the airnoise boundary can be determined by way of resource consent application as discretionary (unrestricted) activities.

In respect of noise, the Residential Area policy 4.2.2.3 provided for:-

"Control the adverse effects of noise within Residential Areas.

Methods
- Rules
- Other mechanisms (Enforcement Orders, Abatement Notices)"

Rule 5.1.3 provides that:

> "The construction, alteration of, and addition to, residential buildings, including accessory buildings, is a permitted activity (except in residential character areas or on a legal road) provided the new building or the new part of the building complies with the following conditions ..."

In its decision, the council placed one restriction on land uses inside the airnoise boundary. It sought to apply the approach taken in the noise standard (NZS 6805:1992) to the area outside the airnoise boundary, ie the approach recommended in Table 2 of the standard to apply to land falling between 55 dBA and 65 dBA. The new rule from the consent orders reads as follows:

> "5.1.3.10 Residential Building Within the Airnoise Boundary
>
> Any new residential dwellings inside the airnoise boundary depicted on Map 39 must be designed and constructed so as to afford a reduction in noise of 30 dBA Lmax from the noise level outside, to that expected inside (doors and windows closed) and any living room, dining room, kitchen, bedroom or study.
>
> The certification of an approved acoustical engineer will be accepted as evidence that designs meet the insulation standard. A list of approved acoustical engineers shall be agreed between the Council and the Airnoise Management Committee and shall be made available on request by the Council."

It was agreed on the advice of the various acoustic consultants at the hearing before us that this standard should be changed to achieve an interior noise standard of 45 dBA L_{dn} and the draft consent orders filed on 19 August 1997 reflect this change. It was accepted this standard should now apply to new residential dwellings in the Suburban Centre area also.

Suburban Centre Areas

The introductory paragraphs of section 6.1 state:

> The Suburban Centre provisions in the District Plan cover the more significant retail and industrial centres in the suburban areas of Wellington City. These important areas provide a base for a wide range of economic activity essential for the City's growth and development.
>
> ...
>
> The District Plan recognises these changing patterns in Suburban Centres by enabling most activities (with limited exceptions) to be Permitted Activities. This will provide flexibility for centres to respond to changing market situations.

Section 6 contains the objectives and policies which apply to the Suburban Centres area. The remainder of the land within the airnoise boundary, not located within the Airport and Golfcourse Precinct and Outer Residential area, is within the Suburban Centres area.

In Objective 6.2 **Suburban Centre Objectives and Policies**, Objective 6.2.1 seeks:

> "To promote the efficient use of natural and physical resources within the Suburban Centres."

The policies used to achieve this objective include:

6.2.1.1 **Generally contain existing Suburban Centres within defined boundaries.**

6.2.1.2 **Encourage a wide range of activities by allowing most uses or activities within a Suburban Centre provided that the conditions specified in the Plan are satisfied.**

This is subject to the standards which are then listed, to include a requirement for noise insulation as required in the Residential area within the airnoise boundary.

Objective 6.2.9 seeks:

> **"To promote the development of a safe and healthy city."**

Policy 6.2.2.3 states, in respect of noise, that the council will control the adverse effects of noise within Suburban Centres by way of rules and other mechanisms such as abatement notices and enforcement orders.

The explanation to the policies and objective records:

> **".... Noise levels are designed to allow most activities to occur. Where noise sensitive uses (including residential) are proposed for Suburban Centres it is the responsibility of the developer or user to ensure that buildings are appropriately insulated against excessive noise."**

Section 7 sets out the rules which apply to the Suburban Centres area.

Under Rule 7.1.1 any activity is permitted, subject to performance standards and bulk and location requirements, except for:

- **those specified as Controlled Activities, Discretionary Activities (Restricted) or Discretionary Activities (Unrestricted)**

Rule 7.1.2 states that the construction, alteration of, and addition to buildings and structures is permitted except for those specified as Controlled Activities, Discretionary Activities (Restricted) or Discretionary Activities (Unrestricted) provided they comply with certain conditions.

Under Discretionary Activities (Restricted) Rule 7.3.4 states that:

> **The construction of residential buildings, including accessory buildings, where the result will be three or more household units at ground level on any site is a Discretionary Activity (Restricted) in respect of:**
>
> | | |
> |---|---|
> | **7.3.4.1** | **design, external appearance and siting;** |
> | **7.3.4.2** | **site landscaping; and** |
> | **7.3.4.3** | **parking and site access** |

It should be noted that multi-unit residential development in the Suburban Centres areas is not restricted by yard and coverage requirements as in the Residential zones. Therefore higher density could be achieved, particularly since height controls in the Suburban Centres area allow development up to 12 metres.

Section 7.4 describes which activities are Discretionary Activities (Unrestricted) in Suburban Centres.

Section 7.4.3 states that any use of a contaminated site is a Discretionary Activity (Unrestricted).

7.5 Non-Complying Activities are defined as:

"Activities that contravene a Rule in the plan. Resource consents notifications will be notified but any application may not be notified if the effect of the activity is minor and written approval is obtained of all affected persons.

In general, applications will be notified. An application may not be notified if the effect of the activity is minor and the written approval is obtained of all affected persons ...."

Airport and Golf Course Precinct

Section 10.2 sets out the Airport and Golf Course Precinct Objectives and Policies. There are two specific objectives in respect of the Airport Precinct:

10.2.1 To promote the efficient operation of the Airport and a planned approach to its future development; ...

10.2.2 To protect the amenities of areas surrounding and within the Precinct from adverse environmental effects.

The intention of the proposed plan is to provide the maximum amount of flexibility for the Airport and the Golfcourse in recognition of the fact that they are special land uses within the City which have a key role in its economic wellbeing.

To achieve **Objective 10.2.1** the council applies the following **Policies**:-

10.2.1.1 To identify the Airport as an area within the Precinct with a distinct character and uses.

10.2.1.2 To establish District Plan provisions which can accommodate future comprehensive re-development of the Airport.

To achieve **Objective 10.2.2** the council applies the following **Policies**:-

10.2.2.1 Exercise an appropriate level of control over Airport and ancillary activities for the avoidance or mitigation of adverse effects.

10.2.2.2 Ensure a reasonable protection of residential and school uses from Airport activities by providing controls on bulk and location, ensuring sufficient space is available for landscape design and screening, and by retaining a buffer of land of a recreational nature to the east of the Airport.

10.2.2.3 ....

10.2.2.4 ....

10.2.2.5 ....

10.2.2.6 Manage the noise environment to maintain and where possible enhance community health and welfare.

It also includes the addition of new wording under **Policy** 10.2.2.6 which includes under methods for achieving policies the following:

.....

- A noise management plan (NMP) will be promoted to assist all interested parties in complying with the objectives and rules in the district plan.

Within the Airport area a range of uses are permitted which are essential for the safe, efficient and economic operation of the Airport. These include runways, taxiways, terminals, air carrier facilities and aircraft maintenance as well as a number of support and commercial activities.

S.E.K.

The **Airport Area Rules** for Permitted Activities allow for activities related to the primary function of the Airport area and activities and services ancillary to this primary function to be Permitted Activities provided that they comply with conditions relating to issues such as noise. These are rules now amended, as set out in the Consent Orders above.

The Council's Case

The council's counsel, Mr Mitchell provided a comprehensive background of the issues before the Court in his opening submissions. We note that these were made before the parties had agreed to new multi-unit developments in the Residential zone within the airnoise boundary becoming discretionary activities (unrestricted). So we reproduce part of them here with that caveat. He submitted that we are required to balance the competing sensitivities of the airport operation with those of the residential community and stated:

> "It is generally accepted that prolonged exposure to the noise levels which will typically occur within the ANB (airnoise boundary) is unhealthy for people with normal sensitivity, and for that reason, the area inside the ANB is not a good residential environment. Equally, it is not desirable for either the airport or the airlines to have to make major financial decisions constrained by the potential for clashes with residential activity.
>
> [But] the solution suggested by NZS 6805 and advocated by BARNZ is neither practical nor equitable. The reality the court is confronted with is that there are a significant number of residential properties within the ANB which were there long before airport noise assumed the level of importance it is today. The options of prohibiting or requiring non-complying activity consents for new residential developments on these properties (which could include extensions to existing houses) both, on the face of it, impose significant penalties on the current property owners.
>
> One of the questions posed [by the council] was just how the costs of controlling noise should be allocated. The council's view is that the NZS 6805 answer advocated by BARNZ imposes too much of the cost on the airport's residential neighbours. It is a solution which is inconsistent with both s.7(c) and, arguably, s.31(d). In other words, encouraging people to relocate is a crude and suboptimal way of protecting amenity values and controlling the adverse effects of noise.
>
> On balance, the solution given by the proposed district plan is preferable. If people want to carry out new residential developments within the ANB, then they should be free to do so, subject to controls which will ensure an acoustically improved living environment."

Evidence was given to the Court by Mr L J Daysh, Policy Analyst in the Physical Urban and Natural Policy section of the council; Mr R W Styles, Policy Analyst/Adviser to the council on airport noise, financial contributions and s.32 analysis of costs and benefits; and Mr N Hegley, noise consultant. Evidence was tabled by Mr J Sule, Environmental Health Officer for the council, Mr P W J Clough, consultant economist who gave an analysis of the economic impact of potential changes to the proposed controls, Mr P Beddek, consultant quantity surveyor whose office has recently undertaken extensive studies of the costs of introducing new thermal insulation code requirements for housing throughout New Zealand; and Mr G Kirkcaldie, consultant valuer who discussed trends in residential valuations around the airport.

Part of Mr Daysh's evidence was taken up with the council's explanation as to why it had (originally) proposed that new residential dwellings be permitted in both the Suburban Centres and Residential zones, an analysis commensurate with its duties under s.32 of the Act. He attested to the fact that the Christchurch, Auckland and Queenstown airports, mentioned above, are very different in terms of current land uses and topography from Wellington Airport in that they are more easily able to utilise the guidance of NZS 6805, particularly in respect of an outer control boundary. He considered, for example, that re-zoning the long standing residential properties which are exposed to noise levels above L_{dn} 65 dBA is not an option in Wellington, and that such an approach is inconsistent with the principles of sustainable management in the Wellington situation. Such an action in his view may

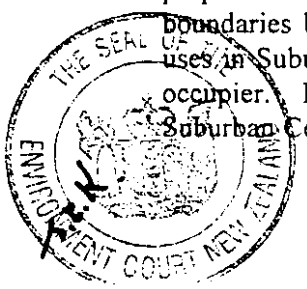
lead to sterilisation of land in the hope that uses which are not noise sensitive will establish. In such a situation there would be a strong likelihood of blighting existing houses through uncertainty and disinvestment and it would create a significant negative social impact for a community which is well established. He pointed out that re-zoning residential properties so they are not used for residential purposes in the future leaves the existing property owners with existing use rights.

A further option was for WIAL to designate the land and purchase the freehold by compulsion if necessary, but this approach was not favoured by either WIAL or the council. In Mr Daysh's opinion "re-zoning" would have to be achieved by a combination of progressive purchasing and/or gradual replacement with new land uses which are not sensitive to airport noise. Other options might include non-statutory methods such as incremental insulation of properties. This could include direct or indirect payments by WIAL to private landowners. In Mr Daysh's view the most difficult factor to establish is equity since the large majority of existing landowners have bought properties in the area in the knowledge of the existence of the airport and its noise effects. If insulation of existing properties was paid for totally by other means, then a private benefit would accrue to property owners who have bought at a lower cost. The council anticipates that this is an issue which can be dealt with through the development of the noise management plan.

In response to the BARNZ and WIAL amended appeals Mr Daysh deposed that labelling activities non-complying has not been used anywhere else in the proposed plan and was a technique not recommended. Firstly, because the council did not consider it equitable in that existing owners have legitimate expectations that they should be able to utilise their land to its potential. Categorising the new residential use within the airnoise boundary of the airport as non-complying may lead to blighting effects with landowners possibly reluctant to carry out even incremental improvements. Secondly, the council's general approach is that the non-complying activity provision of s.105(2)(b) of the Act would only apply in respect of any proposal that does not meet the standards and terms for permitted controlled or discretionary activities. Thirdly, making new residential development non-complying would run counter to the council's position on promoting better utilisation of land in its Urban Containment objective. Fourthly, making new residential development a non-complying activity would also increase administrative costs as the assumption is that such applications would be notified.

If there were standard issues to be resolved to allow adverse affects to be minor in his view it would be a better option to include a standard condition in a permitted activity rule, as recommended by the Hearing Commissioners in requiring construction to a higher specification of noise attenuation. Further, while the council could in theory decline all applications that were non-complying, it was more likely to approve some applications and not others which would be seen to be unfair. It would also be difficult to establish what relative impact to the airport there would be of approving 10 new insulated houses (for example) compared with say 50. If the objective was to provide adequate levels of noise attenuation, then a condition on permitted activities requiring insulation would achieve this satisfactorily.

The council also took a position on the issue of "reverse sensitivity" submitted for the Court's consideration by BARNZ. Mr Daysh identified that a submission by Optoplast Limited had requested that new residential development within Suburban Centres be a discretionary activity instead of permitted. This was based on the argument that legitimate existing industrial or business occupiers may be constrained by the existence of new residential development. The submission was rejected on the basis that the Hearings Committee did not consider that public notification of all development proposals was necessary in Suburban Centres areas. The Committee acknowledged that the boundaries between uses are the points where most conflict can occur, but establishing residential uses in Suburban Centres areas would still need to be at the discretion of the landowner and future occupier. Mr Daysh considered that the same issue that applies to new residential activity in Suburban Centres areas generally applies to new residential activity within the airnoise boundary. He



supported a new condition being imposed in Suburban Centres which mirrors the decision of council in respect of noise insulation in Residential areas within the airnoise boundary. This would place the onus on all residential developers to provide the same levels of noise attenuation within the vicinity of the airport.

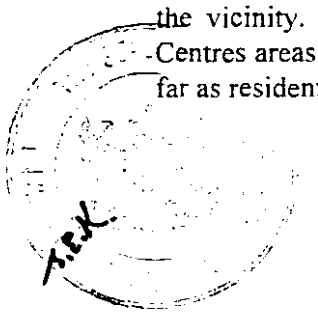
The WIAL Case

The background to the planning and development of the airport was comprehensively reviewed by Mr D S Gordon, Planning and Development Manager for WIAL. He also detailed operational reforms. He traversed the details of WIAL's liaison with the residential community, the promotion and involvement of the community in respect of noise issues in the proposed noise management plan, and the establishment of the consultative group now known as the Wellington Airport Noise Management Committee which has representatives from all parties. Mr Gordon also analysed the details of the considerable economic benefit the airport brings to the region. Overall, the witness provided a helpful overview to the Court which was confirmed in most of its practical aspects during the site visit undertaken with him and with Mrs Maxine Harris from RANAG.

With respect to the unresolved issue before this Court, WIAL moved to support the BARNZ approach that new residential development in the Suburban Centres area inside the airnoise boundary should be considered a non-complying activity because the area currently contains no significant residential development.

Mr A Aburn, planning consultant to WIAL identified that there are a quite specific set of circumstances revolving around the issue of airport noise and potential residential development within the Suburban Centres areas within the airnoise boundary, which do not exist within the other Suburban Centres areas in the proposed plan. He pointed out that the introduction to the Suburban Centres section of the proposed plan identifies that they cover "the more significant retail and industrial centres in the suburban areas of Wellington City (s.6.1)". These "important" areas provide for a wide range of economic activity essential for the city's growth and development and are not focused on residential use as a consequence. They have their planning roots in the major port, railway or airport functions of the city, or they flow from such (former and current) uses as quarries, abattoirs or gas works. And he identified that the quite specific set of circumstances in this case, revolving around noise issues from the airport area within the airnoise boundary, do not exist in the other Suburban Centres areas and therefore they will not be affected by the proposed changes in the same way (as for example would be major industrial uses in Kaiwharawhara).

And in contrast with the Outer Residential area within the airnoise boundary, which is very substantially developed with few vacant sites, Mr Aburn deposed there is no need to provide for potential renewal in the Suburban Centres area within the airnoise boundary for it currently has no significant residential development. It is therefore not a question of providing the opportunity for further development requiring sustainable management of an existing resource. The witness deposed that it is not good planning to encourage new residential development in Suburban Centres areas where they lie inside the airnoise boundary. As a result it was his conclusion that new residential development should not be given any encouragement to locate there - which a proposed discretionary (unrestricted) status would do. And he concluded the council's stance regarding the need to retain the consistency of district plan provisions is (in effect) not strong enough to potentially allow a significant additional number of residential dwelling units in those areas where presently residential dwellings are not a feature, given the history of airport noise and its impact on residential amenities in the vicinity. His opinion, which supported that of BARNZ, was that these identified Suburban Centres areas within the airnoise boundary may be seen as equivalent to a "greenfields" situation in so far as residential development is concerned.



Evidence was also tabled by Mr M J Hunt, noise consultant to WIAL and Mr G Andrews, consultant economist.

The BARNZ Case

The case for BARNZ was outlined in submissions by its counsel, Mr Nolan. He identified that because the Wellington International Airport is part of both the domestic and international airline networks, the implications of the provisions of the proposed plan extend far beyond this city to the whole of the regional and national economy. Consequently we were urged to take a more direct focus on the significance of the airport resource to these economies than did the council. And we were urged to make proper allowance for the potential adverse effects on the airport and its users from a further increase in residential activity in close proximity. It was submitted that the sustainable management of the airport requires any local adverse issues to be considered along with the positive local, national and international benefits which accrue from the airport's activities. The example was given that there is little point in the council protecting the airnoise boundary around its airport if domestic flights from Christchurch to Wellington are constrained by the council failing to adequately protect land use around the airport. Accordingly, it was put to us that the proposed plan needs to contain provisions which promote sustainable management from that broad perspective and accordingly appropriate land use controls must be an integral part of this. It was the evidence of one of the BARNZ witnesses that the proposed plan provisions in respect of the airport was sending the wrong signals; that it was one sided in favour of the residents only.

We were invited to consider also that just because BARNZ agreed to discretionary activity status for new residential uses in the Residential zone, this should not be taken as any indication the same provision would be appropriate for residential activities at other airports in New Zealand or the residential activities within the airnoise boundary in the Suburban Centres zone in Wellington. Discretionary activity status would mean the district plan sees the relationship between the residents and the airport as "neutral" - the type of activity may or may not be suitable and will depend on individual scrutiny. Either that, or the district plan sees the generic use (residential development) as generally acceptable in those zones, but not necessarily all manifestations of that use on all sites in the zone. As a result the non-complying activity status is the stronger control which is needed. Whilst it may be acknowledged that the proximity of residential dwellings to the Wellington airport is somewhat unique, BARNZ was of the opinion there are no special local circumstances applying to the Suburban Centres zone which would require the same approach. It was submitted that the area must be seen as primarily an area set aside for commercial and industrial activities with minimal existing intrusion of housing; for all practical purposes it is as much a "greenfield" situation as exists in some other airports where rural land is located nearby. Although there is little existing housing, it is the zone which has by far the greater potential for multi-unit development as former industrial land is vacated.

We were advised that while BARNZ had initially seen advantages in the prohibited activity approach to residential use at other airports, it has moved to a considerable compromise in Wellington accepting a mixture of permitted and discretionary activity status for new housing in the Residential zone which will now allow some increase in housing stock but a certain degree of control over activities. It was submitted that the proposed plan should be upfront indicating that new housing is not appropriate and should discourage its promotion by allocating it a non-complying status.

Counsel also submitted it is not enough to avoid adverse effects on the residents by limiting aircraft operations to L_{dn} 65 dBA at the airnoise boundary and by controlling APUs and GPUs and engine testing. What is also required is proper land use planning to recognise and provide for the ongoing use of the airport and to avoid potential adverse effects of other uses on the airport itself. We were urged to remember that the need for consistency is one of the reasons that led to NZS 6805 recommending a two-handed approach to the issue of airport noise - i.e. controls on airport noise but

also controls on land uses. Thus non-complying status is essential to achieve these effects. It was submitted that BARNZ's members have done everything that could be expected of them. They are operating Chapter 3 compliant aircraft through Wellington, years ahead of international requirements and they have accepted the wide range of airport noise controls in the proposed plan. However, these need to be complimented by land use controls in the form of non-complying activity status for new housing in the Suburban areas zone.

Counsel then analysed the BARNZ proposed approach to the Suburban Centres zone in terms of the purpose of the Act emphasising the need to avoid, remedy or mitigating any adverse effects of activities around the airport on the use of the airport. In this regard the issue of "reverse sensitivity" was raised as an issue for debate, that is, the effects sensitive activities can have on other uses in their vicinity, particularly by leading to restraints on airport activities. Citing a number of cases recently decided on the issue counsel submitted that it is settled law that the adverse effects of potentially incompatible uses should be avoided, remedied or mitigated where they would be likely to place restrictions on, or inevitably come into conflict with, the use of other resources.

Evidence for BARNZ was given by Mr D S Park - former Manager Flight Operations for Air New Zealand National and closely involved in the formation of NZS 6805 and who represented the company on the Environment Task Force (ENTAF) of the International Air Transport Association (IATA); Mr C W Day - Marshall Day Associates, acoustic consultant: Mr I R Brown - MacGregor and Co consultant in Transport Economics: Mr R Batty - planning consultant. Evidence was tabled from Mr W W L J Bourke - Manager, Aircraft Development and Performance Engineering for Quantas Airway Limited Australia and Mr J H Webb, Executive Director of BARNZ.

The Remaining Issues

There are two main resource management issues in respect of airport noise that remain to be addressed by the appeals by BARNZ and WIAL. It was put to us that the first is to ensure that appropriate methods are in place which balance the needs of the airport, and the future legitimate expectations of adjoining landowners and occupiers. The second is to maintain the economic viability of the airport while safeguarding the health and amenity of residents of surrounding areas and avoiding, remedying or mitigating adverse effects.

In essence what WIAL and BARNZ, and the witnesses supporting them were saying is the noise environment in the vicinity of the airport is undesirable for residential use. It is not practicable to ameliorate this external noise environment further, therefore new residential use should be firmly discouraged within the airnoise boundary. More residents will add to the agitation for reduced airport activity, something that WIAL and BARNZ know is not possible now or in the future. It is alleged that much time and expense will be taken up dealing with anticipated agitation. The Suburban Centres zone contains few examples of residential use at present but the potential appears to be considerable. Residential use in these zones should be discouraged preferably by prohibition but as a concession a non-complying rule would be acceptable. Mr Batty's evidence underlines this view and he was of the opinion that a discretionary rule under which the council could require noise insulation in new properties would not adequately deal with the situation.

At the outset of the hearing we identified an inherent dichotomy in the council's case which caused us concern. Mr Mitchell for the council acknowledged that it was generally accepted that the prolonged exposure to the noise levels which will typically occur within the airnoise boundary, is unhealthy for people with noise sensitivities and for that reason the area inside it was not a good residential environment. But in spite of this approach the council had allowed new residential activities to be permitted within the airnoise boundary subject to only minor qualifications and a noise insulation rule in residential areas. In addition, there appeared to be no mechanism available to either BARNZ or WIAL to have some input into the resource use application process itself whereby they could

challenge any residential proposals that might concern them. We queried whether this was appropriate planning for the airport.

The proposed plan recognises the airport as the hub of New Zealand's air transport system and is its busiest domestic airport. It also recognises that the international trans-Tasman flights may increase in frequency and that the airport also provides a major arrival and departure point for cargo (Part 10 s.10.1). The Airport Precinct zone includes some objectives relating to both the efficiency of the airport's operations and also to the need to protect amenities of areas surrounding the precinct from adverse environmental effects. There were, until these hearings began, no equivalent policies in either the Residential or Suburban Centres zones except in the explanatory statement in the revised provisions.

The concession by the council, BARNZ and WIAL, as evidenced by the filed consent orders requiring new residential activities for multi unit developments in the Residential zones to be processed as discretionary (unrestricted) activity applications went some way to meet our concerns; as did the requirement for insulation in all new dwellings. It remained to be seen whether the proposed amendments now accepted by council would achieve the same effects for BARNZ and WIAL in respect of all new residential developments in the Suburban Centres within the same airnoise boundary. This was to involve a close scrutiny of the way the plan's provisions (objectives, policies, rules) were constructed and a detailed analysis of the issues raised by the parties.

1. Projected Increase of New Residential Development within the Airnoise Boundary of the Suburban Centres Zone

There are two aspects to the BARNZ and WIAL appeals - the effects on those companies of new residential use in the Suburban Centres Zone within the airnoise boundary and the effects of aircraft movements on any residents locating within the airnoise boundary within that zone.

Mr Daysh told the Court that NZS 6805 identifies that residents of properties within the L_{dn} 75 dBA contour could suffer adverse effects in terms of health effects and he identified that between 65 and 75 dBA there is a loss of amenity which becomes more pronounced the closer the residents move to the 75 dBA contour, so the effects on any new residential development are relatively clear cut. Mr Batty deposed that the present airport's operations are already restricted during night time hours as a result of potential noise effects on the surrounding areas.

Discretionary activity status does not meet the concerns of BARNZ or WIAL. They considered residential activity needs to be actively discouraged in the area. Mr Brown for BARNZ made it clear that there has been a history of complaints from residents, that is common with many other airports, and there is no reason to expect anything other than ongoing residential pressure against intrusive noise to increase in the future. Whilst the past history of complaints have been sheeted home to the operation of the 737 - 200 hush-kitted aircraft, Mr Bornholdt noted that even with the introduction of the 737-300 noise levels in the distant future the L_{dn} level will be 3 dBA L_{dn} above present daily levels so therefore they are going up, not down. Mr Hegley acknowledged that 30 houses are within the 75 dBA contour on the western side of the airport.

It is necessary to examine first of all how extensive any new residential development might be in the Suburban Centres zone within the airnoise boundary. The evidence established that Suburban Centres land close to the airport is generally occupied with existing commercial and in some cases very substantial existing industrial buildings. Mr Gordon for WIAL identified that whilst land acquisition particularly on the eastern side of the airport had resolved much of the residents' concerns, tensions still exist in that vicinity; overall however, WIAL had experienced very little complaint from residents west of the runway.

The capacity for new development within Suburban Centres area within the airnoise boundary was discussed at length. According to Mr Daysh there are approximately 660 existing houses within the total airnoise boundary. In cross-examination by Mr Nolan, Mr Daysh acknowledged that 49 additional new houses have come into the area since 1993 - and of those, 19 very recently. He estimated 40-60 new houses might establish in the Residential zone in the future, but had not done a specific study on the Suburban Centres zone. He acknowledged however that whilst the historical increase in dwelling numbers around the airport was small, under the proposed district plan there would be an expectation that this could rise through some development in the Suburban Centres area. In further questioning Mr Daysh identified the potential for a further 30 houses in the Suburban Centres zone within the airnoise boundary but this assessment was based on a number of variables such as the market, different site characteristics, and speculation about housing types and numbers. He made the point that in the Eastern Suburbs residential land is a relatively scarce resource. The council would be obliged to weigh up competing objectives in respect of promoting urban containment and maximisation of the potential of land to be used - as against exposing new residential occupiers to high noise levels.

Mr Batty for BARNZ was of the opinion that the city's planners had not appreciated the potentially significant numbers of new houses that could be constructed in the Suburban Centres zone within the airnoise boundary. He was critical of their conclusion that further provisions in the district plan for avoiding any conflicts were not needed because the noise insulation rules were sufficient. He considered that as the majority of houses are of older weatherboard type some can be anticipated to require development during the next 10 year plan period. In his opinion the potential exists for the amalgamation of such sites to produce increased densities of new housing units and therefore essentially more people living in the same area. The witness had observed similar increases in residential densities in Christchurch and he considered a similar potential exists on currently commercially zoned land within the Suburban Centres zone where redevelopment for multi-unit housing may prove an attractive alternative to commercial development in respect of higher overall returns on initial capital investment. Similarly, he deposed people are often attracted to multi-unit areas because the price of smaller dwelling units is competitive with lower density conventional housing. Mr Daysh in questioning by Mr Robinson appeared to agree with this view. He acknowledged it was entirely feasible to amalgamate 2 or 3 lots in the area and build a number of smaller units as had happened elsewhere in the Wellington City.

It was Mr Batty's evidence that so far only 16 existing residential dwellings exist in the Suburban Centres area within the airnoise boundary but after an extensive survey of the area he considered there is potential for 300 additional new houses in the zone now under discussion, with the potential for 280 of these to be on at least three sites in the Suburban Centres zone within the airnoise boundary - on the corners of Cobham Drive and Kemp Street, Cobham Drive and Rongotai Road, and also on Stone Street which were labelled D, E and F, and are described in more detail later in the decision. He considered these three sites were particularly suitable for residential development being flat land. He concluded that there is currently nothing in the marketplace to prevent such redevelopment and to illustrate the point he indicated that some 30 new houses have been built at Tahi Street in the Suburban Centres zone in Miramar recently which in effect straddle the revised airnoise boundary.

In Mr Day's opinion, for BARNZ, the potential for 280 new residences within the Suburban Centres zone within the airnoise boundary is clearly a significant potential increase in land use given that there are currently 380 houses exposed to greater than L_{dn} 65 dBA. He stated (in referring to the measures taken by the airlines in recent years to reduce noise levels) "allowing an additional 300 houses would significantly erode the gains made by the airlines in reducing the number of houses exposed to Ldn 65 from 1,800 houses (in 1988) to 400 houses". He stated that, in his opinion, land use planning rules should ideally be included for areas inside an outer control boundary and inside the airnoise boundary as recommended in the NZS 6805. He made the point that in the Wellington situation an outer control boundary is not now sought and that it was important to keep this aspect of the NZS 6805 in perspective, as the relief now sought by BARNZ is modest by comparison with the recommendations

in the NZS 6805. He stated that the two reasons given for not including land use restrictions have been that it is politically unpalatable to put such controls on land and in any event there is only minimal potential for new residential development within the airport area. In Mr Day's opinion the NZS 6805 concept is sensible and it is not appropriate to allow even a small number of new residential developments within the airnoise boundary if at all avoidable. Mr Day used as an example the fact that if it is sensible planning to prevent a nominal 30 new families from building in an area exposed greater than 65 L_{dn} dBA at Christchurch Airport, why should 30 new families be allowed to move into the same noise environment at Wellington? He considered that it was "high time" sensible land use planning was implemented around Wellington Airport. To this end, new noise sensitive uses within the airnoise boundary should either be prohibited in accordance with NZS 6805, or, at least, made non-complying activities.

Discussion

In our evaluation of these issues we see that currently within the Suburban Centres zone, as a matter of council policy, the widest range of activities is permitted. If there is a restriction applied to the zone within the airnoise boundary it would limit the range of activities which could be undertaken within it although we acknowledge that excluding residential use would in no way limit the range of other permitted activities. In the Residential zone, multi-unit residential developments are currently subject to yard and coverage restrictions and other restrictions imposed under the consent orders filed. Multi-unit residential developments are not so restricted in the Suburban Centres zone however and the maximum height may be up to 12 metres and there is no rule to restrict density. Much would depend therefore upon relative market demand for either commercial or residential properties at the time a site is committed for redevelopment if such developments are not constrained in the way the BARNZ and WIAL suggest.

The Court questioned Mr Styles on the interest shown in industrial and commercial properties within the airnoise boundary of the Suburban Centres zone. He stated that most of the industrial/commercial properties were tenanted and there was one particular vacant area on Stone Street where film studios may be being negotiated. He also stated that in the last three years there had been no proposal to put residential housing in the Suburban Centres areas in question, although at the same time there had been around 500 units proposed in the Central City. He stated if one was looking at where residential development was most likely to happen, one would not bet on a Suburban Centre area next to the airport.

In questioning of Mr Daysh by the Court it emerged that in one recent meeting with residents over the Airspace Designation very few had expressed a desire to move away from the area. It also emerged from the evidence and cross-examination that the residential dwellings in the Rongotai and Miramar suburbs close to the airport were on the whole well maintained or renovated, so on first analysis this is not a situation where the residents appear either reluctant to live or anxious to leave as a noise nuisance area. We were certainly not given any evidence to the contrary. Other evidence from the council indicated the median house sales for Kilbirnie, Lyall Bay and Rongotai is currently rather lower than other Wellington suburbs so that may be part of the residential attraction to the area. And indeed the fact that a group of some 30 new houses have been built in the Suburban Centres area bordering the airnoise boundary since the new district plan was notified, tends to confirm Mr Batty's suggestion that at least some of the land he identified within the airnoise boundary could be developed for residential purposes at some time in the future.

Given the policy of urban containment and the shortage of residential land in the Eastern Suburbs it should not be assumed that commercial/industrial zoned land within the airnoise boundary will not be used for residential purposes. As Mr Mitchell pointed out, in the 1990s

there is nothing at all unusual about the conversion of industrial buildings to other uses including residential in any of the major cities nor is there anything unusual about buildings being cleared off sites to be replaced with new buildings with the same or different activities such as residential.

Mr Batty's Area D is an area of open space between Cobham Drive and Kemp Street. While it is exposed to the wind and a noisy road, it also has views to the harbour and there are no buildings on the site other than a toilet block. It could be a prime candidate for multi-unit residential development.

Area E is located to the east of Troy Street, close to the runway. It is flat land with partly vacant buildings and industrial uses on other parts. It appears to be on the market as an industrial development site. While it is close to residential land, the area's proximity to the runway, and current industrial use mean it is unlikely to be used for residential development.

Area F in Miramar has had commercial and industrial development for a long time. Its soil has, in part, been polluted by gasworks operation and by paint manufacturing operations. It is still covered for the most part by commercial buildings. Section 7.4 sets out the provisions for Discretionary Activities (Unrestricted) in the Suburban Centres zone and section 7.4.3 sets out Assessment Criteria for the use of contaminated sites. It may be assumed that residential development is unlikely for some time in the future, as no evidence to the contrary was brought forward.

We concluded there may well be potential for further residential development within the airnoise boundary in the Suburban Centres zone although we doubt whether it is likely to be as extensive within the planning period as BARNZ has predicted.

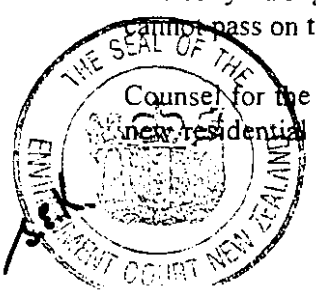
If such future residential dwellings are subject to the same assessment criteria as similar dwellings will now be in the Residential zone, we have to ask, as did Mr Mitchell, why would they have greater potential effect on the airport?

2. Costs and Benefits

It is clear that a s.32 analysis was carried out by the council, and this process itself was not challenged in any of the references. The value to the Court of this cost and benefit analysis lies in the substance of the evidence as it relates to the remaining issue now before the Court. The bulk of the council's evidence on costs and benefits focussed on residential development within the airnoise boundary as a whole, due to it being prepared and presented to the Court prior to the draft consent orders being agreed upon. It also did not look in depth at the new BARNZ proposal of making residential activity a non-complying activity, as opposed to prohibited. Therefore, we have set out below a brief summary of the costs and benefits evidence which relates to the issue now before the Court.

The council's general approach was that the environmental costs of airport noise should be borne by the airlines as they cause the adverse effects and profit from the activity. It was considered WIAL too may carry some of the costs but that organisation at the end of the day will recover these and still be a successful business. The council submitted that if a cost is imposed on the residents through an effective inability to use land for which there is a market demand these costs are less easily recoverable. They can be discounted through cheaper property prices per new entrants to the area or indirectly through the share of the overall economic benefit that the airport brings, but the residents cannot pass on the costs.

Counsel for the council submitted that the options of prohibited activity or non-complying status for new residential developments on the existing properties (which could include extensions to existing



houses) both impose significant penalties on the current property owners. If people wish to carry out new residential developments within the airnoise boundary they should be free to do so, subject to insulation requirements.

Mr Mitchell hypothesised that WIAL could designate all land within the airnoise boundary and thereby exercise complete control over the development. The cost then becomes WIAL's and not the landowners. He submitted that the existence of a mechanism such as designation in the Act under which WIAL and its users could obtain that benefit and pay for it should be a relevant consideration. Meanwhile we were told the council placed considerable emphasis on the noise management plan as a means of addressing airport noise including, as it does the acquisition of residences (within the L_{dn} 75 dBA contour), noise mitigation programmes, differential landing charges on noise, and restructuring ground operation procedures.

In terms of a s.32 costs and benefits analysis, a number of options were looked at by the council. Mr Styles identified the key costs and benefits as:

- environmental costs of airport activities (adverse effects of airport noise on the health and amenity of the residents);
- compliance costs (costs incurred by those complying with rules proposed in the district plan);
- economic benefits to the city and region of the airport's activities.

In order to calculate the environmental costs of airport activities Mr Styles adopted two methods which had been recommended in an Economic and Environmental Impact Report in 1990 from McGregor and Company, W D Scott, Deloitte, and Hegley Acoustic Consultants ("the McGregor Report"). The first method was in terms of depreciation of property prices attributable to the change in noise exposure. The second was in terms of the expenditure required to satisfactorily insulate affected dwellings. Mr Styles noted that no system of assessment was perfect because one is dealing with non-market effects for which there are, by definition, no prices.

With respect to property price depreciation he followed the methodology from the report by adopting a representative depreciation of 0.5 percent per dBA change in noise exposure from L_{dn} 60 to L_{dn} 65, rising to 0.8 percent per dBA change in noise exposure above L_{dn} 75. He noted that the OECD recommends using the 0.5 percent per dBA change. The total depreciation, thus calculated, amounts to 2.5 percent for a house exposed to L_{dn} 65; 5.5 percent for a house exposed to L_{dn} 70, and 9 percent for a house exposed to L_{dn} 75.

Mr Styles considered that an additional factor to be considered is the "inertia cost", which describes the situation where people feel trapped by the high cost of shifting away from an area when they have miscalculated their tolerance to the noise. In the McGregor Report the inertia cost was calculated at the same amount as the property price depreciation value. However the witness preferred a lower level, taking it to be 50 percent of the depreciation value, making the estimate of environmental cost between one and one and a half times property price depreciation. Therefore, total dependency for a house exposed to L_{dn} 65 dBA is 3.75 and for a house exposed to L_{dn} 70 dBA it is 7.75 percent. Estimates from real estate professionals of the house price depreciation of affected dwellings due to airport exposure indicated a figure of 5-10 percent. Their findings therefore are consistent with and support the methodology used by Mr Styles.

The other methodology used was calculation of the insulation required to attenuate noise to acceptable levels but those calculations included all residential dwellings within the airnoise boundary and was not strictly relevant to the amended proceedings now before the Court.

Mr Styles went on to consider land use controls within the airnoise boundary. In this respect he looked at three specific options in terms of district plan rules, although none of these options

adequately reflected the proposal BARNZ put before the Court. The aggregate figures presented by him relating to the costs and benefits of the options were based on the whole area within the airnoise boundary. Given that the Court is now only concerned with the Suburban Centres area within the airnoise boundary, these figures too are not strictly relevant.

Mr Styles identified an environmental benefit from requiring appropriate insulation for new residences constructed within the airnoise boundary. The additional costs of construction would be 8 to 9 percent for houses between the L_{dn} 70 contour and the airnoise boundary. In cross-examination by Mr Nolan, Mr Styles established that for new dwellings the costs of insulation could be calculated at $1,800 per dwelling. He concluded the insulation requirement for new residential dwellings inside the airnoise boundary was the best practicable option in the circumstances.

At the end of his evidence Mr Styles considered the option of non-complying status for new residential activities within the airnoise boundary now sought by BARNZ & WIAL. His analysis was predicated upon the fact that he was expecting a maximum of 30 or so new dwellings in the area that he was assessing. In his view, non-complying status would entail quite high administrative costs, and could only potentially have two practical outcomes for applicants, being either approval or refusal of applications. If it was refusal, then this would be tacit prohibition which would have the same negative impacts such as loss of amenity value and compliance costs. If the new dwellings were approved with a requirement for insulation, then this was no different from having a permitted activity with a rule requiring compliance with respect to insulation. Thus permitted activity status would be "more efficient" by avoiding the additional costs of administration of non-complying activities.

Mr Styles concluded that the proposed use of the noise management plan and the use of NZS 6805 as the basis for the plan rules, with the addition of a curfew and the ban on non-chapter 3 aircraft were the best options in terms of costs and benefits.

In cross-examination, Mr Nolan established that Mr Styles had applied a depreciation rate to the cost of housing when the noise level was not expect to change overall in the next decade. Mr Nolan put to Mr Styles the benefits from the BARNZ non-complying option that would accrue to the airport, to the airport users, and to those administering the process, and that these benefits were not brought to the Court's attention by his evidence. Such benefits included avoiding adverse amenity impacts on residents, avoiding economic costs to the region from reduced airport activity, and avoiding compliance costs to the airlines and the public. There were also benefits to the Environment Court and the council from having full participation in resource consent hearings due to the notification of non-complying activities. Mr Styles maintained that such benefits were very difficult to quantify but agreed that they would be benefits. Mr Nolan put to Mr Styles that there was potential for around 300 new residents within the airnoise boundary; that residents seek constraints on the airport and that the more residents there are the more complaints and the more pressure is put on the airport: therefore there is a benefit to BARNZ in limiting that pressure. Mr Styles agreed. In re-examination Mr Styles was given the opportunity to point out that the benefits referred to by Mr Nolan would not be huge, and that the three main costs and benefits, as he saw them, were explored in his evidence.

For BARNZ, Mr Brown, consultant to McGregor and Company aviation consultants, was asked to examine Mr Styles' application of the McGregor Report methodology and comment on the conclusions regarding the appropriateness of land use controls on residential buildings within the proposed airnoise boundary. He worked on the basis that Mr Batty's evidence had shown 316 new dwellings were possible within the airnoise boundary, of which 280 could be within the Suburban Centres area.

Mr Brown regarded Mr Styles' interpretation and use of methodology from the McGregor report as inappropriate because in the report it was used to assess the costs and benefits associated with a

change in noise levels, whereas the relevant issue here is the costs and benefits associated with any change in the number of dwellings exposed to a constant level of noise. Mr Brown queried whether any loss in property value arising from non-complying activity status for new residential uses in Suburban Centres area within the airnoise boundary is likely to be significant at all. Almost no residential dwellings currently exist in the zone (16 properties) and residential use is in fact just one of a wide range of activities provided for.

Mr Brown concluded that the focus should be on the costs and benefits arising from permitting or not permitting new residential activities within the airnoise boundary. Mr Brown's costs included those of the extra complaints arising from the in-coming residents and more pressure for further constraints on the airport - these eventually imposing significant costs on the airport and on the New Zealand and Wellington economy. He stated, for example, that over 10 years a 1 percent reduction in passenger numbers would amount to a $37 million reduction in spending in the Wellington region. Thus constraints on the airport would not need to be dramatic before they began to cause significant economic effects within the region.

In terms of the compliance costs associated with the BARNZ proposal, Mr Brown stated that the $500 per application, as estimated by Mr Styles, is also not significant. Even if one assumed a worst case scenario of 280 applications, the potential compliance costs would be only $140,000 for all applications. This would seem small in comparison to the economic costs to BARNZ that may arise from not restricting new housing development in the Suburban Centres area within the airnoise boundary. Furthermore, where an individual applicant can establish a special case and obtains consent as a non-complying activity, then the application fee may be the only economic cost. Mr Brown was happy to recommend non-complying status based on the economic evidence.

Mr Daysh had acknowledged that if the land is subdivided under the proposed plan within the airnoise boundary, individual houses or any 2 unit developments could be built in the Suburban Centres zone as a permitted activity, subject only to bulk and location requirements. He agreed the possibility of compulsory acquisition is not desirable, although he noted that some residents have agreed to acquisition in the Residential zone.

Mr Nolan questioned Mr Daysh on the compliance costs of making new housing non-complying within the airnoise boundary. He confirmed that all new housing developments, which comprised three or more units, already required resource consent. Compliance costs would be $600 if non-notified and $1,500 if notified. But he confirmed that for total additional compliance costs to be significant, it would mean there would have to be a large number of applications for new development.

On re-examination Mr Mitchell asked Mr Daysh about the effect the BARNZ control would have on sustainability. Mr Daysh's answer related to Residential areas, where permitted uses are fewer than in Suburban Centres areas. However, his concerns about uncertainty for property owners, and possible blight or disinvestment are worth noting as being applicable to Suburban Centres areas to some extent. This is particularly so, given the scarcity of flat land in Wellington and the policy of urban containment.

WIAL's point of view was comprehensively presented by Mr Gordon. He deposed the passenger traffic through the airport is projected to grow at 6 percent per annum until the year 2000. If growth were to continue beyond that, it is expected to double by 2005 to 2006. The 1994 BERL study "Economic Impact of Wellington International Airport" (updated in 1997) stated that aviation services have a significant influence on Wellington's future in maintaining its current economic and commercial base and supporting growth in new directions. Airport activities as a whole, including all of the businesses providing services necessary or complimentary to airport operations, is estimated to have an annual output of $137.7 million and employment of 1,246 full time equivalents. Also the

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economic impact of the airport is much larger than its direct output as its activities generate a considerable flow-on effect. According to the report the airport is responsible for direct and indirect benefits to the city and region in the order of $276 million per year. WIAL's conclusion is that the airport is a major strategic asset for Wellington region and a significant direct contributor to the local economy. Any constraints on airport operations therefore become constraints on the region's development.

Discussion

We found the council's analysis of key costs and benefits of restricting residential activity within the airnoise boundary of the Suburban Centres area flawed in some respects. Its witness applied a blanket depreciation rate to house prices when the noise levels at the airport are actually likely to be lowered in the short term with a slight rise towards the end of the planning period as seen in a graph produced by Mr Hegley. Mr Hegley's statement on the meaning of noise terms, which was read by agreement by Mr Day, explained how the addition of two noise sources of 60 dBA each results in a noise level of 63 dBA. This increase of 3 dBA Mr Hegley considered as just perceptible. Mr Day stated on reading Mr Hegley's statement that there was some difference of opinion as to whether 3 dBA L_{dn} would in fact be perceptible. Mr Bornholdt was of the opinion that a rise of 3 dBA L_{dn} is possible in the distant future but even this on Mr Day's evidence would be scarcely perceptible. Also, from Figure 2 of Mr Day's revised evidence (attached as Appendix I) the increase to the year 2020 is only about 1 dBA L_{dn} above present levels.

As a result of the council's concessions with the amended proposals now before us compliance costs are basically the difference between processing a restricted or unrestricted discretionary activity and that of a non-complying one. These costs differences would be minor. In any event the depreciation costs associated with the restriction upon new housing should not be significant. Land may be used for commercial offices and small scale non-intrusive manufacturing within the existing assessment criteria for the zone. The evidence from WIAL satisfactorily demonstrated that commercial activities around the airport are quite likely to increase creating a demand for such land use.

As to the economic costs to BARNZ of future complaints, first of all as we have indicated we consider the number of residents who may reside in the Suburban Centre zones is not likely to be nearly as great as BARNZ projects. But 16 residential dwellings currently exist in the zone as of right anyway. Short of prohibiting any residential activity in the zone in question, which is no longer an issue in this case, the potential for complaint from these residents exists in any event - as it would potentially for residents who gain access to the zone on a non-complying application. Further, the new controls on noise generation need re-emphasis for their potential to alter the noise environment be it in the Airport Precinct or both the Residential and Suburban Centres zones within the airnoise boundary. And thirdly, Mr Gordon for WIAL set out the limitations of this site which dictate the type of aviation possible in the planning period in question. WIAL regards itself as an Australasian "domestic aerodrome" and is developing its terminal facilities accordingly. The reason for this is runway length, and the prohibitive cost of creating further runway extending out into Cook Strait is the key to its restricted development. Those factors constrain the variety and performance of aircraft that use the airport and the range of direct services to more distant destinations. The airport's performance is also limited by the high terrain to the sides of the approaches and takeoff clearance surfaces and by the hills to the north, namely the Newlands Ridge. Thus there are a number of permanent features to this airport which are not going to allow much change to its existing services unlike, for example, the airports at Auckland and Christchurch. This analysis is very important to remember particularly with reference to the location of the airnoise boundary which is not going to alter significantly in the next planning period.

Thus there is no infrastructure proposed which would expose areas to aircraft noise where this is not already an issue, or new runways or procedures being developed which would expose new areas to noise where this is not previously a question (such as in Sydney). The procedures and controls now proposed ensure, as some of the evidence indicated, that noise emissions are to be kept within reasonable limits. And with a noise management plan required (now common we understand for overseas airports) as a necessary adjunct to the existing legal controls (such as the s.16 duty on noise emitters to adopt the best practicable option to control noise), any future concerns of residents may now be channelled more effectively through this device. What is more, Map 39 which delineates the proposed airnoise boundary, is an effective planning tool which will serve as a guide to future residential developers as to what noise emissions are predictable within the boundary, whilst the plan provisions will predict how they are to be controlled.

What we conclude from this analysis is that the airport, the airlines, the residents and the council are now in a position where they may all have a part to play in sustainably managing what is a very significant resource to the region in a way not previously considered. It is our conclusion that this is the appropriate way of dealing with the effects of airport noise - not through an effective prohibition on any further residential use.

What BARNZ and WIAL are implying by their amended challenges to extended residential use in the Suburban Centres zone is that the planning for this airport with its unique characteristics is not going to work - an implication we do not accept. By their signatures on the draft consent orders the parties have effectively conceded they will work for Residential areas within the airnoise boundary, so if there, why not in the Suburban Centres areas?

3. <u>The Greenfield Aspect</u>

The proposed plan notes that the Suburban Centres zone applies to the more significant retail and industrial centres in the suburban areas of Wellington City (Section 6.1). It is not therefore primarily intended for residential activity and currently there is little existing housing within the zone. For this reason it was seen by BARNZ and WIAL to be a greenfield situation. Non-complying status would therefore be a clear signal that residential development has not yet taken over and is indeed not intended.

Discussion

We do not accept the identification of the Suburban Centres area within the airnoise boundary to be a greenfield situation by comparison with that of the Residential zone. We accept Mr Mitchell's submission that it derives from an attempt to compare the current situation with airports developed in a genuine greenfield (rural) situation and which then come under threat from urban sprawl. The Suburban Centres areas within the airnoise boundary are not greenfields. They are, with the exception of Cobham Park, fully developed. The three sites identified by Mr Batty and discussed earlier, with the exception of the open space adjacent to Cobham Park, have only become available through the decommissioning of industrial plant and are immediately proximate to Residential areas.

In Objectives 4.2.4 and Policies 4.2.4.2 relating to the residential areas of the proposed plan, the word "greenfield" is used in relation to the subdivision of existing sites where the council seeks to minimise the peripheral expansion of urban development. A "greenfield" subdivision will only be considered as part of a district plan change to extend the urban area. Thus the term as used in the proposed plan is the converse of what the BARNZ and WIAL submissions and evidence contemplate.

We consider that what BARNZ and WIAL are trying to achieve through the tacit prohibition of residential use by giving it a non-complying status, is to begin to effectively re-zone the area through that device and thus create the beginnings of a de facto buffer zone. Neither party appealed the zoning of the areas in question. We do not consider the appellants' approach at all appropriate because there are already existing residential areas patchworked amongst the areas identified "D, E and F" in Mr Batty's evidence and existing legitimate residential uses in the Suburban Centres zone. The appellants' approach would result in further planning fragmentation of the land resource rather than integrated management of its use. If WIAL wishes to achieve this result it should designate the areas for airport use - but this appears not to have been contemplated.

4. The Question of Reverse Sensitivity

BARNZ urged us to consider the question of "reverse sensitivity" under s.5(2)(c). It was submitted that an increased population close to an airport such as Mr Batty suggests is likely to cause future conflicts and adverse effects with the inevitable consequences that new residents will seek to place restrictions and controls on the airport. It was submitted that it is settled law that the adverse effects of potentially incompatible uses should be avoided, remedied or mitigated when they would be likely to place restrictions on or inevitably conflict with the use of other resources.

Mr Park pointed out that to efficiently utilise airport facilities and to ensure that the benefits which airports and air commerce provide for the wider community can continue to be derived, it is desirable to place some controls on the type of activities that can take place near an airport so that there can be reasonable co-existence. In particular, this involves placing some restriction on the encroachment of new noise sensitive uses, such as housing, around an airport.

The council's response to this issue was to argue that the use of the term "reverse sensitivity" should not obscure either of two things. First, it is not a term which is either used in the Act or given any particular status. Second, it is no more than a description of a class of effect - the sensitivity of a person quite lawfully creating adverse effects to pressure from people who may be potentially affected by those adverse effects. But, like any other "effect", reverse sensitivity needs to be considered in the context of all effects.

Discussion

As Mr Mitchell pointed out all the cases referred to by Mr Nolan involve one significant difference to the present. They all concern the possible entry of potentially sensitive people into an area where they may be affected by existing adverse effects which are not only lawfully created within the area, but for which the area is indeed designed. That is not the case here. It would be if we were looking at residential activity within the Airport Precinct, or within land zoned by WIAL. But we are not. We are assessing an activity which is generally considered acceptable within the zone (as it is elsewhere in the city), but for the activities in a neighbouring zone. We agree with Mr Mitchell none of the authorities referred to by Mr Nolan advance the proposition that far.

Even if there was support for the application of the reverse sensitivity principle within the Suburban Centres airnoise boundary, that would not necessarily require noise sensitive activities to be given a non-complying or a prohibited activity status. In Auckland Regional Council v Auckland City Council A 10/97 - the Business 5 and 6 zones were specifically designed for mixed and heavy industry. The relief sought by the regional council was that permitted activities, which are likely to be adversely affected by discharges to air from other activities in the vicinity, be reclassified from permitted to controlled or discretionary activities because

heavy industry was seen as a scarce resource needing an environment in which it could function effectively and where public health and safety was not compromised. In that case the regional council did not look to zoning out sensitive issues - but to controlling them effectively. For that reason the Court held that it was acceptable to make provision for reverse sensitivity in these zones but as a discretionary rather than non-complying activity.

We turned to the terms of the consent orders to see if there was anything included in a discretionary (unrestricted) use application applying in the Residential zone within the airnoise boundary to recognise the sensitivity of the airport to residential development and concluded there was. In this case, Assessment Criterion 5.5.6.5 of a discretionary (unrestricted) activity would be of some persuasion in any resource use application. It requires assessment of:

> "Whether in the circumstances the development is likely to lead to potential conflict with and adverse effects on airport activities."

We concluded that the inclusion of a similar provision attached to the description of discretionary (unrestricted) activities in the Suburban Centres zone within the airnoise boundary would further assist BARNZ and WIAL - as would the noise insulation rule. We consider reverse sensitivity uses would in that event be more properly accounted for in the proposed plan.

In our opinion there is no need for new residential development to be non-complying in this case. There are numerous caveats now agreed to in the consent orders which can most usefully be adopted as a result of the council's (now) considerable concession on the issue. There are others already existing as a result of the proposed plan's provisions.

5. <u>Noise Management Plan</u>

Mr Gordon deposed that the noise management plan as a result of amendments to 10.2.2.6 will include:

- **a statement of noise management objectives and policies;**
- **details of methods and processes for remedying and mitigating adverse effects of airport noise;**
- **procedures for monitoring and ongoing review of the plan;**
- **dispute resolution procedures**
- **land use zoning and insulation issues**

We note he added in "land use zoning" and "insulation" as an oral addition to his evidence-in-chief. We consider this addition important as a result of our findings on the two issues in Part I of this decision (see p 14).

The inclusion of the details of the noise management plan was not seen as appropriate in the district plan itself. Mr Park for BARNZ stated it needs to be a working document able to be changed relatively frequently to take account of ongoing circumstances at the airport. Its inherent feature he deposed must be its flexibility.

It was Mr Styles' evidence that the promotion of the noise management plan as a means of addressing airport noise is a factor in many airports around the world, and that some of the key components of the Wellington plan might be:

- voluntary acquisition of residences (for example within the L_{dn} 75 dBA contour);
- noise mitigation programmes, such as provision of funding for insulation of existing dwellings;
- operational procedures, such as fly friendly programmes;

- ground operation procedures:
- funding issues for the noise management plans programmes:
- differential landing charges based on noise.

He did not comment on these individual components other than to say it is anticipated that some of these and other measures will ultimately be reflected in the noise management plan for Wellington Airport.

Discussion

We agree that to have a document such as this enshrined in the district plan, where it can be only changed by way of a plan change or variation, would work against the whole purpose of having it in the first place. It is a useful tool or other method to assist ongoing noise mitigation at the airport. It reinforces the statement of intent in the plan Enabling People to Meet Their Needs now and for the future, and we see the mechanism or method as part of the intent of the council under Equity to empower the community to care for its environment and influence change.

The noise management plan does not replace council's regulatory functions in any way as the rules may be considered to be the best practicable option for setting overall noise controls (as they were not effectively challenged) but the purpose of such a plan is to provide a framework for ongoing discussion; it is not intended for council's powers to be delegated to the Airport Committee.

We agree with the parties it is entirely appropriate in achieving the purposes of the Act for the council to institute such non-regulatory approaches to resolving particular issues such as these on an ongoing basis.

6. Non-Complying or Discretionary (Unrestricted) Activities in the Suburban Centres Zone?

Section 1.8.4 Rules contains a description of how the use of the discretionary activity status is contemplated. The rule types are listed in order of increasing actual or potential adverse effects. And it is stated that improving the way the rules are used can lessen adverse environmental effects. Discretionary (unrestricted) uses are seen as having potentially the most adverse effects and the council's discretion is unrestricted in that regard. Even the development of contaminated sites is given this status where assessment indicates it poses or is likely to pose an immediate or long term hazard to health or the environment, a point of which we took note. Where rules in the plan are contravened the activity proposed is seen as non-complying. Noise rules differ for different locations in the plan.

In order to determine whether the use should be non-complying or discretionary, we turned to an appeal related to an analysis of the issue - Caltex New Zealand Limited v Auckland City Council A 95/97 - which usefully sets out the legal tests for both activities. In determining what constitutes the two categories of use, the Court outlined what is required as to compliance with the provisions of the Act. The question must always be asked: is classification of the activity as non-complying or discretionary necessary in achieving the purpose of the Act, namely sustainable management of the city's physical and natural resources (s.5(2))? And in considering that question, the consent authority has to have regard to the actual and potential effects of the activity on the environment and to decide the relevant classification in order to achieve the objectives and policies of the plan. It is required to look at the primary function of the relevant zone based on the objectives and policies of the plan. Any argument for a discretionary activity will mean the effects of the activity (residential use on airport activities) can be adequately mitigated or avoided and the proposed procedure for assessment allows appropriate examination of applications and an assessment of whether the activity meets the

needs of the local community. There is a need for consistency in the theme running through the plan provisions. If a common theme suggests such an activity would not be suitable then it would be better to have a presumption against it.

The Caltex case related to a plan reference from Caltex which sought to have provisions for service stations as a discretionary activity on sites in the Residential 5, 6 and 7 zones fronting district and regional roads. The council had proposed that the use be non-complying. In its decision the Court disallowed service stations being a discretionary use in the residential zones against the background of the council's examples that some existing service stations exceed limits for noise and light and most have a high visual impact. In addition, the evidence indicated that some of the (failed) attempts to mitigate adverse effects allowed for the extrapolation of the effects on the environment of service stations to those of the future (see page 9 of the decision and in particular footnote 17). The Court held that there was sufficient justification as a result for not providing for service stations in Residential zones so that by default they become non-complying.

An analogy may be made with this case because BARNZ and WIAL are saying noise mitigation measures will never entirely satisfy residents - a position they have taken because in spite of the significant noise reduction measures put in place over recent years, complaints still continue.

Discussion

In addition to the Caltex analysis above, as stated in Nugent Consultants v Auckland City Council [1996] NZRMA 481, 484 the following are the guidelines for our inquiry:-

> "... a rule in a proposed plan has to be necessary in achieving the purpose of the Act, being the sustainable management of natural and physical resources (as those terms are defined); it has to assist the territorial authority to carry out its function of control of actual and potential effects of the use, development or protection of land in order to achieve the purpose of the Act; it has to be the most appropriate means of exercising that function: and it has to have a purpose of achieving the objectives and policies of the plan."

Mr Mitchell submitted that categorising new residential use as non-complying is a "tacit prohibition" of the activity. Mr Daysh endorsed this description and it is accepted as such.

In this plan's provisions there is a requirement for efficiency of use. Under General Principles of Sustainability at section 1.2 the plan requires that renewable and non-renewable resources need to be used efficiently to minimise the effects caused by their use. Under the provision for Finite Resources the plan notes that the City's natural and physical resources (in this case potential land and buildings for residential use) are in limited supply and that we need to make sound choices about how to use them. It records that "equity sustainability" means allowing people to meet their needs and achieve their aspirations now and in the future, and that equity is an essential step in achieving sustainability. And it is recorded that the term includes enabling communities to care for their environment and influence change. In section 1.3 Efficient Resource Use, the plan states that sustainable management requires the city to use its resources in a sustainable manner and the need to achieve a balance between protection and development. In addition, section 1.6 Qualities and Values states that efficiency is a measure of how resources are allocated or used. "Efficiency" is defined in the New Shorter Oxford Dictionary (1993 Edit. p787) as "the ability to accomplish what is intended" and the question may be asked what is intended by the objectives and policies and methods of the Suburban Centres zone?

An objective relates to the specific or general outcome desired by the council in relation to the zone and in relation to Wellington City in general. A policy is a generic means of achieving such an outcome. A method (rule in this case) is the means by which it is implemented.

Bearing in mind that s.5 of the Act requires the promotion of sustainable management of the City's resources, we conclude that in terms of the plan's general Objectives 1.6.3, (to promote efficient use) a non-complying activity status for new residential use would not encourage what is intended for Wellington City. Nor are we persuaded that acknowledging existing residential uses in the Suburban Centres zone but requiring new residential uses to be subject to tacit prohibition status achieves the efficiency intended. Nor does it achieve the overall sustainable management of the land inside the airnoise boundary.

Objective 6.2.1 in the Suburban Centres zone also specifically promotes the efficient use of the land resource. To achieve this outcome, Policy 6.2.1.2 of the Suburban Centres zone provides for a wide range activities within it. It appears to have been extrapolated from Specific Issues: S1 Containing Urban Development which identifies that the plan works towards general containment of city expansion and the intensification of development within the existing urban centres. A non-complying classification would reflect a negative provision for new residential opportunities and would offend this policy.

As to Policy 6.2.2.3 which requires control of the adverse effects of noise in the Suburban Centres zone, (our emphasis) BARNZ and WIAL are trying to control effects from noise which emanates outside the zone by a tacit prohibition of additions to a use which already exists within it. Policy 6.2.2.3 identifies that higher noise levels are allowed within Suburban Centres in any event, (Mr Hegley identified an L max of 75 dBA) so the council would be faced with effectively imposing a higher standard of use on new residential development in a zone which is already subjected to high noise levels. We are not at all persuaded the appellants' approach is commensurate with the provisions of sustainable (integrated) management.

As to Objective 6.2.9 of the Suburban Centres section which is to promote the development of a safe and healthy city, we note under the Qualities and Values section 1.6.1, a healthy living environment is one that creates a state of wellbeing for all people. In our opinion only consistency and integrated management of the use of land around the airport will assist in creating that state of wellbeing for WIAL, BARNZ and the residents. A tacit prohibition on new residential use will not achieve this outcome. It would send the wrong signals to other residential users within both the Suburban Centres zone and the Residential zone within the airnoise boundary. Such a provision would also create uncertainty as to its relationship with any other related provisions in the plan in respect of airport noise - e.g. Objective 2.2.2 of the Airport Precinct zone which requires protection by BARNZ and WIAL of the amenities of areas surrounding the Precinct from adverse environmental effects. The BARNZ and WIAL approach to new residential use if allowed within the Suburban Centres zone within the airnoise boundary will give residents no confidence as to what is to be achieved in respect of noise reduction, not only in the next ten years, but to the year 2020.

Nor would making new residential use a non-complying activity encourage new residential developments to take place within the existing developed parts of the city; nor would the provision (as a tacit prohibition) assist to ensure that new subdivisions were developed on suitable sites, nor would it assist in managing the actual and potential effects of noise pollution in positive terms.

Our conclusion on these issues is that the BARNZ and WIAL proposal fails to achieve the goal of integrated management of the airport's resources, of the airport's noise provisions and the activities in the zones around it. In our view integrated management envisages that the council must bring together all separate but similar parts of the plan to form a consistent whole to ensure the sustainable management of its resources. A non-complying status for new residential use in the Suburban Centres zone within the airnoise boundary would not achieve this. It does not assist in promoting most of the relevant policies and objectives of the plan; it is inconsistent

with others; it is not an efficient use of the land resource; and we concluded that with all the other noise provisions now in place as well as the existence of the noise management plan any adverse effects of residential activities on the airport use may now be adequately avoided, remedied or mitigated.

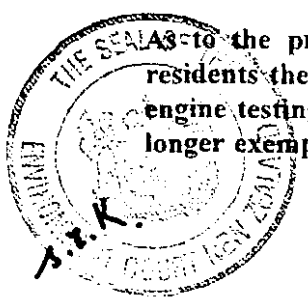
7. RMA Part II Provisions

We turn to the provisions of s.5 and other relevant provisions contained in Part II of the Act which qualify s.5(a),(b), (c).

As part of his submissions on the purpose of the Act, counsel for BARNZ submitted that allowing new housing to proceed in the Suburban Centres zone inside the airnoise boundary, even with insulation, or even being content to consider new houses on their merits as discretionary activities in the area could not be seen as consistent with s.7(b) of the Act, efficient use of the airport resource. In that there is no real alternative to the use of the airport, any additional constraint on its potential would not constitute its efficient use. He submitted that it cannot be left to the market place to restrict new housing in the zone and thereby promote sustainable management of the airport, as Messrs Daysh, Styles and Kirkcaldie (for the council) appeared happy to do. On this basis there would for example be no need to retain the green belt around Christchurch International Airport. Counsel highlighted the fact that we were told by the respondent's witnesses that in recent weeks alone, 19 new units had been consented to inside the airnoise boundary and only a few years ago, 30 were built on its border 49 houses in all. BARNZ considered that such an approach to the Wellington Airport is "non-planning".

The emphasis in these appeals is about the use of potential residential land within the airnoise boundary and its compatibility with the airport itself. We are not sure on what basis the BARNZ submission on "market place" efficiency was based and we searched the evidence in vain to see if any of the BARNZ and WIAL witnesses had specifically analysed economic efficiency as such. There was some planning reference from Mr Batty and a brief comment from Mr Park. But as we understand the term, in the absence of evidence to the contrary, economic efficiency relies on market forces to encourage utilisation of resources most productively. The Court's role is not to compare the efficiency of what the resource is to be used for or compare to what it could be used for. The provision of s.5 of the Act is essentially an "enabling provision" and as such promotes the opportunity for all persons in the community, including the airport and related airport companies to protect and/or develop the area's resources. A council's role under this Act is in defining environmental standards to avoid adverse effects and not in effect allocating resources. Such an approach comes close to reverting to the "wise use" philosophy of the Town and Country Planning Act 1977. Mr Nolan himself considered, as did some of the witnesses, that if the expected growth in airport activities occurs, the land in question may be required for airport related activities, warehousing, courier departments and the like. Mr Hegley for his part stated that people are still prepared to move into the area because they will be aware that the curfew at night means there is a reasonable period when they are able to enjoy undisturbed sleep and he also deposed that some people "simply do not mind the noise". We questioned several of the witnesses about the stability of the residential neighbourhood proximate to the airport and were satisfied by the answers that there was no overt movement away from the area. Our conclusion on this aspect of economic efficiency is that there is likely to be healthy competition for sites for example those that have been identified although as noted only one of these at present (Area D) appears to be possibly suitable for residential use.

As to the provisions of s.7(c) the maintenance and enhancement of amenity values of the residents the general noise environment has improved. New residential use will be insulated, engine testing is proposed to be housed in an acoustic shield building, military aircraft are no longer exempted from the curfew except in emergency situations, and the proposed plan states



that the noise management plan will include a range of issues which can only contribute to an enhancement of the amenity values of the residents as a result of the consultations between RANAG and WIAL and BARNZ and the council. We observe that no evidence was produced by WIAL and BARNZ to indicate sleep disturbance or adverse effects on the health of residents.

With respect to s.7(f) of the Act, the quality of the airport environment will be enhanced by the provisions of the consent orders and the ability of the parties to participate in the noise management plan. There was evidence also to the effect that the location of the airnoise boundary will shrink within a few years. In addition the discretionary activity (unrestricted) status of new residential building will allow public participation in the resource use applications and scrutiny by BARNZ and WIAL as to whether any new units would have adverse effects on the operation of the airport. We accept Mr Mitchell's submission that the strong Assessment Criteria, namely criteria 5.4.6.3 and 5.4.6.5, to be considered in determining whether to grant consent and consideration of what conditions to impose, would assist in protecting the operational concerns of BARNZ and WIAL.

As to s.7(g) the finite characteristics of the airport resource and the economic climate which will ensure their viability, we are at all not persuaded that these are under serious threat. Referring to s.16 of the Act, counsel for BARNZ submitted that based on the package of controls now agreed to between the parties, the Court should be satisfied that the best practicable option has been adopted to ensure that emission of noise from aircraft operations at Wellington Airport will not exceed a reasonable level.

In determining what is the best practicable option, it has been found that the best practicable option "is the optimum combination of all the methods available to limit the noise damage to the residents ... to the greatest extent achievable". Auckland Kart Club v Auckland City Council A 124/92 (PT) pp 22 - 23. The noise level now produced by the airport has reduced significantly below historical levels and will remain lower for the foreseeable future. In this regard we take Mr Gordon's point that the Boeing 737:200s appear by the residents to be perceived as being a noise problem, notwithstanding that with hush-kitting they meet Chapter 3 certification requirements. And in fact, as Mr Day deposed, there has been an 8 dBA reduction in noise levels since 1988. As to the nature and locality of the environment concerned, the airport is well located, as directly north and south the aircraft operate over the water where the bulk of the noise is emitted. On the other hand, the remaining area on either side which includes a reasonably large number of houses by comparison with other airports in New Zealand, is the primary reason why the overall range of controls on airport noise at Wellington appears to be stricter than any other airport in the country. We are conscious that the capital and other investments already made in aircraft noise mitigation have been considerable and the ongoing research into noise reduction measures for aircraft worth millions of dollars identified by Mr Park is being reviewed all the time. We are satisfied that the current state of technical knowledge, particularly the fact that major advances of noise reduction have been achieved in recent times, make further significant advances in the planning period unlikely. If it were otherwise, we would not hesitate to identify and take account of them in this decision. But Chapter 3 compliant aircraft are seen as representing the relevant state of technical knowledge for the life of the proposed district plan. We are mindful (and emphasise) that in this regard the evidence indicated that Wellington is several years ahead of many other parts of the world.

From the above we find that particular regard has been had to s.7(f) and (g) provisions.

As to s.5(2)(c) matters, it is our conclusion that by adopting the concept of an airnoise boundary from NZS 6805, the council has already set up an area within which noise sensitive uses are to be controlled satisfactorily particularly in the light of consent orders reached. If BARNZ and WIAL consider the noise provisions and land controls for the Outer Residential zones (some of

which are much closer to the airport than the Suburban Centres areas identified) are now satisfactory, then it stands to reason they are satisfactory for possible future residential development in Suburban Centres areas not as close. We accept the BARNZ and WIAL's position that the council's philosophy in respect of the consistency of the district plan provisions was not strong enough to potentially allow the number of additional residential dwelling units in those areas where presently residential dwellings are not a feature, without some further control. The areas identified are not historically in residential use but are part of a wider locality where there is a history of detraction from residential amenities as a result of airport noise with potential pressure to introduce controls on the airport's operations. There is no argument that in the ideal situation there ought to be a good buffer zone as an investment around a busy airport which excludes noise sensitive issues. Mr Mitchell submitted that if the present residential owners whose constituent properties would represent such an investment are to be treated as part of a buffer zone then the provisions of Part VIII of the Act should apply. But we consider that for the Wellington circumstances such a tacit prohibition of residential use is not necessary.

We consider that by requiring new residential dwellings in the Suburban Centres zone within the airnoise boundary to be insulated and by providing for them as a discretionary activity (unrestricted) the airlines and WIAL will have ample opportunity to have input into their establishment. Mr Hegley states that an internal building design goal should be set and the sound attenuation required should depend on the exact location of any new building relative to the noise exposure from the airport. If design value is to vary it would be desirable to relate the design figure to the predicted noise L_{dn} contours. In this regard we note that the NZS 6805 is only a guide to the management of airport noise and we accept that the council's position that the proposed plan provisions have imposed alternative methods of control to those identified in the Standard. These, in certain measure, have offset the prohibited activity status recommended for new residential activity within the airnoise boundary in NZS 6805.

Will the imposition of conditions for consent be effective in mitigating or avoiding adverse effects on BARNZ or WIAL? Mr Batty identified that allowing the potential increase in housing would be likely to promote future conflict thus interfering with the process of sustainable management. He stated it would also reduce the likelihood of social well-being being achieved if the use of the airport as a resource for future generations became unsustainable.

But this case is unusual. The appellants have established an airnoise boundary which will meet the airport operational requirements long term and within which the limits of noise are now strictly controlled. There will be no spillover effect of increased noise and the precedent effects of past noise events will no longer apply. Hush-kitted planes are in the process of being phased out. Noise insulation for new buildings will be a requirement in any event. Noise levels over the next decade will initially diminish and then only rise (by 3 dBA L_{dn} or less) towards 2020 while still remaining within the airnoise boundary on Map 39. Mr Styles deposed and we accept, the projection of noise contours and airnoise boundary serves as a cap on future environmental costs. The boundary itself provides certainty for the airport and certainty for residents in which to judge for themselves any future use for their properties.

In addition residents' concerns are to be channelled through the Airnoise Management Committee. People living in dwellings without noise insulation may press for such noise reduction as they see as practicable. An unrestricted discretionary zoning for residential use within the Suburban Centres would enable the council to require various conditions and also to refuse consent if it persuaded to do so. Developers of new residential units in the zone within the airnoise boundary will be under an obligation to meet council conditions which will as a minimum require noise insulation.

S.E.K.

If there has to be a control then it should be an appropriately worded discretionary activity control. This would allow notification and an opportunity for interested parties to make submissions and lodge appeals. It would allow a clear limitation of the situations in which new residential activity might be appropriate. It would allow a clear set of mitigation measures. The cost to the property owner would be a compliance cost and a possible loss of development opportunity cost as opposed to a virtually guaranteed loss of development opportunity cost from non-complying status.

We have concluded that providing for new residential use as a non-complying activity would not provide sustainable management for a land resource which has been freed up from industrial activity. It would not represent management of that land in a way that enables people and their communities (along with the other methods the plan provides to control airnoise issues) to provide for their social and economic well-being and for their health and safety. Mr Styles for the council stated:

> "Land is a scarce resource in Wellington, particularly in the Eastern Suburbs and that sustainable use of that land is important. We are concerned about keeping healthy communities. If there is perhaps some form of disinvestment by both prohibitive controls or by non-complying controls of a new investment, it wouldn't, in my view, promote the purposes of the Act. A non-complying use would not as an effective prohibition of an activity achieve is the same purpose. It is the effects of the use and development which are to be managed and not the use or development itself. We have concluded that this is being satisfactory achieved by what is proposed in the discretionary use provisions and other provisions of the district plan and other methods."

We are not persuaded that there might be adverse effects on WIAL and BARNZ which would not be sufficiently mitigated by the terms of the consent orders, the noise insulation provisions, the extensive monitoring of noise events at the airport and the proposed assessment criteria for discretionary activities now applying in the Outer Residential zone. The evidence about noise complaints from residents relates to past effects which are now being mitigated or remedied. The provision for ongoing consultation in terms of the noise management plan is not new to some of the airlines as we were told that noise management plans are being used in various other parts of the world. This will allow for greater understanding of issues.

We are satisfied that the council's compromise position on the Suburban Centres zone for all new residential use within the airnoise boundary should be adopted.

The Precedent Effect of the Wellington Airport Plan Provisions

We noted earlier in this decision, in terms of airport planning nationwide that counsel for BARNZ impressed on us the need for a consistency of approach to the application of NZS 6805 and the Resource Management Act 1991 throughout New Zealand. He indicated that to this end individual BARNZ members or their associated carriers are fully involved in the proposed district plan processes throughout the country. He asked that if we were to take the local Wellington circumstances into account it would be helpful for us to say so specifically in our decision so that we may not unwittingly provide precedent provisions for airports elsewhere.

From the Court's point of view, even the brief description of the other major airports given together with the evidence and cross-examination of some of the noise and planning witnesses, drew enough distinctions between the situation within which the Wellington Airport finds itself and the others cited, for the Court to realise Wellington is unique in some of its aspects and therefore in its environmental implications. The way in which NZS 6805 has been applied in the Wellington context (with no outer control boundary for example) is one such adaptation of the standard to local circumstances. As stated, the standard is a guideline only and in the

circumstances of Wellington, this is how it has been utilised. It would therefore be quite wrong for any airport planners elsewhere in New Zealand to view the conclusions we have made in this decision as necessarily having relevance to their own situations.

Conclusion

For the reasons given above we have decided that all new residential development in Suburban Centres areas within the airnoise boundary shall be a discretionary (unrestricted) activity. We invite counsel for the council to present draft formal orders to give effect to this decision by way of any appropriate amendments to the proposed district plan. Any other party has leave to lodge with the Registrar within 7 working days of receiving a copy of the draft order a written memorandum bringing to the Court's attention any respects in which it is claimed that the draft fails to give effect to this decision, or does so inappropriately.

There will be no order as to costs in these proceedings.

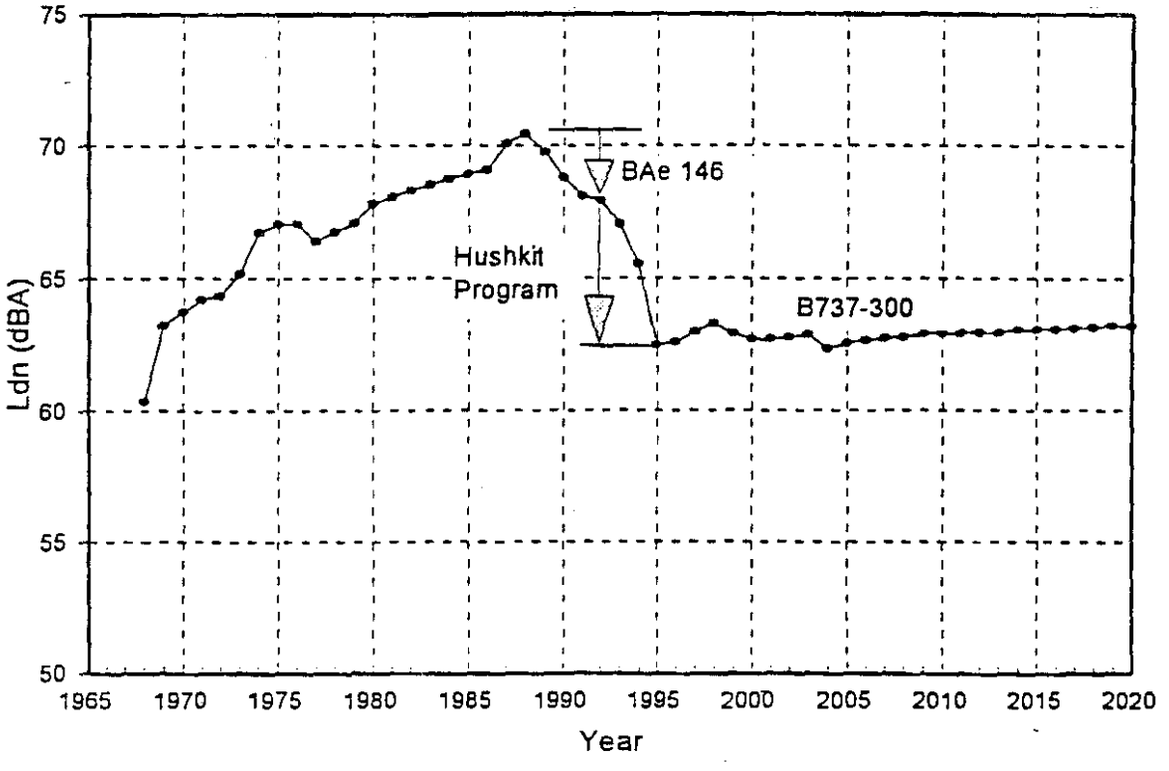
DATED at WELLINGTON this 19th day of November 1997

S E Kenderdine
Environment Judge

airport.doc (j9)

APPENDIX I

Figure 2 - Wellington Int Airport
Noise Level at Kauri St



ORIGINAL

Decision No. W 082 /2004

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of appeals under s120 of the Act

BETWEEN AFFCO NEW ZEALAND LIMITED
First Appellant

RICHMOND LIMITED
Second Appellant

NAPIER SANDBLASTING LIMITED
(ENV W 0046/04)
Third Appellant

AND THE NAPIER CITY COUNCIL
Respondent

AND LAND EQUITY GROUP
Applicant

BEFORE THE ENVIRONMENT COURT
Environment Judge C J Thompson
Environment Commissioner W R Howie
Environment Commissioner P A Catchpole

HEARING at NAPIER: 16 - 20 August 2004. Site visit 20 August 2004.
Evidence taken before a Registrar: 15 September 2004
Final submissions received: 30 September 2004

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

COUNSEL

J K MacRae and M A Stirling for AFFCO New Zealand Limited, Richmond Limited, and Napier Sandblasting Limited

I N Gordon and M J Slyfield for Land Equity Group

M B Lawson and H I Kyle for the Napier City Council

S J Webster for the Hawkes Bay Regional Council – s274 party

J P Matthews and A McEwan for Port of Napier Limited – s274 party

DECISION

Introduction

[1] After a hearing before a Commissioner on 3 and 4 December 2003, the Napier City Council, on the recommendation of the Commissioner, granted a land use resource consent to Land Equity Group to establish and operate a large format retail facility at Pandora Road, on the western edge of central Napier City. It is that decision which is the subject of this appeal. The applicant has been referred to throughout by the shortened title of Land Equity Group, but we are informed by Mr Gordon that the correct name of the owner of the land is Equity Development (Gateway) Limited. The original appellants have been joined by the Hawkes Bay Regional Council and the Port of Napier Limited as s274 parties. The Port of Napier opposes the granting of the resource consent. The Regional Council originally opposed it also but has now modified its approach and, if its concerns can be met by conditions, does not oppose the grant of consent. The land in question has an industrial zoning, and the essential issue is whether the proposed activity is appropriate to that zone, having regard to its own effects, and the effects of the activities conducted on surrounding sites.

The Council's position

[2] The City Council found itself in the slightly uncomfortable position of having adopted the Commissioner's recommendation to grant consent when its Senior Planner, Mr O'Shaughnessy, had quite strongly recommended against that course. Further, at the time of the hearing before us, other obligations made it impossible for Mr O'Shaughnessy to attend, and Mr Alastair Thompson, the Council's Planning Manager was briefed to appear in his place. In light of developments in demand for large format retailing space in the meantime, and other more recent information, Mr Thompson was not as opposed to the proposal. In essence he adopted a neutral stance, saying, at the end of his written brief:

> I believe the present application will have minimal effects on the industrial area where it is sited. Equally it will not enhance the area by its presence.

Mr O'Shaughnessy was able to give evidence before the Registrar at a later date, and we have of course read the transcript of what he and Mr Thompson had to say. In general terms, Mr O'Shaughnessy saw no reason to change his earlier views on matters of substance. Faced with all of that Mr Lawson, very properly, did not take a partisan stance either way but offered his assistance to the Court by way of submissions which we found very helpful.

The site and the general proposal

[3] The subject site is on the western side of Pandora Road at its intersection with Thames Street. It contains 2.7044 hectares and is rectangular in shape with frontages of 270m to both Pandora Road and Tyne Street, which forms its western edge, and 105m to Thames Street, which is its northern edge.

[4] Most of the site is occupied by a former wool store of around 20,000m2; some of which is presently short-term tenanted for a variety of uses. The proposal is to demolish parts of the wool store and to convert the site into three blocks of retail tenancies arranged around an outdoor carpark, facing generally towards Pandora Road. Eleven individual retail tenancies, with floor areas ranging between 3720m2 and 500m2 are proposed, with carparking for 392 vehicles, giving a ratio of carparks to gross retail floor area of 1:33m2. Loading docks are to be provided to the rear and side of the tenancies adjoining Tyne Street. Vehicle entrances will be off Thames Street and Tyne Street but with egress to only Tyne Street. Landscaping by way of large palms, smaller trees and shrubs, grasses, planter boxes and the like are proposed for all street frontages, and within the carpark.

The applicable law

[5] The original application was made to the Council on 11 August 2003. The Resource Management Amendment Act 2003 therefore applies.

District planning documents and planning status

[6] The Napier City Transitional District Plan was promulgated under the Town and Country Planning Act 1977. Under that Plan the site is within the *Pandora Manufacturing* [illegible]. There is no provision for a proposal such as the present in that Plan and it would therefore be *non-complying* with no specified assessment criteria.

[7] The Proposed District Plan was notified in 2000 and is not yet operative, although we understand that the process for public participation is almost at an end and that recommendations *in principle* have been made by the Council's Hearing Committee. We are informed that it is unlikely that there will be any substantial change to the proposed zoning of the relevant site. The Proposed Plan has the site within the *Main Industrial Zone* but it also has Objectives, Policies and Performance Standards which enable a wider range of activities than would be possible under the Transitional Plan. Some limited retail activity would be permitted on the site but the large format retail proposal would be a *discretionary* activity. There are assessment criteria for assessing non-industrial uses within the zone.

[8] As between the Transitional and Proposed Plans, the Transitional Plan is now approaching 20 years old, and was prepared under the earlier legislation. The Proposed Plan has now progressed to the point where it represents fairly settled thinking on the part of the Council, and its Policies and Objectives about the Industrial zones provide useful guidance, as do its assessment criteria. Subject to what we are about to say in the next two paragraphs, we think predominant weight should be given to the Proposed Plan.

[9] The Proposed Plan has no category of *non-complying* activity. Note 1.6.1 contains this explanation:

> The Council has deliberately avoided the use of the non-complying activity status as it is generally not well understood by resource users and has not been widely applied. Land uses that do not comply with all of the relevant conditions can be successfully dealt with by means of the discretionary activity status. This approach is also in line with the proposed changes to the Resource Management Act.

As is evident, the Plan was drafted at a time when mooted amendments to the Resource Management Act would have done away with that status altogether, and the draft anticipated that. That legislative change did not occur, but the Council has retained the Plan strategy. In the end, the absence of that status may not make much practical difference, save that it does remove from the spectrum a classification of activity which, while short of *prohibited*, might be taken as implying a presumption against the activity, with the possibility that it might win through if it can, as a preliminary step, pass either of the s104D gateways. It does also raise an issue about the decision in *Doherty v Dunedin City Council* (C6/04). That Decision held that, by definition, a *discretionary* activity cannot be contrary to the objectives and policies of

a Plan and that as a *discretionary* activity it is accepted as being generally appropriate in the relevant zone. Some counsel submitted that, even in the case of a Plan with a *non-complying* status, that decision may go one step too far. We think we need not try to resolve that general issue here. It can at least be said that where what would elsewhere be *non-complying* activities are to be dealt with as *discretionary*, then *discretionary* must logically include activities that might be contrary to objectives and policies. That is because *non-complying* activities do include those which conflict with objectives and policies, but they might still be consented to if their adverse effects are no more than minor.

[10] It is common ground that the activity is non-complying under the Transitional Plan and discretionary under the Proposed Plan. The proposal must therefore in any case first pass through either gateway in s104D, before we can assess it under the general discretion in s104. Strictly, the activity requires consents under both Plans: see *Bayley v Manukau CC* [1999] 1 NZLR 568.

[11] As an aside (to which we shall return) witnesses versed in local real estate trends say the comment in the Proposed Plan at 2.1.1 that:

> Research has shown that there is ample vacant land, infill potential and empty industrial premises within the City's existing industrial areas to cope with the anticipated level of market demand for industrial sites well beyond the 10-year lifespan of this district plan. Consequently there is no need to expand the presently industrially zoned areas

has already been proved wrong. There is in fact a shortage of larger (2ha or more) industrial sites close to the City.

[12] We set out what seem the more important Objectives and Policies from the Transitional and Proposed Plans in Appendix 1.

Regional planning documents

[13] The Hawkes Bay Regional Council is finalising outstanding references to its Proposed Regional Resource Management Plan. That Plan will include the Regional Policy Statement (which is already operative) and the Operative Regional Air Plan. The Proposed Regional Plan defines the issue of conflicting land use in this way:

> The occurrence of nuisance effects, especially odour, smoke, dust, noise, and agrichemical spray drift, caused by the location of conflicting land use activities. (Section 3.5.1)

We have collected what appear to us to be the most relevant Objectives and Policies of this Plan in Appendix 2.

[14] Both the Regional Council's Environmental Regulation Manager, Ms Helen Codlin, and the Regional Council's Consultant Planner, Ms Rowena Macdonald, confirmed the Regional Council's concern about reverse sensitivity issues, particularly odour. They foresee the possibility that even if there are *no complaint* convenants in the leases, at the very least shoppers will bring their complaints about odour to the Regional Council.

Retail Strategy

[15] In October 2003 the Council adopted a Retail Strategy as a framework for the management and sustainability of future retailing patterns and the growth of retail activities across the city. It is the Council's intention, after the statutory procedures have been complied with, to incorporate elements of the Strategy into the Proposed Plan, but that is some way off yet. For the moment the document has no formal status, but it might be taken as at least an indication of the Council's general thinking on the topic. It was, apparently, the product of considerable consultation, which is laudable in its own way, but the document is criticised by Mrs Sylvia Allan, the Port's consultant planner, as being a *camel*: - a horse designed by a committee - and as lacking rigorous analysis of the issues. That may be a little harsh. The document has its uses, among them a spin-off appraisal of the traffic issues arising from the Report's scenarios, completed by Traffic Design Group in association with Gabites Porter. It may also be a relevant consideration among the *...any other matters...* to be considered under s104(1)(c), if the proposal passes the gateway tests and we consider other elements of s104.

[16] The Strategy recognises the possibility of large format retailing in Industrial zones where:

- individual tenancies have a minimum floor area of 500m2
- at least 75% of tenancies have a floor area of or exceeding 1000m2
- there is a café/and or lunch bar per 10,000m2 of floor area.

This proposal would not comply with the second or third of those points, although it was not suggested that the lack of a food outlet was significant. In fact, given the reverse sensitivities

raised, such an absence may be an advantage. In terms of the second point, 55% of the 11 proposed tenancies would have a floor area of or exceeding 1000m2. Arguably, it may not comply with other suggested criteria about access and parking either, but the carparking issue is dependent on traffic generation, and we shall discuss the difficulty of accurately predicting that. We are inclined to accept the view that the proposed number of parks will be quite adequate.

[17] The assessed level of interest in retailing upon which the Strategy was based has already been outstripped. According to Mr Thompson, the City's requirement for new large format retailing space is now assessed at 70,000m2. Previously, the assessed space requirement over the next five years, or even more, was 30,000m2. (See Mr Copeland's evidence at para 32).

Permitted baseline

[18] In discussing the permitted baseline concept, it is necessary to bear in mind that it is a baseline of effects that is to be considered, not activities. There was considerable discussion about the permitted operation of retailing in the zone, provided that the space it occupied did not exceed 35% of the area of the relevant site. That is to allow for operations such as garden centres, building suppliers and the like. Large format retailing would almost certainly produce more traffic than those sorts of operations. Apart from that it seems to us that the effects which could be generated by permitted activities in this industrial zone are plainly well beyond anything that could be reasonably contemplated as arising from the proposal. Unless the world goes completely mad, a large format store, or even eleven of them, selling such things as furniture, whitewear, fabrics and the like, are not going to be noisier, smellier, dustier, or produce more effluent than, say, an abattoir/tannery, or a sawmill.

[19] We cannot therefore imagine that there might be adverse effects created by the proposal, with the possible exception of traffic generation, that will exceed the effects of permitted and non-fanciful baseline activities. That needs to be acknowledged. But the two situations are just so different that we see no assistance in trying to take the concept of baseline further than that simple acknowledgement: ie that the proposed activity is, in comparison with what might otherwise occur there, relatively benign. We do not need to go so far as to exercise our discretion under s104(2) to put the permitted baseline entirely aside, when and if we come to examine the proposal under s104(1)(a).

Principal issues

[20] From the range of submissions and evidence presented, four principal issues arise for consideration both in terms of the gateway tests under s104D and, assuming either of those is passed, under the general criteria of s104. They are:

[a] Whether traffic generated by the proposal will cause significant adverse effects to the road network in the vicinity of the site.

[b] Whether the sensitivity of the activity may result in reverse sensitivity effects for adverse effect emitting neighbouring activities.

[c] Whether the use of the site for a non-industrial activity might adversely affect the sustainability of the surrounding industrial land resource. (This may be better phrased as an issue of plan integrity and of attempting to achieve *sustainable management*).

[d] Whether any effect of the proposed activity might have adverse effects on transport to and from the Port of Napier or the ability of the Port to be supported by industrial infrastructure.

Traffic generation

[21] In the course of cross-examination of Mr MacKenzie, the applicant's consultant traffic engineer, Mr MacRae put to him paragraphs from the Court's decision in *The National Trading Company of New Zealand Limited v North Shore City Council* (A 182/02). The paragraphs referred to were a discussion by the Court of so-called *pass-by trips*:- ie an estimate of vehicle movements into and out of a development which arise from vehicles which would have passed the development in any event, rather than going to it as a specific destination.

[22] That point is perhaps not of immediate relevance. But *The National Trading Company* decision turned almost entirely on questions of traffic generation and its effect on the surrounding roading network. We particularly noticed a comment from the Court in the context of estimates of traffic generation. The Court said this:

> The amount of traffic that would be generated by a future food market is not susceptible of calculation. Having heard the experts' opinions, we have to make our own finding, recognising that in the nature of the subject matter, the amount of traffic generated cannot (and need not be) be predicted with precision.

[23] In answer to a question from the Court, Mr MacKenzie accepted that that was the situation here. He confirmed, as is plain, that nobody can really know how much traffic will be generated by this proposal. The best that can be done is to give estimates based on certain assumptions. If those assumptions prove to be wrong, the estimates will be wrong. It is futile to pretend that calculations of likely traffic generation are a precise science. They simply are not.

[24] The point is emphasised by Mr Mark Georgeson who was subpoenaed to give evidence for the applicant. Mr Georgeson is a member of the same traffic engineering consulting firm as Mr MacKenzie, but had been independently retained to undertake a study for the Napier City Council on traffic management proposals arising out of various retailing scenarios being considered for the City. The study projected estimates out to the year 2026. The two engineers operate from different offices of the firm and, we accept, undertook this work completely independently. Mr Georgeson acknowledged that he and Mr MacKenzie would have different conclusions about estimates of traffic volumes likely to be generated by the proposal. His figures would be somewhat higher than Mr MacKenzie's. Nevertheless, his conclusion was that whichever set of figures was taken, the roading network in the immediate area was well able to cope without significant modification. His further view was that if the proposal generated more traffic than was expected, or if other developments in the area added to traffic generation, modifications were possible to the network, particularly to the Pandora Road/Thames Street intersection, which would enable it to deal with future traffic flows.

[25] In common with other traffic engineering witnesses, Mr Georgeson made reference to the Roads and Traffic Authority (RTA) "Guide to Traffic Generating Developments" (December 1993, Issue 2.0). We understand that this document is regarded as a useful and authoritative reference to assist in making estimates of likely traffic flows to be generated by various types of developments. At paragraph 3.6.8, the Guide discusses traffic generation by *Bulky Goods retail stores* in surveys undertaken to provide figures for the Guide. A variety of Bulky Goods retail stores ranging from specialist furniture stores to lighting and electrical appliance retailers, were surveyed. The weekday evening range extended from 0.1 to 6.4 vehicles per hour per 100m^2 of gross leaseable floor area (GLFA). The range for the weekend was from 0.7 to 16.9 vehicles per hour per 100m^2 of GLFA. That range would seem to amply support the comment in paragraph 3.6.8:

> The trip generation rates varied so widely that average generation rates cannot be recommended.

The comment we have cited from the *National Trading Company* decision seems amply supported. We find it difficult, and in the end unhelpful, to try to make decisions based on any particular traffic statistic. The proposal will undoubtedly generate some traffic, and in all probability that increase will be significant. The issue to focus on is whether the local roading infrastructure is robust enough to cope with a statistically significant increase.

General traffic issues and local infrastructure

[26] Part of the Port of Napier's concern was the possible effect of the development on the potential use of its land adjacent to Thames Street. It owns some 7ha on the northern side of Thames Street. The Port's General Manager, Mr Donald Cowie, told us that it is possible (but only possible) that the Port may choose to move its container storage depot from its wharf site to the land at Pandora. If it did so, it would generate, on present rates of turnover, some 39,000 truck movements to and from the Port each year; ie an average of over 100 movements for every day of the year. If that ever came about, he agreed, the Thames/Pandora intersection would require an upgrade, regardless of whatever might happen on the subject site.

[27] There is considerable conflict about the capacity of the surrounding roading network to absorb the sort of increases likely to be generated by the proposal, whatever that might be. Mr Tuohey, the appellant's traffic engineer, believed that the applicant had underestimated traffic generation and that at a more realistic volume the Pandora/Thames intersection would not safely and efficiently cope. Mr Georgeson's study assesses Pandora Road as having significant redundant capacity, enabling it to absorb future increases in traffic flows. Mr McKenzie has concerns about delays and safety at the Pandora/Thames intersection. He believes that there is likely to be a particular problem with traffic turning right out of Thames St to travel south on Pandora Rd. But those concerns seemed to presume that the intersection was unchangeable, which of course it is not. Roads are not ends unto themselves, they are there to serve the traffic that requires to use them. If the design of an intersection is inadequate for increased traffic, then it can be changed, with one option at least being the installation of a roundabout. We saw nothing that persuaded us that any potential problem with this intersection was irresolvable. While recognising the possibility of some issues arising for Pandora Road and Thames Street, we do not see them as of a magnitude that would cause us to decline the consent.

[28] We do though accept that there could be issues about Tyne St. For understandable reasons, the proposal is that all traffic leaving the development's carpark will do so into Tyne St, and will then turn right onto Thames St. Effectively, that will mean that almost all of its traffic will enter off Thames St, and leave by Tyne St. The Mainfreight depot at the end of Tyne St, and the AFFCO plant, will continue to produce substantial truck traffic and there will also be truck traffic generated by the proposal itself. There is an obvious potential for conflict between the two types of traffic on Tyne Street in particular. This is an effect which deserves attention in its own right, and it is also, potentially, an issue of reverse sensitivity which is of concern to AFFCO at least. We turn next to consider reverse sensitivity as a separate issue.

Reverse sensitivity

[29] It is almost inevitable that industries of various kinds and scales may produce effects on their surrounding environments, or at least people believe they do. In turn, reactions to those effects, or perceived effects, by way of complaints or actions in nuisance can give rise to pressures on the industries that can stifle their growth or, in an extreme case, drive them elsewhere. That stifling, or that loss, may be locally, regionally or even nationally significant. If an industry or activity likely to emit adverse effects seeks to come into a sensitive environment, the problem should be manageable by designing appropriate standards and conditions, or by refusing consent altogether. It is when sensitive activities seek to establish within range of a lawfully established effect emitting industry or activity that management may become difficult. This is the concept known as *reverse sensitivity*. A very helpful definition of the concept comes from an article by Bruce Pardy and Janine Kerr: *Reverse Sensitivity – the Common Law Giveth and the RMA Taketh Away:* ((1999) 3 NZJEL 93, 94)

> Reverse sensitivity is the legal vulnerability of an established activity to complaint from a new land use. It arises when an established use is causing adverse environmental impact to nearby land, and a new, benign activity is proposed for the land. The "sensitivity" is this: if the new use is permitted, the established use may be required to restrict its operations or mitigate its effects so as not to adversely affect the new activity.

[30] In a number of previous decisions this Court has held that reverse sensitivity is itself an *adverse effect* in terms of s3 RMA (eg *Winstone Aggregates & Auckland Regional Council v Papakura District Council* (A49/02) para [12] and *Independent News Auckland Ltd v Manukau City Council* (2003) 10 ELRNZ 16, para [57]). That has a significant consequence.

If reverse sensitivity is an adverse effect, then there is a duty, subject to other statutory directions, to avoid, remedy or mitigate it, so as to achieve the Act's purpose of sustainable management. Whether one should deal with an adverse effect by avoiding it, remedying it or mitigating it is a question of judgement in each case. It will depend on a matrix of issues; for instance, the nature of the effect; its impact on the environment and amenities; how many people are affected by it; whether it is possible to avoid it at all and, if so, at what cost.

[31] Of the range of possible effects which might give rise to reverse sensitivity complaints: - noise, odour, vibration etc, noise is not a live issue here. The evidence of Mr Hegley for the applicant was not seriously disputed and no other acoustic evidence was called to contradict his views. Of the appellants, AFFCO is concerned about complaints of odour emitted from its tannery immediately opposite the site on Tyne St. Richmond's main concern is about odour complaints also. It has a plant in Mersey St, a block west of the site. Napier Sandblasting is also in Mersey St, next to Richmond, and it is concerned about possible complaints about dust. There are other industries in the Pandora industrial area, such as another, smaller, tannery, a timber sawmill and so on which might also be possible candidates for complaints from an incoming sensitive activity. We have mentioned in para [28] the issue of traffic in Tyne Street as potentially giving rise to reverse sensitivity concerns also. Of all of those possibilities, traffic is the one which stands out as being the most difficult, if not practically impossible, for the existing activities to internalise. As discussed in *Winstone Aggregates v Matamata-Piako District Council* (W55/04), emitting activities should be required to internalise effects to the greatest extent reasonably possible, although the law does not require total internalisation in every case.

[32] We see large format retailing as rather middling on the scale of activities which are sensitive to industrial effects such as noise and odour and on the scale of those likely to produce complaints and thus reverse sensitivity. Unlike activities such as residential, educational or health care, for instance, shopping centres are not places people (or at least the shoppers) have to remain in. If shoppers find the amenities unpleasant, they can and will leave, and not return. There will not be the sort of attractions in the development to encourage it being seen as a leisure destination. There will not, for instance, be cafes or outdoor markets or activities. If shoppers do stay away because of adverse effects, we do recognise the likelihood that the tenants will almost certainly promote complaints from their customers, even if *no-complaints* covenants in their leases prevent them from complaining themselves.

But complaints based on perceived trading issues, rather than genuine adverse environmental effects, can be recognised for what they are. On the other hand, if emitted odour is objectively offensive and objectionable beyond the emitting site boundary, then the emitter will almost certainly not be complying with its own discharge consent, and the complaint may be entirely justified. We add that we accept the validity of the suggestions made in evidence that industrial activities are likely to be tolerant of the effects emitted by other industries, if only on a tacit *live and let live* basis. That is a tolerance less likely to be shared by different classes of activities.

[33] Nor does history suggest that there is a great problem here. The closest parts of the residential area of Napier Hill are of the order of only 200m from the Pandora zone boundary, but there is only a very modest history of complaint from residents about adverse effects. Mr Rhys Flack, the General Manager of Richmond's Leather Division says that there has been no recorded complaint about odour from the Richmond's tannery in Mersey St in the last five years. Odour is probably one of the more difficult effects to internalise. In general terms, the Richmond operation is comparable in scale with the AFFCO plant.

[34] The Ahuriri Mixed Use zone, containing what seems a surprising combination of commercial, retail, residential and semi-industrial activities, commences on the other side of Pandora Rd and Thames St from the site. The two zones appear to co-exist in harmony. Mr Stephen Hill has for five years operated a car sales yard in the mixed use zone, on the corner of Thames St and Pandora Road, immediately opposite the site. He gave evidence for the applicant. He has more than 100 cars on his site, and most of the contact with prospective purchasers is conducted in the open air. He says that the only noticeable noise comes from Pandora Rd itself, not from local industry. There is occasionally a noticeable odour, largely dependent on wind direction. It is not strong enough to call for comment, and has never been complained about. For his business, he says that odour is *...simply not an issue.*

[35] We acknowledge the possibility of reverse sensitivity issues arising, but we are not convinced it is a major issue. On its own, it would not have persuaded us that consent should be refused.

Non-Industrial Use of Industrial Zoned Land

[36] We mentioned briefly at para [11] that the confident assertion in the Proposed District Plan that the City was well provided for in terms of industrial land has not proved to be accurate. We have looked to the evidence of Mr John Reid, who practises as a property analyst and valuer, and Mr Francis Spencer and Mr Patrick Turley, both of whom similarly practise in land valuation and consultancy. Mr Spencer estimates that the subject site, at 2.7ha, comprises about 3% of the industrially zoned land in Pandora and Corunna Bay. On its face, that seems like a relatively small amount of land. In turn, the total area of Pandora and Corunna Bay represents about 28% of the total industrial land in Napier City. But both witnesses agree that industrial zoned land in lots of 2ha or more is simply not available for purchase in Pandora, and that there is a significant unsatisfied demand for Lots of that size in particular. While perusal of a map or aerial photograph would indicate that there are areas of vacant land in Pandora, that appearance is misleading. More than 20ha of that land is, we understand, in Crown ownership and is not presently available for sale because it is being reserved for possible settlement of Treaty claims. There is 12ha of land at Awatoto which is zoned as *deferred industrial*. Again we understand that this is not presently available for use as industrial land, and is unlikely to be so in the foreseeable future. There are issues about the nearby effluent treatment plant and the like.

[37] Mrs Allan's view was that not enough consideration has been given to alternative sites for a large format retail development. She said: *There are other possible sites, which are more appropriate locations for a large format retail development in Napier:* although it was not quite clear what alternative sites she had in mind. Mr Turley, the Port of Napier's consultant valuer, mentioned possible alternatives in the Lagoon Farm development (which he acknowledges would require a plan change) and the old *Write Price* site in Wellesley Road. In the end, we think we need to decide this on issues other than the insufficient exploration of alternatives, as a topic in itself.

[38] Mr Spencer mentions that there is possibly 12ha of land presently in the Rural Zone which might be the subject of a rezoning application to make it industrial. That seems to be simply a possibility at the moment. It is not presently available. The problem cannot be solved by simply rezoning other land as industrial. As Mrs Allan points out (para 6.11) Napier is running out of greenfield options for any kind of expansion. Residential growth can be accommodated in the western hills, but that is not an option for industry.

[39] The end result is clear enough. Napier presently has little available industrial land at all, and none in lots of 2ha or more. It is therefore presently a scarce and increasingly valuable resource. The issue of the sustainable management of that resource therefore comes into sharp focus. Mrs Allan regards this shortage as a significant factor. In her opinion it is *...not sound planning...* (para 2.17) to use this scarce resource for retailing purposes. Reflection since the hearing has brought us to the same view. It is now apparent that the City has an unsatisfied demand for industrial land, particularly in larger lot sizes. Equally, the current demand for large format retailing space was unforeseen and has taken the planning process by surprise, but that is not a reason to place that activity on land that should be reserved for activities requiring particular, and scarce, attributes.

[40] There is a related issue. At a cost of some $3M the Council has constructed a trade waste sewer to service the Pandora Industrial zone. It discharges to the Awatoto effluent treatment plant. The capital cost is recovered from users by way of trade waste charges. Objectors to the proposal express concern that a non-industrial use of the site will lessen the number of contributing users, thus raising the per capita cost to the users. The wool store on the site at present does not use the trade waste sewer, nor is there any assurance that an incoming industrial activity would use it either. It would depend entirely on the type of industry being conducted. Again, this is an issue that, taken on its own, is not of anything like decisive weight. But it does help bring home the point that Pandora has been zoned as an industrial area, and provided with infrastructure to deal with the effects of significant and *wet* industrial activity.

[41] It is true that, to a degree, the provision of land for industrial purposes is a regional issue, and that land at Whakatu and closer to Hastings City may be available. But adequate provision of industrial land close to Napier remains a significant issue. Local economic well-being, by way of employment opportunities and otherwise, is an issue addressed by both Napier Plans. Additionally, proximity to the region's port and airport are factors for some industries at least.

[42] This is a piece of land of land of some 2.7ha within a clearly defined industrial zone, with other industrial activities closely adjoining. The proposed activity has potential effects for that industrial zone (even if they are not individually acute) and will not add to the

efficient use of the trade waste sewer. More importantly, it will occupy a category of land that is in very short supply and which cannot presently be duplicated elsewhere within Napier City. Because of its effects, industry needs to go into an industrial zone. Large format retailing does not need to go into an industrial zone. It is an activity which has traffic generation issues (even if they may be largely unquantifiable in advance) but does not produce *noxious* effects, such as odour, noise, vibration or dust. It can be accommodated within a much wider spectrum of land categories than any true industrial activity. It cannot be assumed that sites or activities are interchangeable. While the RMA is permissive and effects based, Plans allocate zones in recognition of the likely effects of types of activities.

[43] We do not see this as an issue of precedent. It is rather an issue of plan integrity and of promoting *sustainable management.* That is, the management of the use of a scarce resource in a way which best enables the community to provide for its economic well-being and safety, while avoiding, remedying or mitigating adverse effects of, in this case industrial, activities on the environment.

Effects on transport to and from the Port.

[44] While originally put as a separate ground of objection to the proposal, in substance this head is really a sub-set of the general traffic and roading infrastructure issue, which we have already discussed. If the Port does relocate its container storage facility to its Thames Street property, the Thames/Pandora intersection will need substantial attention in any event. That possibility aside, there was nothing in the evidence that caused us concern about access to the Port generally, whether via Hyderabad Road, or by any other route.

The s104D gateways

[45] It may make our thinking clearer if we address the s104D gateways in reverse order. In paras [36] to [43] we have set out our concerns about the appropriateness of using this piece of land for other than industrial purposes. Addressing the provisions of the two Plans demonstrates that the issues giving rise to those concerns are captured in the Plans. We refer in particular to:

Transitional Plan:

Objective 14.3.1 and Policy 1

Objective 14.3.2 (in the sense that if this land is not retained for industrial use there may be pressure to locate industry in other, less suitable places), and Policies 2 and 5.

Objective 14.3.3 and Policy 2

Objective 14.3.4 and Policy 1

Proposed Plan

Objective 22.2 and Policies 22.2.1 and 22.2.2 (and their accompanying reasons).

Objective 22.3 and Policies 22.3.1 to 22.3.4 (and their accompanying reasons).

We have said that the Proposed Plan should be given more weight, but note that s104D(1)(b)(iii) draws no distinction between *relevant* and *proposed* plans. In any event, in our judgement the concerns we have outlined mean that this proposal is contrary to those Objectives and Policies of both Plans, in the sense that it is in conflict with them, not just that it cannot find support in them, or support in other provisions of the Plans.

[46] Turning to the question of effects, the same sets of issues come into play. In paras [26] to [28] we discussed adverse effects on Traffic and roading infrastructure. While not of themselves of sufficient moment to decline consent, they did raise a live issue. Similarly, in paras [29] to [35] we discussed the adverse effect of reverse sensitivity. Again, while not of itself of sufficient weight to require a refusal of consent, this too raised a live issue. Most significantly, the potential adverse effects of allowing the scarce resource of industrial zoned land to be used for an activity which does not need land of that category has been discussed in paras [36] to [43].

[47] The last of those, for the same reasons that put it in conflict with the Objectives and Policies of the Plans, would be of itself be sufficient to take the adverse effects beyond the scope of *minor*. When put together with the traffic and reverse sensitivity issues, the cumulative adverse effects, or, put another way, the accumulated effects of those phenomena are undoubtedly more than *minor*.

[48] On that analysis, we cannot be satisfied that the proposal passes either of the gateways contained in s104D. It follows therefore that a resource consent may not be granted.

[49] Given the absence of a non-complying status from the Proposed Plan, we are conscious that such a view may not be thought entirely adequate. So we should say that if we were considering this proposal solely as a discretionary activity, or if we were not brought to those conclusions about s104D, the very same process of analysis would have lead us to decline consent in the exercise of our judgement under s104. The use of this land for a non-industrial

purpose is definitely not, in our judgement, something which will promote *sustainable management*. We should say that we heard significantly more evidence and submissions than did the Council's Commissioner, and that it is an analysis of all of that material that has brought us to a different result.

Result

[50] For the reasons we have outlined, the decision of the Council is not upheld, and the resource consent is declined.

Costs

[51] Any applications for costs should be lodged within 15 working days from the release of this decision, and any response lodged within a further 10 working days.

DATED at Wellington this 4th day of November 2004

For the Court

C J Thompson

Environment Judge

APPENDIX 1

Relevant Objectives and Policies

Transitional District Plan

Objective 14.3.1:

"To provide the opportunities for industrial growth in the district to ensure ample employment opportunities for the people of Napier."

Policies:

"1. For the Council to develop and service land for industrial purposes either as a landowner or in consultation with other landowners.

2. To co-ordinate with other Government and local agencies to ensure that all the essential services are available to meet the demand for industrial land."

Objective 14.3.2:

"To provide locations for industries to establish so that they have the least disruptive effect on the residential suburbs."

Policies:

"1. To encourage noxious industries to locate at Awatoto or to modify their options so that they can be accepted within the city.

2. To retain Onekawa and Pandora as the principal industrial sub-districts for Napier.

3. To retain a substantial area of Ahuriri for industrial activities.

4. To permit certain service industries within the commercial sub-district and retain some areas for service industries adjacent to shopping centres.

5. To establish a new industrial area to the west of Pandora. The development of this area to be known as The Pandora West Sub-District, will depend on the demand for land and the financial resources of developers and the local authorities."

Objective 14.3.3:

"To ensure that the industries are compatible and that the combined effect is not detrimental to the environment."

Policies:

"1. To establish a hierarchy of industrial areas which recognises the compatibility of industrial groups.

2. To control the effects of industries on each other and on the adjoining residential areas by the use of performance standards."

Objective 14.3.4:

"To ensure an efficient use of land to satisfy... industry."

Policies:

"1. To encourage the utilisation of industrial sites that are already fully serviced to avoid the creation of an excess of developed land before demand.

2. To ensure that the siting of buildings allows sufficient open space for storage of goods and materials, the loading and unloading of trade vehicles and the manoeuvring of all vehicles associated with the site."

Proposed District Plan

Main Industrial Zone

Objective 22.2:

"To enable the continued use and development of industrial activities and resources through:

- *The identification of defined areas for industrial activity.*
- *The provision of clear and certain environmental performance standards within, or in some cases adjacent to those industrial areas.*
- *The restriction of sensitive land uses in defined industrial areas."*

Policies:

"To achieve this Objective the Council will:

22.2.1 Continue to zone the Pandora, Onekawa, Awatoto and Port of Napier areas for industrial activities.

22.2.2 Enable and provide for the use and development of physical industrial resources without unnecessary restriction. ...

22.2.4 Ensure the avoidance, remediation or mitigation of adverse environmental effects associated with the establishment and location of sensitive land uses within the identified industrial areas."

Principal Reasons for Adopting Objectives and Policies

Pandora, Onekawa, Awatoto and Port of Napier have traditionally been utilised for industrial activity purposes. Much of Napier City's industry is located in these areas. Thus, it is important that these areas continue to be zoned industrial to provide certainty for these businesses, and prevent undue restrictions being imposed upon industrial activities that would not otherwise be able to operate and develop elsewhere within the City. ... Sensitive land uses should be carefully assessed before being permitted to establish within or adjacent to existing industrial activities that are operating using the best practicable method, in the defined industrial zones. Reverse sensitivity arises when a sensitive land use is located next to a less sensitive one, which then potentially constrains the operation and viability of the encroached land use by demanding increasing levels of amenity or reduction in risk that which was previously acceptable. For example, careful consideration would be needed for a people orientated land use to be permitted next to a bulk storage facility, which could raise reverse sensitivity issues.

Objective 22.3:

"To avoid, remedy or mitigate the adverse effects on the environment of land uses within the industrial areas of the City."

Policies:

"To achieve this Objective, the Council will:

22.3.1 Ensure that land uses are managed to avoid, remedy or mitigate any adverse effects on the environment and people's health, safety and well-being.

22.3.2 Control retailing land uses to retain the existing amenity of industrial zones and to manage the adverse effects on the environment, particularly the roading network.

22.3.3 Control the establishment of sensitive land uses within the City's industrial areas.

22.3.4 Ensure that non-industrial activities do not compromise or limit the efficient and effective use and development of existing lawfully established industrial activities, or new industrial activities."

Principal Reasons for Adopting Objectives and Policies

It is important that industrial activities are provided with a location, and accompanying operating conditions, that allow them to undertake their business activities with certainty. However it is also important that environmental standards and the wellbeing of people within and adjacent to industrial areas are not compromised below acceptable levels.

Significant effects can be generated as a result of industrial traffic and increased numbers of vehicles due to retailing land uses occurring in industrial areas in Cities. Limiting the scale of retailing land uses occurring in industrial areas ensures that any adverse effects associated with increased traffic flows are avoided. Retail land uses, if left unmanaged, can also have an adverse effect on other physical resources throughout the city, primarily the art deco building resource of the Central Business District.

Sensitive land uses are likely to be susceptible to effects generated by typical industrial activities now and in the future. This may lead to the occurrence of reverse sensitivity, potentially leading to limits on traditional industrial operating requirements. Discouragement of sensitive uses in the industrial areas of Awatoto, Onekawa, Pandora and service industrial type areas will ensure that industrial uses are not compromised by reverse sensitivity issues.

APPENDIX 2 PROPOSED REGIONAL PLAN

Particularly relevant Objectives and Policies under the Regional Plan are:

Objective 16

For future activities the avoidance or mitigation of nuisance effects arising from the location of conflicting land use activities.

Policy 7

Problem Solving Approach – Future Land Use Conflicts

To:

a) Recognise that the future establishment of potentially conflicting land use activities adjacent to, or within the vicinity of, each other is appropriate provided no existing land use activity (which adopts the best practicable option or is otherwise environmentally sound) is restricted or compromised. This will be primarily achieved through liaison with territorial authorities and the use of mechanisms available to territorial authorities, which recognise and protect the ongoing functioning and operation of those existing activities. ...

Policy 8

Decision-making Criteria – Odour Effects

To have regard to the following factors when considering conditions on resource consents where a discharge of odour to air occurs:...

c) The nature of the local environment where odour may be experienced and the reasonable expectation of amenity within that environment given its zoning...

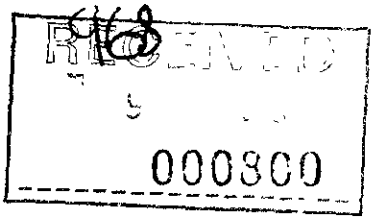
e) The extent to which lawfully established resource use activities operate in a manner that adopts the best practicable option, or which is otherwise environmentally sound.

Section 3.5.7 of the Plan states:

The crux of this principle is that where an existing activity produces a situation that a new activity would likely regard as noxious, dangerous, offensive or objectionable, then the new activity should not be sited next to the existing one. Alternatively, safeguards should be put in place to ensure that the new activity does not curtail the existing one.

IN THE HIGH COURT OF NEW ZEALAND
GISBORNE REGISTRY

AP.1/95 4/8



UNDER the Resource Management Act 1991

IN THE MATTER of an appeal against a decision of the Planning Tribunal

BETWEEN J.I. FALKNER & ORS and PARE STREET PARTNERSHIP

Appellants

AND THE GISBORNE DISTRICT COUNCIL and THE MINISTER OF CONSERVATION

Respondents

Hearing: 24, 25 May 1995

Counsel: N. Weatherhead and H. Taumanu for appellants
G.R. Webb for first respondent
A.F.D. Cameron for second respondent

Judgment: July 1995

JUDGMENT OF BARKER J

Solicitors: Wilson Barber & Co, Gisborne, for appellants
Nolan & Skeet, Gisborne, for first respondent
Crown Solicitor, Wanganui, for second respondent

This appeal is brought on a question of law under S.299 of the Resource Management Act 1991 ('the Act') against a reserved decision of the Planning Tribunal ('the Tribunal') delivered on 13 October 1994. The Tribunal had been asked by both the appellants and the respondents to make a number of declarations. It declined to make any of the declarations sought by the appellants and made only one sought by the respondents.

The decision of the Tribunal is very comprehensive and deals more than adequately with the relevant facts, including the lengthy history of efforts to combat coastal erosion at Wainui Beach. Accordingly, it is not necessary for me to repeat all the facts as found by the Tribunal in its careful review.

Introduction:

The appellants focused on the long history of dealings between the residents of beach-side properties at Wainui Beach, north of Gisborne and various predecessors of the present local authority, the Gisborne District Council ('the Council') concerning coastal protection works first erected there in the 1920's. The foredune of the beach has been susceptible to erosion from the sea for years. Since the early 1960's, local and national governmental agencies assumed some responsibility for constructing protective buffers and replacing them when damaged by storm activity and erosion. The works currently extend

for some 700 metres along the foreshore, broken only by the Wainui Stream. There are some 106 properties on the beachfront on most of which dwellings are erected.

More recently, professional advisers to the Department of Conservation and the Council voiced their concern that a coastal protection scheme was not an effective long-term option for the area. Instead, it was considered that the more appropriate long-term policy was one of "managed retreat", a somewhat euphemistic expression involving removal of the existing coastal protection works and a retreat of residential occupation from the foredune. In accordance with this advice, the Council resolved on 17 December 1992 to "discontinue all beach works within the framework of the Wainui Beach Foredune Protection Scheme".

The residents (including the present appellants), understandably, opposed this policy with vehemence, particularly when they had been paying special rates to the Council or its predecessor, the Cook County Council to ensure foreshore protection works. The appellants are concerned at the notion of their properties being eroded away, slowly but surely, through the ravages of the sea, particularly when there has been no suggestion of compensation. Many of the homes likely to be affected by a policy of "managed retreat" are of considerable value.

The winter of 1992 brought particularly heavy seas, causing damage to parts of existing protection works. The Council then undertook some additional work, replacing damaged gabions and logs with quantities of rock. Two groups of residents applied for resource consents for both this work as well as for further reinforcement work which they wished built.

The Tribunal considered that these proposed works fell within the "Foreshore Conservation A Zone" pursuant to the Council's transitional district plan. Because they were said to involve structures, depositing of filling material and alterations to the established landform, the Tribunal held that they would be "conditional uses" and were therefore deemed to be a discretionary activity under s374(3)(b) of the Act. The Tribunal held that the proposed protection works did not lie within the "coastal marine area" as defined by S.2 of the Act. Accordingly, any application for a resource consent was to be heard by the Council and not by the Minister of Conservation ('the Minister'). The respondents did not appeal that part of the Tribunal's decision. The Tribunal also upheld a direction by the Minister that solid structures placed along the shoreline 200 metres or more in length (including incremental structures adding up to 200m contiguous) were to be treated as "restricted coastal activities" for the purposes of the Act.

Relevant Issues:

The relevant issues for this appeal are: (a) the appellants' claim of a common law duty incumbent on the Crown to preserve the realm from the inroads of the sea; (b) a similar claim to a common law right of frontagers to protect their properties from the sea; and (c) the extent to which either or both of (a) and (b) have been abrogated or modified by statute. Counsel for the residents contend that this duty and the public right are well-established both in English law (at least prior to the enactment of the Coast Protection Act 1949 (Imp.)) and in New Zealand law.

Second Respondents' Strike-Out Application:

Shortly before the hearing commenced, the second respondent applied to have the appeal struck out on the basis that the stated grounds did not disclose a question of law. The second respondent submitted that, because the Tribunal had accepted for the purposes of argument, that the above duty and right existed, no error of law arose. Reference was made to the following part of the Tribunal's decision (at p8) -

> "We had no submissions or evidence on [the question whether the duty and right are part of the laws of New Zealand]....and it would not be appropriate for us to decide them without further assistance. We therefore proceed to consider the submissions of the parties on the assumption, but without deciding, that the duty

> and right mentioned are part of the laws of New Zealand."

Moreover, it was argued that the relevance of the common law duties in New Zealand law did not bear upon the Tribunal's final determination. At p11 of the decision, the Tribunal had stated -

> "It is not necessary for [that question] to be determined to enable the Tribunal to decide the present applications for declarations, nor to enable the appropriate consent authority to decide the residents' resource consent applications."

And further -

> "... it is irrelevant to the present purpose whether or not the Gisborne District Council or the Crown has duties to maintain the works. The resource consent applications are made by groups of property owners affected. No question has been raised about their entitlement to make those applications, nor about their rights, if the consents are sought are granted, to carry out those works."

Counsel for the appellants contended that, read in its entirety, the overall effect of the Tribunal's decision was to render the common law right and duty subject to the provisions of the Act. The appellants' argument before the Tribunal was not about the extent to which the duty and right had been modified by the statute, but was that the statute did not affect them at all; accordingly, the residents were entitled to continue protecting their properties without the need for any consent.

I declined to consider the application for striking-out, made as it was at an unacceptably late stage and after a telephone conference relating to the mechanics of the hearing. I therefore heard the appeal proper. The parties were ready and able to argue the real issues involved. I took into account the following considerations both in considering the strike-out application and at the substantive hearing -

(a) The Court should be wary of deciding on an interlocutory application that an appeal discloses no question of law. It should only do so in a plain case (**Smith v Takapuna City Council** (1988), 13 NZTPA 156).

(b) The limited nature of the High Court's role in hearing appeals on points of law has been well traversed (see **Countdown Properties (Northlands) Ltd v Dunedin City Council** [1994] NZRMA 145, 153-154; **Environmental Defence Society v Mangonui County Council** (1988) 12 NZTPA 349, 353).

(c) Where a definitive or positive finding on a particular issue has not been made by the Tribunal, the appellate court cannot revisit the issue on the basis of an error of law (see **Auckland Acclimatisation Society Inc v Sutton Holdings Ltd & Ors** (Auckland, M.583/83, 25/9/84) at p25; **Lendich Heavy Equipment Ltd v Auckland Regional Authority**

(Auckland, M.193/87, 22/2/91) at p11; **Waimea Residents' Association Inc v Chelsea Investments Ltd** (Wellington, M.616/81, 16/12/81) at p21.

(d) Any error of law must materially affect the result of the Tribunal's decision before the High Court will grant relief (**Royal Forest and Bird Protection Society Inc v W A Habgood Ltd** (1987) 12 NZTPA 76, 81-82).

Looking at the Tribunal's decision as a whole, there are areas of enquiry for the Court; i.e. (i) whether the common law duty and the common law right exist in New Zealand; and (ii) if so, whether they have been abrogated or modified by statute. With respect to (i), the Tribunal, arguably, made no positive finding, and it might therefore not be possible to revisit that issue.

With respect to the second inquiry however, the Tribunal stated (with reference to the direction by the Minister of Conservation) -

> "We hold that the Minister's direction is not repugnant to a duty of the Crown at common law to protect the realm from inroads of the sea, nor to a common law right of subjects to protect their properties from the sea. The effect of the Minister's direction is to change the class of certain activities to that of restricted coastal activities, and the consequence of that is not that they are prohibited, but that the Minister becomes the consent authority **instead of the Council**. That particular proposals for defences against the sea may be so classified is not repugnant to the common law, but merely an incident of the

> scheme for sustainable management of natural and physical resources imposed by the Resource Management Act. If that regime is applicable, the duty can still be performed, and the rights exercised, but in accordance with the Resource Management Act regime. The direction does not abolish or modify the Crown's duty or the subject's rights, but directs to a different decision-maker applications for consent for certain classes of activity. That was plainly within the contemplation of the legislation....(emphasis added)"

The direction was made by the Minister pursuant to s372(1) of the Act. Its effect was to require applications for consents for the structures specified in the direction to be heard by a committee answerable to the Minister rather than by the Council itself (s117 and s119).

Several points about the Tribunal's conclusions here are to be noted -

1. The Tribunal assumed that if the Ministerial direction was not made, persons wanting to erect structures of more than 200 metres in length along the coastline would in any event have to apply to the local consent authority; all the direction did was substitute a different decision-making body.

2. The Tribunal also assumed that the scheme of the Act applies to the building of such structures irrespective of whether they are built pursuant to the exercise of a common law right or duty. In other words, it held that any common law duty and

right are modified or regulated by the Act's procedural regime.

3. It may be questioned whether the Tribunal was correct in asserting that the Ministerial direction does not "abolish or **modify** the Crown's duty or the subject's rights" (emphasis added). Requiring a person desirous of protecting property from sea damage to go through a statutory consent process would certainly be a modification of the common law rights alleged.

That the Tribunal found as a matter of law that any common law right or duty was to be subject to the Act and thus "modified" by it, is further borne out by the Tribunal's finding that protection works fell within the transitional scheme's "A zone" and were a discretionary activity for which resource consents were required.

Clearly, then the Tribunal made a finding that the common law duty and right, if they exist in New Zealand, have been abrogated or modified by statute.

It is this finding that the appellants allege constitutes an error of law, and it is this finding which bore upon the Tribunal's determination (i.e. that the Minister's direction was validly given). No question therefore arises as to this Court's encroaching on the factual merits of the decision or usurping the function of a

specialist tribunal; it is simply a matter of whether the Tribunal applied the wrong legal test. Accordingly, the respondent's submission that the entire appeal should be struck out on the basis that it discloses no question of law could not be sustained.

The appellants' notice of appeal nevertheless did illustrate a degree of confusion over the issue; in particular, the **question** of law there posed (i.e. whether the common law duty and right exist in New Zealand) does not seem correct, given that that issue was deliberately left undecided by the Tribunal. Nevertheless, I accept that, for the purposes of this appeal, the ***error*** of law alleged in the notice of appeal contains the real point of law to be resolved; i.e. whether any common law duty or right extant in New Zealand and of the nature described by counsel for the appellants in submissions has been abrogated or modified by statute.

A substantial part of the submissions from counsel was taken up with arguments about the existence of the common law duty and right in New Zealand law. The appellants' argument was notable for its scholarship and comprehensiveness.

The common law right and duty:

Counsel for the residents cited a large number of English authorities, many of which go back for centuries, in

support of the proposition that there is a common law duty on the Crown to protect the realm from inroads of the sea and a corresponding right of citizens to protect their properties from the same. The premise underlying the argument seems to be that, given the existence of this duty and right, nothing in the statute can prevent the residents from building such protective walls as they see fit.

Counsel for the respondents recognised that the Crown duty was the historical basis for the powers conferred by statute on various agencies in relation to coastal protection in England but submitted that any such duty on the Crown is of an imperfect nature in that it cannot be enforced. It was further argued that the corresponding right has been overtaken by developments in the law of private nuisance.

The Tribunal itself accepted that the duty was a part of the English common law, and that finding is not now the subject of challenge. The Tribunal then turned to the question as to whether this duty and right became part of the laws of New Zealand. It observed -

> "Section 2 of the English Laws Act 1908 provided that the laws of England as existing on 14 January 1840 "so far as applicable to the circumstances of New Zealand, and insofar as the same were in force in New Zealand immediately before the commencement of this Act, shall be deemed to continue in force in New Zealand and shall continue to be therein applied in the administration of justice...." (a proviso being immaterial to this case)".

The English Laws Act 1908 had as its predecessor the English Laws Act 1858, s1 of which provided -

> "The laws of England as existing on [14 January 1840], shall, so far as applicable to the circumstances of ... New Zealand, be deemed and taken to have been in force therein on and after that day, and shall continue to be therein applied in the administration of justice accordingly."

The Imperial Laws Application Act 1988 ('the 1988 Act') was intended to resolve uncertainties in respect of imperial legislation, listing applicable Imperial legislation in the First and Second Schedules. However, perhaps, of necessity, the test for applicability of pre-1840 common law remained less certain. Section 5 provides that the common law of England "so far as it was part of the laws of New Zealand immediately before the commencement of this Act, shall continue to be part of the laws of New Zealand".

In determining whether the present common law right and duty are part of the laws of New Zealand, four criteria need to be addressed: (i) the law was existing in England on 14 January 1840; (ii) it was applicable to the circumstances of New Zealand; (iii) it was in force in New Zealand prior to the commencement of the English Laws Act 1908; and (iv) it was part of the laws of New Zealand prior to the commencement of the 1988 Act.

With regard to (i), the Tribunal accepted this was the case. I see no reason to disagree. As to (ii), it is important to bear in mind that the principle underpinning the English Laws statutes is one of full inheritance (Joseph, **Constitutional and Administrative Law in New Zealand** (1993), 13). The Courts normally look to the mischief to which the English law was addressed; only if that situation did not or was not likely to exist in New Zealand, would the law be deemed inapplicable (**Re Burns** (1961), 25 DLR (2d) 427; **Attorney General v Stewart** (1817), 35 ER 895, see also **Re Lushington (Deceased)** [1964] NZLR 161).

On the facts of the present case, there is nothing to suggest that the duty and right were not applicable to the circumstances of New Zealand; both New Zealand, English and Wales are surrounded by sea and the New Zealand coastline is no less susceptible to erosion or to the "inroads" of the sea.

With respect to (iii) and (iv), English law applicable to the circumstances of New Zealand was deemed to be continuing "in force" pursuant to the English Laws Act 1858. It is arguable that common law which had subsequently been modified or overridden by statute is not law "in force" or "part of " the laws of New Zealand, but that would seem to misrepresent the nature of common law. As noted in Bennion, **Statutory Interpretation** (2nd ed) (1992) at 112 -

> "To describe the way Acts operate on existing law one can use the image of a floor upon which rugs are spread. The floor consists of unwritten law or **lex non scripta**, in other words common law, rules of equity, and customary rules. An Act is like a rug laid down on this floor. The Act conceals, for the area it covers, the texture underneath. That texture becomes visible again if the rug is later removed, that is the Act is repealed."

Although in one sense, the common law is not "in force" if it is covered wholly or partially by statute, that cannot be the sense in which the words are used in this context. If it were, the task of determining which common law principles, or which parts of common law principles, were "in force" and thus applicable to New Zealand would become next to impossible. Accordingly, I conclude that the common law duty and right are applicable in New Zealand, unless affected by a New Zealand statute.

Nature of the Duty:

49 **Halsbury** (4th ed) (para 319) states -

> **"319. Duty of the Crown.** It is the royal duty of the Crown to preserve the realm from the inroads of the sea by appropriate defences; and every subject has a corresponding right, although the duty is a duty of imperfect obligation, since there is no process of law by which it may be enforced. Statutory powers conferred on coast protection authorities and the default powers of the Secretary of State operate to ensure that sufficient measures are taken against encroachment by the sea. Moreover, local legislation may have imposed express duties for the construction or maintenance of defences against incoming water".

Similarly, the learned authors of Coulson and Forbes, **The Law of Waters** (6th ed) (1952) stated at 44 -

> "The king has probably from the very earliest times had a duty as part of the prerogative to defend the realm against the waste of the sea, and to order the construction of defences at the expense severally of those who are to be benefited by them. The power....is one of those things which emanate from the prerogative of the Crown for the general safety of the public; and no doubt the ordinary rights of property must give way to that which is done for the protection and safety of the public, but only to the extent to which it is necessary that private rights and public rights should be sacrificed for the larger public purposes- the general common weal of the public at large".

This passage relies on the judgments of Lord Coleridge CJ in **Hudson v Tabor**, (1877) 2 QBD 290, 294 and of Cockburn CJ in **Greenwich Board of Works v Maudslay** (1870), 5 QB 397, 401-2 (although, interestingly, the "duty" was framed by Lord Coleridge as a "right", and by Cockburn CJ as a "power").

Because landowners derive their title from the Crown, the land can only be taken subject to the Crown's duties. Accordingly, a subject who interferes with seawalls or natural barriers may be restrained (**Halsbury**, op cit, para 320). Many of the cases concern just such interference.

It appears that, centuries ago, the Crown established Commissions of Sewers for the purpose of carrying out the duty, which operated initially by way of regulation of

the Crown's prerogative powers, but later through statute (e.g. the Bill of Sewers, 23 Hen 8, c5).

Counsel for the appellants cited a number of authorities involving the application of the duty (including: **Keighley's Case** (1609), 10 Co Rep 1399; **The Case of the Isle of Ely** (1609), 10 Co Rep 141a; **The Mayor and Burgesses of Lyme Regis v Henley** (1834), 1 Bing (NC) 222; **Greenwich Board of Works v Maudslay** (1870), 5 LR QB 397; **Hudson v Tabor**, (supra); **Nitro-Phosphate and Odam's Chemical Manure Company v London and St Katharine Docks Company** (1878), 9 Ch D 503; **Attorney General v Tomline** (1880), 14 Ch D 58; **Canvey Island Commissioners v Preedy**, [1922] 1 Ch 179; **Symes and Jaywick Associated Properties v Essex Rivers Catchment Board**, [1937] 1 KB 548).

A cautious approach to these authorities is appropriate. Many of them concern express provisions in statutes or charters then in force; and many involve nuisance-type disputes between neighbours over damage or neglect of existing structures. Moreover, many couch the duty in somewhat absolute terms. An example of this tendency is the passage by Lord Coke in **Isle of Ely** -

> "... the King ought of right to save and defend his realm, as well against the sea, as against the enemies, that it should not be drowned or wasted....and therefore if the seawalls be broken....the King ought to grant a commission to enquire and to hear and determine these defaults" (at 141a-141b).

In a similar vein, Brett LJ stated in **Tomline** (at 67) -

> "The King's duty, therefore, would be to make a bank if it were not there - to improve the bank if it required improving, and to restore the bank if it were injured by natural causes..."

In the same case, Cotton LJ opined (at 69-70) -

> "The duty and obligation of the Crown was to protect the land from the incursions of the sea, and if there is land vested in the Crown which is a natural barrier against the sea, in my opinion the public have a right to say that the Crown shall not deal with that in such a way as to deprive the realm of that natural barrier".

Upon closer inspection however, it is clear that the underlying premise of the duty is that it is in the interests of the general public to protect the land from encroachments of the sea. It is not exclusively for the benefit of frontagers to the sea. Cockburn, CJ captured this point in the **Greenwich** case, with numerous references (at 401) to "larger public purposes", "the general common weal of the public at large" and "the general safety of the public".

It would be wrong to frame the duty in terms of an absolute, positive duty on the Crown to construct and maintain sea walls, if such construction and maintenance be not in the wider public interest (for example, if it would cause greater damage to other areas of the coastline, or if it were geographically impracticable). What Brett and Cotton LJJ had in mind in formulating the duty in the **Tomline** case, was a situation where the Crown entirely neglects or acts in defiance of its duty, rather than that where it genuinely decides as a matter of

public policy not to erect or maintain a particular sea-wall (indeed, **Tomline's** case involved the removal by the defendant of part of a natural shingle barrier for the purposes of sale).

Soil Conservation and Rivers Control Act 1941:

It was submitted for the appellants that the Soil Conservation and Rivers Control Act 1941 ('the 1941 Act') is the present New Zealand equivalent of the former Commissions of Sewers in England; that the Crown has entrusted the duty to protect to the Catchment Boards established the Act.

The history of dealings between the residents and the Poverty Bay Catchment Board (one of the Council's several predecessors) and that Board's involvement in constructing and maintaining the longitudinal protective works and in levying for the purposes of funding the same, is said by the appellants to give rise to a statutory duty on the Council to continue with the scheme.

However, as the Tribunal noted, a letter dated 29 October 1975 addressed to the Poverty Bay Catchment Board made it clear that the Soil Conservation and Rivers Control Council a regulatory body established under the 1941 Act ('the SC and RC Council') could give no guarantee of permanent protection and was unwilling to enter into

further commitments. Moreover, the chairperson of that SC & RC Council issued a public statement on 24 December 1975 to the effect that the SC and RC Council firmly opposed the issuing of more building permits on such coastal areas and would encourage the eventual withdrawal of residences from Wainui Beach. It appears that the futility of continuing the protective works, and their essentially temporary nature was signalled by the authorities, even twenty years ago.

Counsel for the appellants drew attention to s10 of the 1941 Act which states that Act's objects as being -

> "(a) The promotion of soil conservation:
> (b) The prevention and mitigation of soil erosion:
> (c) The prevention of damage by floods:
> (d) The utilisation of lands in such a manner as will tend towards the attainment of the said objects."

Again, it must be emphasised that although erosion prevention is undoubtedly one of the purposes of the Act, there is nothing in the Act stating that the erection and maintenance of sea walls or other protective barriers is mandatory, wherever land is affected by erosion. This may be contrasted with the relevant Act considered in **Sephton v Lancashire River Board** [1962] 1 All ER 183 cited by Mr Weatherhead. The empowering provisions are framed in necessarily discretionary terms (see s126, 133) Clearly, there must be scope for the exercise of professional judgment and for even a policy of "managed retreat" where appropriate (for example, where such a

step would prevent worse erosion from occurring to other parts of the coastline). Any "statutory duty" is no less discretionary than that at common law.

Imperfect nature of duty:

Counsel for the respondents submitted that, in any event, the common law duty is imperfect in nature because it cannot be enforced against the Crown. There are many statements to this effect in the English cases. Cotton LJ suggests that this is so, simply because the Crown is not "amenable to the jurisdiction of the Court" (unless a petition of right gives a remedy), and that the subject can therefore only seek redress via a petition to the Crown (Tomline at 70).

Counsel for the appellants responded that, whatever the English situation, in New Zealand the so-called duty is enforceable against the Crown because of the provisions of the Crown Proceedings Act 1950, s3(2) viz -

> "(2) Subject to the provisions of this Act and any other Act, any person (whether a subject of Her Majesty or not) may enforce as of right, by civil proceedings taken against the Crown for that purpose in accordance with the provisions of this Act, any claim or demand against the Crown in respect of any of the following causes of action:
> ....
> (d) Any cause of action, which is independent of contract, trust, or tort, or any Act, for which an action for damages or to recover property of any kind would lie against the Crown if it were a private person of full age and capacity, and for which there is not another equally

> convenient or more convenient remedy against the Crown:
> (e) Any other cause of action in respect of which a petition of right would lie against the Crown at common law or in respect of which relief would be granted against the Crown in equity."

Further to this, s6(1) provides -

> "(1) Subject to the provisions of this Act and any other Act, the Crown shall be subject to all those liabilities in tort to which, if it were a private person of full age and capacity, it would be subject -
> ...
> (c) In respect of any breach of the duties attaching at common law to the ownership, occupation, possession, or control of property..."

No real argument was addressed to this issue. Theoretically (i.e. in the absence of the complicating statutory overlay) the argument might well have some merit if the Crown had wholly abdicated its duty or acted with contemptuous disregard of it. That is not the present situation. In any event, the subsequent findings on the effect of the Act on the duty render this question academic.

Nature of the Right:

In para 321 of **Halsbury** (op cit, 177-8) it is stated -

> **"321. Common law rights of subject.** At common law a subject might erect groynes or such other defences as were necessary for the protection of his [sic] land on the sea coast, even if such erections have the effect of rendering it necessary for his neighbour to do the same..."

It should be noted that this "right" is apparently conceptually distinct from the "imperfect" right attaching to members of the public, as a corollary of the Crown's duty, to have the Crown fulfil its duty (**Tomline**, op cit, at 67 per Brett LJ; see also **Halsbury**, op cit, 75-178). Both however, would appear to stem from the same policy imperative: the economic desirability of protecting land from encroachments of the sea.

Again, many authorities were cited by Mr Weatherhead to this effect, some of which applied in the context of inland or tidal waters (see **R v The Commissioners of Sewers for Pagham, Sussex** (1828), 8 B&C 355; **Neild and Another v the London and North Western Railway Company** (1874), LR 10 Ex 4; **Whalley v The Lancashire and Yorkshire Railway Company** (1884), 13 QBD 131; **Maxey Drainage Board v Great Northern Railway Company** (1912), 106 LT 429; **Gerrard v Crowe**, [1918] NZLR 323; **Strange v Andrews**, [1956] NZLR 948).

Again, the right was expressed in somewhat absolute terms: there are references to the sea as a "common enemy". As Bayley J put it in **R v Commissioners of Sewers** at 361 -

> "It seems to me that every land-owner exposed to the inroads of the sea has a right to protect himself, and is justified in making and erecting such works as are necessary for that purpose..."

It might be said that such an approach manifests a narrow 19th century preoccupation with proprietary rights, out-of-keeping with the more holistic policy concerns of sustainability and environmentalism popular today. The policy underlying the common law perhaps has less force today. Counsel for the respondents argued that the old authority has been overtaken by subsequent evolution in the law of nuisance, particularly the development of the concept of natural servitude and tortious liability for "natural conditions" (see **French v Auckland City Corporation** [1974] 1 NZLR 340). Accordingly, it can no longer be safely asserted that frontagers to the sea can construct artificial protective barriers, irrespective of consequential damage to the foreshore and to other properties.

It may be questioned whether the principles evolved with respect to inland waterways apply with equal force in the present situation. Professor F.M. Brookfield in his article "Surface Waters: the Natural Rights of Drainage and Disposal" (1965), 1 NZULR 440 specifically notes the distinction between repelling sea and flood waters on the one hand and damming natural surface water on the other. The right to repel the former is recognised because the "danger is extraordinary and incalculable" (446).

Nevertheless, it seems safe to question whether, even at common law, such a right could be asserted in direct opposition to a bona fide legislative policy of

management of the coastline, implemented in the interests of the general public. (Whether or not the proposed policy is in fact appropriate is not for this Court to determine on this appeal).

Estoppel:

Counsel for the appellants further contend that by their encouragement and acquiescence, the respondents are now estopped from contesting the resident's right to continue with the protection work. Leaving aside the issue of the extent to which an estoppel may operate in a statutory environment (as to this see the recent decision of Fisher J's in **Fairnington Investments Ltd v The New Zealand Kiwifruit Marketing Board** (C.P.360/94, 6 July 1995), for the reasons traversed above in relation to the claimed statutory duty, this argument must fail. There has been no unequivocal conduct or assurance on the part of the Catchment Board or local authority which could found an estoppel action based on established estoppel principles.

Equitable Easements:

Likewise, the appellants' rather hopeful argument about an equitable easement over the foreshore in favour of the frontagers just cannot possibly apply. The essential elements for an equitable easement as set out in **Hinde,**

McMorland & Sim Land Law (2nd ed) para 6.051 just cannot apply in this situation.

Resource Management Act:

The final and crucial issue is whether the common law right and duty such as they are, have been abrogated or modified by the Act. This question comes down to a simple exercise in statutory interpretation. Each side advanced a number of interpretative principles or maxims in the course of argument which, although useful as tools of analysis, do not of themselves provide definitive answers.

The Court's interpretative task should be approached in a manner mindful of the legislative background. As has been acknowledged both academically and judicially, the statutory implementation of integrated planning and environmental regimes represents a clear policy shift towards a more public model of regulation, based on concepts of social utility and public interest. Private law notions such as contract, property rights and personal rights of action have consequently decreased in importance (see D.A.R. Williams, Environmental Law (1980), para 109; Attorney General v Cunningham, [1974] 1 NZLR 737, 741; Pioneer Aggregates Ltd v Secretary of State for the Environment [1985] AC 132, 140-141).

There is nothing in principle to prevent a duty sourced in the Crown's prerogative power, or an established common law right being overridden or restricted by statute (**Attorney General v De Keyser's Hotel** [1920] AC 508). This principle is clearly illustrated in England, where the Coast Protection Act 1949 (s16(1)) requires the Coast Protection Authority's consent before any coastal protection work is undertaken

Counsel for the appellants placed great emphasis on s23 of the Act viz -

> **"23. Other legal requirements not affected-**
>
> (1) Compliance with this Act does not remove the need to comply with all other applicable Acts, regulations, by-laws, and rules of law.
> (2) The duties and restrictions described in this Part shall only be enforceable against any person through the provisions of this Act; and no person shall be liable to any other person for a breach of any such duty or restriction except in accordance with the provisions of this Act.
> (3) Nothing in subsection (2) limits or affects any right of action which any person may have independently of the provisions of this Act."

Counsel submitted that any such a "savings" section should be construed liberally. Concomitantly, any provision purporting to restrict or abolish existing rights ought to be construed strictly. A statute cannot remove existing rights unless it does so either expressly or by necessary implication in a clear and unambiguous manner.

While I would generally accept these as established principles of interpretation (with the possible exception of the submission relating to savings clauses; see the scepticism expressed by Lord Scarman in relation to savings clauses in **Ealing London Borough Council v Race Relations Board** [1972] AC 342, 363), they really only become crucial in cases of genuine ambiguity (**Cunningham**, at 741).

Moreover, s23 cannot be invoked to protect a right or rule of law which, upon proper construction of the statute as a whole, would otherwise impliedly be restricted or abolished.

Provisions of the Resource Management Act:

The Act repealed 59 enactments, and amended many others. The Long Title of the Act states -

> "An Act to restate and reform the law relating to the use of land, air, and water."

Part II of the Act sets out its governing purpose and principles which infuse its decision-making and policy-formulating procedures. Of these, the purpose (being the promotion of sustainable management as defined in s5) is paramount. At each operational level, policy statements, plans, and rules promulgated under the Act are linked back to the core provisions of Part II.

Moreover, Part II must be considered in determining any resource consent application (s104, as amended).

This represents a relatively new form of statutory organisation; the Act is structured around a fundamental purpose and various principles which function as substantive guidance to decision-makers at a localised level. The Act itself is perhaps not so much a code as such (in that it merely sets certain standards and delegates much to the local authorities); it does, however, represent an integrated and holistic regime of environmental management (see Fisher "The Resource Management Legislation of 1991: a Juridical Analysis of its Objectives" in Brooker's **Resource Management** (1991)).

The Act prescribes a comprehensive, interrelated system of rules, plans, policy statements and procedures, all guided by the touchstone of sustainable management of resources. The whole thrust of the regime is the regulation and control of the use of land, sea, and air. There is nothing ambiguous or equivocal about this. It is a necessary implication of such a regime that common law property rights pertaining to the use of land or sea are to be subject to it. (See **Ideal Laundry Ltd v Petone Borough** [1957] NZLR 1038; the principles from which as applied to the former town planning legislation, are equally appropriate to the Act).

Moreover, section 10A of the 1941 Act provides -

> "Notwithstanding section 10 of this Act, nothing in this Act shall derogate from...the Resource Management Act 1991".

The Tribunal held that the effect of this provision was that each statute was to function according to its own terms; full effect must be given to both Acts. This is all very well where their respective spheres of influence are separate, but where there is a direct conflict or overlap between the two statutes, the natural meaning of the word "derogate" certainly suggests that the Resource Management Act's scheme is to assume priority. This view is strengthened by the comprehensive nature of that Act's regime, and the reformist nature of its philosophy.

The effect of all this is simply that, where pre-existing common law rights are inconsistent with the Act's scheme, those rights will no longer be applicable. Clearly, a unilateral right to protect one's property from the sea is inconsistent with the resource consent procedure envisaged by the Act; accordingly, any protection work proposed by the residents must be subject to that procedure.

Counsel for the appellants appeared to argue that the provision of the transitional district plan stipulating that the proposed works amount to a discretionary activity was **ultra vires** the scheme of the Act, with the effect that the Wainui protection scheme remains outside the consent process of the Act. No real argument was advanced as to how or why this provision in the plan was

ultra vires, other than the fact that it circumscribed the common law right by requiring a consent for protective works. It was also submitted that other instruments created under the Act (the New Zealand Coastal Policy Statement no.3.4.6; and the Ministerial direction of 1 October 1991) were **ultra vires** for similar reasons.

These appear somewhat circular arguments; there is nothing in the scheme of the Act to suggest that the common law right cannot be infringed - quite the reverse. The Act is simply not about the vindication of personal property rights, but about the sustainable management of resources.

Counsel for the appellants further contended that it would be unreasonable and unjust to read the provisions of the district plan as sanctioning the removal of existing works. This appeal is of course not concerned with the validity of the proposed policy of "managed retreat". Suffice to say that the governing philosophy of sustainability does not of itself require the protection of individuals' property to be weighed more heavily than the protection of the environment and the public interest generally.

Compensation:

It was further submitted for the residents that an intention to take away property without giving legal right to compensation is not to be imputed to the legislature unless that intention is expressed in clear and unambiguous terms (**Central Control Board (Liquor Traffic) v Cannon Brewery Company Ltd**, [1919] AC 744, 752). The Act contains no such unequivocal intention.

Reference was also made to s21 of the New Zealand Bill of Rights Act 1990 which provides that everyone has the right to be secure against unreasonable search or seizure of property, and to s6 of that Act which provides that wherever an enactment can be given a meaning consistent with the rights and freedoms contained in the Act, that meaning shall be preferred. Counsel's point was that a policy of managed retreat would result in an effective "seizure" of property because land lost to the sea vests in the Crown.

Again, this appeal is not strictly concerned with the legality of the proposed policy; few submissions were received on the point. In any event, it may be emphasised that the above rules are rules of construction only, and depend on the precise wording and purpose of the particular statute and instruments created under it. They will not of themselves render a plan ultra vires. The relevant statute in the present proceedings

deliberately sets in place a coherent scheme in which the concept of sustainable management takes priority over private property rights.

Leaving aside the question whether or not the "seizure" is "unreasonable" within the ambit of s21, it may also be questioned whether erosion of property by the sea constitutes a "seizure" on the natural and ordinary meaning of that word. The word is suggestive of the forcible taking of possession, capture or confiscation (see Cory v Burr (1883), 8 App Cas 393; Johnston v Hogg (1883), 10 QBD 432; Robinson Gold Mining Co v Alliance Marine & General Assurance Co (1901), 70 LJKB 892 cited in Butterworths' **Words and Phrases Legally Defined** (3rd ed 1990) 151-2). The word "seizure" is also suggestive of some sort of human agency rather than of a gradual process of nature, albeit one which could be prevented by human intervention.

I expressed concern at the hearing that a seemingly insensitive application of a "managed retreat" policy, as advocated by the respondents' officials, ignored the fact that the discontinuance of protection works would seriously affect the viability in the long term and the marketability in the short term of the appellants' properties. Many of the appellants have invested their life savings in a Wainui beach property.

Counsel for the second respondent referred me to S.85 of the Act which does not appear readily adaptable to the present situation. The compensation provisions in the predecessors of the Act - the old Town & Country Planning Acts - were notoriously opaque. I for one never encountered anybody who had mounted a successful claim under them, although I knew of several attempts.

What would be more helpful to the residents is if the Act were to contain a provision comparable to S.19 of the United Kingdom Coast Protection Act, the relevant parts of which provide as follows -

> "(1) Where on a claim being made under this section it is shown -
>
> (a) that the value of an interest of any person in land has been depreciated, or that any person has suffered damage by being disturbed in his enjoyment of land, in consequence of the carrying out of coastal protection work by a coast protection authority in the exercise of the powers conferred by this Part of this Act, or
>
> (b) that the value of such an interest as aforesaid has been depreciated in consequence of the refusal of consent for which application has been made under section sixteen of this Act, or in consequence of the granting of such consent subject to conditions,
>
> the coast protection authority shall pay to that person compensation equal to the amount of the depreciation or damage:
>
> Provided that a person shall not be entitled to compensation under paragraph (a) of this subsection unless the act or omission causing the depreciation or disturbance would have been actionable at his suit if it had been done or omitted otherwise than in the exercise of statutory powers.

(2) A claim for compensation under this section shall be made to the coast protection authority within twelve months of the completion of the work, the refusal of consent, or the imposition of conditions, giving rise to the claim.

(3) Any dispute arising under this section shall be determined by arbitration."

I commend this section to those responsible for revising the Resource Management Act as offering some resolution of the residents' understandable concerns at the prospect of losing their homes without compensation and without the ability to erect coastal protection works.

Conclusion:

Any common law duty on the Crown or the Council to protect the coastline is not an absolute duty in the sense alleged by the appellants. It is also questionable whether the common law today would recognise the right of property owners to protect their land to the extent that the appellants require, given that it is no longer taken for granted that the natural process of erosion is necessarily an evil or mischief to be avoided wherever possible.

In any event, my inevitable conclusion is that the proposed works are subject to the Act; permission for these works must be sought and applications determined in accordance with the framework established by the Act. Possibly, the common law duty and right could be matters

that the consent authority might consider relevant pursuant to s104(1)(i); but those matters would merely be weighed in the balance along with other considerations.

I have come to a similar view on the central issue as did the Tribunal for basically the same reasons upon which I have expanded somewhat.

The result is that the appeal is dismissed. Leave is reserved to the respondents to apply for costs.

R. D. Sutton J.

ORIGINAL

Decision No A 51/96

IN THE MATTER	of the Resource Management Act 1991
AND	
IN THE MATTER	of an appeal under section 120
BETWEEN	NEW ZEALAND SUNCERN CONSTRUCTION LIMITED
	(Appeal RMA 48/95)
	Appellant
AND	THE AUCKLAND CITY COUNCIL
	Respondent

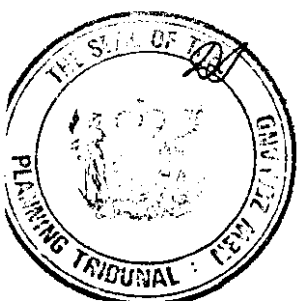
BEFORE THE PLANNING TRIBUNAL

Planning Judge DFG Sheppard (presiding)
Mr P A Catchpole
Mr F Easdale

HEARING at AUCKLAND on 30 and 31 October, 1 and 2 November 1995, and 22 April 1996

Appearances

Mr PT Cavanagh QC for the appellant
Mr MLS Cooper for respondent
Ms D M Ewen and Mr G M Shieff, persons having interests in the proceedings.



DECISION

Introduction

This is an appeal under section 120 of the Resource Management Act 1991 against refusal of resource consent to remove a grove of 9 pine trees at Meadowbank, Auckland. The appeal turns on the value of the trees to the local community, shading of adjoining properties, the hazard to occupiers of adjoining properties of falling branches, and the expected life of the trees if they are not removed.

The trees are growing on a property which was bought by the appellant early in 1994. The land fronts Gerard Way and Grand Drive, Meadowbank, and has a total area of 1.2434 hectares. The appellant has since subdivided that land into lots for residential building sites, and has constructed substantial homes on many of them.

District plans

The transitional district plan contains general tree protection rules in ordinance 12.10:3 which apply to the residential zones including the Residential 5 zone in which the appellant's property is found. We quote clause (b):

> (b) Without the prior written consent of the Council, no person shall—
>
> (i) Cut, damage, alter, injure, destroy or partially destroy any tree (including the roots) over 6 m in height or with a girth (measured at breast height) greater than 600 mm;
>
> (ii) Carry on, conduct or undertake any use, excavation, construction, work or other activity in, on, or under, in relation to, or in the vicinity of, any tree described in (i) above, which endangers or is likely to endanger that tree.

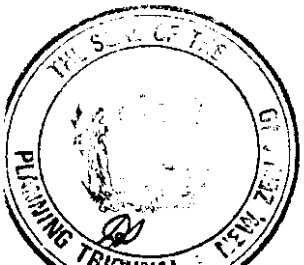
Clause (d) of the ordinance sets out criteria for assessing applications under clause (b). However the assessment criteria for the proposed district plan incorporate the content of those for the transitional district plan, so we do not need to quote the latter.

The explanation of the general tree protection control is contained in paragraph 12.03:2, relevant passages of which state:

> The purpose of this particular control is to ensure that the general tree cover within the City is retained wherever possible...
> The main objective of the Ordinance is to ensure that those trees and areas of bush which make a positive contribution to the quality of the environment, both visual and physical, are retained and conserved. This does not imply an absolute prohibition on the cutting or removal of general tree cover but rather that work on mature trees is controlled and may in appropriate cases be prohibited.

The proposed district plan contains a rule on general tree protection which, in application to the Residential 6a zone in which the appellant's property is found, is beyond challenge by appeal. Relevant passages of rule 5C.7.3.3C (incorporating amendments made by decisions on submissions) are—

> The following rule applies to every site on the Isthmus.
>
> A. No person shall, without a resource consent (except as provided for below):
> i) Cut, damage, alter, injure, destroy or partially destroy the following trees.
>
> In the Residential ... 6 ... zones:
> - indigenous trees (including the roots) over 6m in height or with a girth (measured at 1.4m above the ground) greater than 600 mm.
>
> - exotic trees (including the roots) over 8m in height or with a girth (measured at 1.4m above the ground) greater than 600 mm.
>
> ...
> ii) Carry on, conduct or undertake any use, excavation, deposition of material, construction, work, emplacement of services, storage, or other activity in, on above or under, the dripline (branch spread) of any tree described in (i) above, which in the opinion of Council endangers or is likely to endanger that tree.
>
> Exceptions to this control
>
> - Any regular minor trimming or maintenance ...
>
> - The removal of any tree of part of a tree that is dead or that is suffering from an untreatable disease which has caused a significant decline in its health (Evidence shall be produced if required).
> Note: Where any element of uncertainty exists as to the likely fate of the tree, the benefit of doubt will be given to the tree survival by not removing it until such time as its irreversible decline is obvious. Before removing any affected tree, consultation with the Council's arborist is strongly advised.
>
> - Work immediately necessary to avoid injury to persons or damage to property. In such circumstances the person undertaking the work shall notify the Council in writing within 7 days ...
>
> ...
> Any application for the Council's consent to carry out any of the activities described in (i) and (ii) above, shall be by way of an application for a restricted discretionary activity (refer clause 4.3.2.6).
> In assessing an application the Council shall consider the guidelines for the carrying out of works in the vicinity of trees continued in Annexure 5 and the following matters:
>
> - The Plan objectives and policies, particularly those in respect of the zone involved.
> - The applicants need to obtain a practicable building site, access, a parking area, or install engineering services to the land.
> - Any alternative methods which maybe available to the applicant in the achievement of his/her objectives, including consideration of variation to specified development



controls where this would encourage retention and enhancement of existing large trees on the site.
- Whether the tree can be relocated.
- All previous applications made in respect of the land which involved consideration of treescape conservation.
- The extent to which the tree or trees contribute to the amenity of the neighbourhood, both visual and physical, including contributions as habitats for birds and other animals
- Any function the tree may have in conservation of water and soil.

Conditions may be imposed as part of any consent ...and may include the following:

...

- The requirement to provide a replacement tree or trees (where a tree(s) is removed) elsewhere on the site or in the near vicinity, where this is appropriate. The replacement tree(s) shall be of a size and species which is approved by the Council, having regard to the amenity of the area. Indigenous trees are favoured for their role as a food resource and habitat for native birds.

The general strategy for protection of trees (paragraph 5C 7.3.2) refers to the importance contribution of trees in the sustainable management of natural and physical resources of the Auckland Isthmus; and states that trees play a role in sustaining the ecological balance between nature and technology, and contribute to the community's health and well-being. It identifies important environmental functions of trees in the City, including visual amenity, noise buffers, weather shields, land stabilisers, atmospheric effects, heritage and habitat.

The particular strategy for general tree protection, and expected outcomes, are stated at paragraph 5C 7.3.2. We quote passages material to this case, incorporating amendments made by decisions on submissions.

C. General Tree Protection

The Plan makes provision for the protection of trees over a certain size throughout the district. The purpose of this particular control is to ensure that the existing general tree cover within the City is retained wherever possible. The rules are designed to reduce the risk of serious or irreversible damage being done to the local environment through unnecessary or undesirable tree removal.
Although the tree control has as its main motivation the retention and conservation of trees which make a positive contribution to the quality of the environment, it does not imply an absolute ban on the cutting or removal of trees. Rather it is to ensure that any work on trees is neither done in haste nor executed without care. In appropriate cases consent may be refused.

D. Expected Outcomes

It is expected that the provisions will result in the retention of trees of value to the public, to wildlife and the neighbourhood in which they are located...
There should also be a reduction in the risk of serious or irreparable damage being done to the local environment through tree removals or works to trees that are unnecessary or that will have an adverse effect on the amenities of the neighbourhood...

It was common ground that removal of the trees on the appellant's property is within the scope of the general tree protection rules of both the transitional district plan and the proposed district plan, and that resource consent is needed for that work in terms of both instruments. As the relevant provisions of the proposed district plan are now beyond challenge by appeal, we will focus on them. Although the transitional plan still has effect at law, for practical purposes the general tree protection provisions of the proposed plan have virtually replaced those in the transitional plan.

Subdivision consent

Application was made by the appellant to the City Council on 4 July 1994 for subdivision consent to subdivide the property into 22 residential lots (later amended to 21 lots). The stems of the trees are growing on three of those lots, and their driplines extend over two other lots. The trees form a grove covering an area of about 850 square metres including the spread of the canopy, and are about 30 metres in height.

Neither the scheme plan of subdivision, nor the original application, made any mention of the trees. The land surveyor who prepared and submitted the plan of subdivision on behalf of the appellant, Mr D A Turner, acknowledged in evidence that he had been aware that the trees were there. He also acknowledged that the subdivision had been designed on the basis that the trees would be removed. The application lodged by Mr Turner stated that to the best of his knowledge no other resource consent was necessary.

In response to a request by City Council officials, a plan titled "Plan of trees to be removed" was submitted to the council in August 1994 by Mr Turner, showing the centre position of each pine tree relative to adjacent lot boundaries. However that plan did not show the extent of the drip-lines of the trees. It showed an outer line of the grove of trees which Mr Turner described in evidence as "symbolic only, to indicate that the features shown were trees". Although practising as a consulting surveyor, Mr Turner stated in evidence that at the time he presented that plan he

had not been aware of rule 11.5.4.1 B of the proposed district plan which requires that applications for subdivision consent are to be accompanied by a plan illustrating the proposed subdivision which is to show, among other details, "all trees and bush including the spread of the canopy".

A planning consultant called on behalf of the appellant , Mr VRC Warren, deposed that in his experience tree plans supplied by surveyors normally present the position of the trunk and a symbolic representation of a tree unless otherwise requested. We observe that the rule of the proposed plan that the scheme plan of subdivision show the spread of the canopy is a requirement otherwise.

There is no basis on which we should reject Mr Turner's evidence that he did not know of that requirement. However he had accepted a professional engagement to present an application for consent to a subdivision of land in the Auckland isthmus on behalf of the appellant. In accepting that engagement it was his responsibility to make himself familiar with the legal requirements applicable to it, and to comply with them.

Although the application for subdivision consent submitted by Mr Turner stated that to the best of his knowledge no other resource consent was necessary, because of the district rules already quoted resource consent was indeed necessary for removal of the trees. An application for resource consent to remove the trees was made by the appellant to the City Council on 16 August 1994. A person whose signature is indecipherable, purporting to act on behalf of a development services manager of the City Council, granted the subdivision consent on 12 September 1994. It appears from the report to the development services manager on the subdivision application that he had been informed that the developer had applied to remove the pine trees, and that he had also been given to understand that removal of the pine trees was not necessary in order to create building sites on the affected lots. That advice was based on examination of the plan of the trees submitted by Mr Turner.

Although it might have been expected that a site visit would have revealed the true extent of the canopy spread, it appears that the subdivisions officer who prepared the report on the subdivision did not realise that the canopy spread is greater than

appeared from Mr Turner's plan, and that he did not realise that some of the lots that would be created could not be built on if the trees were not removed. The subdivisions officer did not consider it his responsibility to measure the extent of the trees to verify what had been shown on the plan submitted by a registered surveyor, and his superior officer testified that having received information from a registered surveyor who is generally reliable, they had little reason to question the information given.

There were no conditions imposed on the subdivision consent about preserving the trees the subject of this appeal, but the report on the subdivision application referred to the separate application for consent to remove the trees then being processed.

On 8 December 1995 the respondent sealed the survey plan of the subdivision, and it was lodged on the appellant's behalf with the Department of Survey and Land Information for deposit on 9 December 1995. The subdivision plans have subsequently been approved as to survey.

The representative of the appellant who was called to give evidence was its property manager Mr P Gray. He deposed that he did not know when Lots 7, 8, 12, 13 and 14 had been sold, but he acknowledged that at the time they were sold the application for consent to remove the trees was unresolved. At least the building consent for a dwelling on Lot 8 was tagged "resource consent required". We find that the dwellings on Lots 7, 8, 10, 11 and 14 were commenced at times when the application to remove the trees had not been decided, or after consent to remove them had been refused and before this decision on the appeal against that refusal.

Replacement planting

It was the appellant's case that the effect of removing the trees would be mitigated by planting of tree specimens better suited to a residential environment. A landscape architect called for the appellant, Mr J L Goodwin, had prepared a plan for plantings on the front of the properties and the street berm, and proposed that they be irrigated to enhance success and growth rates. In brief, the plantings on

Gerard Way would be Queensland Box and magnolia grandiflora on the street berms, and flowering cherry and pin oak in the front yards; and on Grand Drive, melia on one berm and magnolia grandiflora on the other berm and in front yards, with flowering cherry within the properties too. Mr Goodwin estimated that the trees would reach some 4 to 6 metres high, 5 years after planting; and 6 to 10 metres high, 10 years after planting. After that, growth would tend to slow down as the trees start to reach a semi-mature state. In cross-examination Mr Goodwin gave the opinion that the planting would be desirable irrespective of removal of the pine trees, as it would not replace them but provide a different feature.

A botanist and environmental consultant called for the appellant, Dr NMU Clunie, was generally supportive of the planting plan produced by Mr Goodwin, and gave the opinion that in about 10 years that planting would have reached sufficient size to provide a good treescape for the area, and good habitat for avifauna (birds).

Mr Warren gave the opinion that the planting proposed would be more attuned to the visual character and amenity of the surrounding residential environment than the pine trees, and over time would make a contribution to habitat for birds that would be superior to that provided by the pine trees.

A consultant landscape architect called for the respondent, Ms M J Absolum, accepted that the proposed plantings would soften the streetscape, but considered the species selected were not entirely suitable for planting in narrow street berms.

Although we accept that planting such as that proposed by Mr Goodwin would enhance the amenity values of the properties in the appellant's subdivision and its neighbourhood, we do not consider that it would remedy or mitigate the adverse effect on the environment of removing the pine trees. The latter, because of their size and position, the fact that they have been standing there for about 60 years, and their association with earlier use of the land as a golf course, have landmark significance which could not be replaced by the new plantings, at least for many years. The new planting would provide a habitat for birds, and because of its diversity of species, it would be superior to the habitat provided by the pine trees

alone. However the combination of the new plantings and the existing pine trees would provide a habitat that would be better still.

Community value

The strategy of the general tree protection control is related to the contribution that trees make to the quality of the environment; and the expected outcome is retention of trees of value to the public, to wildlife and the neighbourhood in which they are located. It was the respondent's case that the subject trees form a remarkable stand of trees in an area where other planting is nowhere near as mature, contribute in a very significant way to the amenity of the area, that they form a local landmark, and that they are also an ecological resource.

The appellant accepted that the subject trees have local visual significance because they are growing on elevated land. However its counsel, Mr Cavanagh QC, contended that from many locations and particularly from more distant areas, views of the trees are often blocked by intervening housing, and that the trees do not constitute a significant visual feature. Counsel also maintained that generally, pine trees are not a species to be found in residential areas, being usually associated with forestry or farming.

Dr Clunie deposed that with the building of nearby houses, the lower part of the trees will become obscured from most vantage points, but he acknowledged that the upper canopy would be visible from some vantage points in the locality and would have some landscape significance.

Mr Goodwin gave the opinions that the trees are a significant visual feature for residents in the immediate neighbourhood, and contribute to the amenity of that area; but that beyond that immediate area, although often visible and sometimes quite prominent, they do not constitute a significant visual feature. He also deposed that there are no other tree stands of such scale and prominence within the immediate neighbourhood, although there is maturing vegetation creating a high standard of visual amenity and appropriate streetscape character. He considered

that in the long term pine trees are not appropriate for a fully developed residential area.

Mr Warren deposed that although a prominent local landscape element, the pine trees contribute less to the visual amenity of the nearby residential properties than they do to the visual amenity of streetscape. He observed that once development is completed, the lower third of the grove will be hidden behind the houses, which he considered would significantly reduce the prominence of the grove as a visual element. Mr Warren also stated that pines are not a food tree, and offered the opinion that they do not make more than a minor contribution to habitat for birds and animals.

Two residents of the area, Mrs Ewen and Mr Shieff, gave evidence which was said to represent the views of a large number of residents of the area. In summary those views were that the trees are valued for their contribution to the visual amenity of the area, and for softening the outline of the rooftops; that they are a landmark and a visual link with the golf course; and the proposed new plantings would not replace them.

Ms Absolum deposed that the group of trees is a local landmark, creating a focal point on the intersection of Gerard Way and Grand Drive, and a gateway effect for the subdivision; that they are visible from many locations in the neighbourhood; that they are an important landscape feature of the landscape, and that they retain a reference to the history of the area.

A research scientist specialising in the ecology and behaviour of birds, Dr P Jenkins, was also called on behalf of the respondent. Dr Jenkins reviewed scientific literature on bird habitats in pine trees. He gave the opinion that the grove of trees could become an oasis of bird life if a diversity of other trees were planted within the fenced area; and that the diversity should not be reduced by cutting down the pines.

Paragraph 5C 7.3.2 of the proposed district plan identifies visual amenity, heritage and habitat among the environmental functions of trees in the City. It states as a main motivation the retention of trees which make a positive contribution to the

quality of the environment, and records an expected outcome of retention of trees of value to the public, to wildlife, and to the neighbourhood in which they are located.

Having ourselves viewed them, we find that the grove of trees the subject of this appeal perform functions of visual amenity, heritage and habitat, make a positive contribution to the quality of the environment, and are of value to the public, to wildlife and to the neighbourhood in which they are located. We accept that with continuing development of the suburb, the lower parts of the trees will be obscured from view from some vantage points. In our opinion, that does not disqualify them from protection under rule 5C 7.3.3 C. We hold that in those respects the pine trees are a worthy subject for retention under that provision of the proposed district plan.

Shading

It was the appellant's case that lots to the south and southwest of the trees are affected by shading; that 7 of the lots would be affected with more than 50 % of the property covered for part of the day; that at the equinoxes, two lots would receive very little sunlight after 2 pm.

Those claims were supported by the evidence of Mr K R Miller, a director of a company engaged in photogrammetric mapping and computer-aided view and shadow simulations of proposed developments. In cross-examination the witness agreed that he had not considered whether the sites would be shaded anyway by the landform rising from the sites up to the Remuera Road ridge; nor had he considered the extent to which some of the sites would be shaded by dwellings on others of the sites. He accepted that some of the buildings would cast shadows on others.

Mr Warren acknowledged that the shadowing effects are characteristics of the site which predate development proposals. In cross-examination, he accepted that people live in houses that are subject to shading, and that the houses on Lots 12 and 13 cast shadows on other lots in the subdivision.

A planning consultant called on behalf of the respondent, Mrs S M Speer, deposed that the site's topography causes shadowing of houses built on it; that the houses on Lots 1 to 8 lose the afternoon sun as they lie to the east of higher ground where a shopping centre has been established; and that Lots 9 and 10 would be in shadow even if the trees are removed, as they lie at the bottom of a hill; and that 2-storey houses on Lots 12 and 13 would throw shadow over the houses on Lots 9 and 10.

We find that the trees contribute to the shading of lots created by the appellant's subdivision. That was capable of being discovered at the time the subdivision was designed. On the evidence we are not able to quantify how much shading of those lots would occur even if the trees were removed, as a result of the lie of the land, and of buildings already erected or those that may be erected. For those reasons we place little weight on shading effects in evaluating the appellant's case for removal of the trees.

Falling branches

It was also the appellant's case that many of the trees have potential for progressive splitting and breakage of heavy parts of the crown structure, and there is a likelihood of windthrow which would be hazardous for houses in the immediate vicinity.

Dr Clunie testified that recent pruning of some large limbs from trees at the northern end of the stand had opened the northern face of the stand, exposing trees in the northern part of the stand to increased potential for wind breakage. In particular he considered that weight imbalance in the crown of one of the trees had been exacerbated by recent removal of limbs on the north-west side of the lower stem. He also reported that a substantial limb had been removed from the southwestern side of the trunk of another of the trees at the level of the primary crotch, and that this junction was becoming suspect.

Dr Clunie gave the opinions that the potential for splitting and breakage of large and heavy parts of the crown structure in many of the trees is substantial, that this

potential would increase progressively; that it would be imprudent to build a dwelling within 30 metres of the trunk, or 20 metres of the dripline, of those trees. He considered that to do so would be a substantial and avoidable risk to life and property. He concluded that no satisfactory measures could be taken to modify the stand to make it safe in close proximity to the houses. In cross-examination the witness agreed that the trees might stand for many years, but affirmed that they might break in a storm at any time.

Mr Warren adopted Dr Clunie's evidence and deposed that while the trees remain, no building platform is available on Lots 12 and 13; that it would not be prudent to build on Lots 7, 8 and 9; and that parts of Lots 10, 11 and 14 are compromised. A dwelling has been built on Lot 8, but he would have advised against it.

An arborist employed by the City Council, Mr B C Gould, considered that there is only a moderate risk of a tree falling, and that the branches overhanging the house on Lot 8 could be trimmed to remove the overhang without affecting the stability of the trees.

We find that there is a risk of branches falling from the trees. (There is also a lower risk of a whole tree being windthrown, but we address that in the next section of this decision.) The risk of falling limbs can be reduced by skilled pruning, as described by Mr Gould.

Moreover, the risk of branches falling from the pine trees was capable of being discovered before the subdivision was designed. The appellant has chosen to subdivide and development its property as if the pine trees were not there, although it knew that it was not entitled to remove them without resource consent, which it did not have. Purchasers of the lots created by the subdivision have bought in the knowledge of the trees and could readily have obtained advice about the possibility of limbs falling.

We find that the appellant and its purchasers have accepted the risk. We also find that the risk is capable of being managed. In our opinion, that risk is not a weighty consideration in favour of removal of the trees.

Expected life

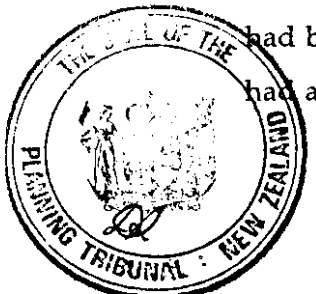
The trees were planted about 1935 as part of the development of a golf course. A drainage trench cut about 10 years ago some 3 metres to the north of two trees on the Lot 8 boundary would have severed all roots of the trees, but they continued apparently healthy.

In October and November 1994 a contractor engaged by the appellant excavated a stormwater trench very close to one of the trees at the boundary of Lot 8. The work damaged the roots of the trees.

On 17 January 1995 there was a meeting on the site of representatives of the appellant and the respondent to consider whether, in terms of rule 5C 7.3.3 C.A (ii), excavation and other works on Lot 8 of the subdivision close to two of the trees would be likely to endanger the trees. The works were approved, and the relevant building consents were issued, it being considered that they would not compromise the pine trees. Some of the earthworks had been carried out before the application had been made, and were legalised retrospectively by the consent. The conditions of consent required that trenching be hand-dug and any tree roots over 50 millimetres in diameter were to be cleanly sawn.

In May 1995 the appellant was granted discretionary activity consent to construct a house on Lot 8 under the drip-line of the trees, it having been considered that if the proposed works were carried out in compliance with the conditions of consent, the health of the trees would not be affected.

Dr Clunie deposed that the work carried out had included a deep ground cut to within 2.5 metres of the northern side of the trunk, that all roots which extended to the north were severed along that cut; and that a shallower cut to within 1.9 metres of the trunk had severed surface and subsurface roots there. The ten-year old trench had been cut to a deeper level than the later work, so damage to the original roots had already been done. He gave the opinion that damage to the roots of two of the

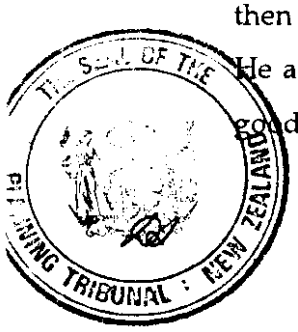


trees is likely to have a significant adverse effect on the health and ultimately the stability of those trees. He explained that the root cutting had damaged the roots, tearing and shattering them inwards and that the root damage very likely will be the site of ingress of pathogenic fungi, that rot is likely to develop and spread progressively into the root collar and lower trunk, and sooner or later will undermine the structural integrity of the trees and lead to their collapse. Dr Clunie considered that if there is spread of pathogenic fungi, the trees would become unstable in about 5 or 7 years. He gave the opinion that building too close to the pine trees has precluded the option of retaining them, because of the danger to life and property.

In cross-examination the witness stated that the trees are in moderately good health for their age, and that there was no evidence of any major setback to their growth in recent years. Although he agreed that remedial measures for the damage to the roots would be useful, it was by no means certain that they would prevent fungal ingress. He told the Tribunal that if the stand remained intact, it was possible that the trees would reach an age of 100 years, although they would require ongoing maintenance. Both Dr Clunie and Mr Gould considered that to ensure mutual physical support the stand would need to be kept intact.

Following a further inspection jointly with Mr Gould, and a later inspection with Mr Gray, Dr Clunie could not discount either that fungal and microbial incursion and wood rot may have been contained within the root, or that it may have spread or be spreading into the base of the trunk. From his own experience, Dr Clunie gave the opinion that it is unlikely that decay would have been contained effectively, and that it is more likely that it has spread extensively into the root area at the stem base. This would increase greatly the likelihood of windthrow of either or both of the trees that had suffered root damage. In his experience there may be no external evidence of decay on pine trees which are undermined and windthrown.

In cross-examination Dr Clunie agreed that there could well be many roots, other then in the sector to the north and northeast of the trees, that have not been affected. He agreed that the crowns and foliage of those trees appeared to be in reasonably good health.



Mr Gould's additional evidence following the joint inspection with Dr Clunie was that there is no definitive way of quantifying the extent of the problem. Mr Gould confirmed that the trunks, main branches and canopy foliage appear normal and typical, and that he had not observed any sign or evidence to suggest ill-health. If the trunks or major roots were severely rotted, he would expect to see signs of decline or dieback in the upper crowns, but no such signs were evident. Nor had he found any signs of instability, such as soil heaving or cracks. He gave the opinion that there is a more than 50-50 probability of the trees surviving and having a substantial life span ahead.

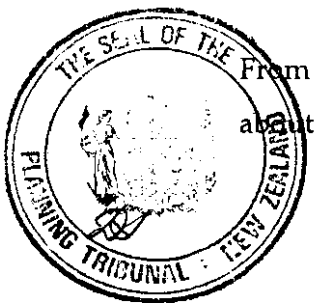
Mr Gould gave the opinion in evidence that overall the general health and condition of the trees appears good, with no signs of significant decay, disease or instability. He considered that they have a life expectancy in excess of 50 years, providing there are no radical changes to their immediate environment, especially in the rootzone area. He added that it there has been any ingress of pathogenic fungi, it is not sufficiently advanced to be of any significance, and there was no significant danger of the trees falling. He had seen no signs of fungal attack or rot.

Mr Gould had examined the damage to the roots of the two trees, and was confident that with pruning, backfilling, fertilising and watering root growth could be promoted. A fungicide could be added to the fertiliser. He deposed that despite the root damage, about 70% of the root system exists and is serving the tree quite adequately.

The proposed district plan makes express provision for the uncertainty that can arise when expert witnesses offer differing opinions about the life of a tree the subject of the general tree protection control. The provision (inserted in rule 5C 7.3.3 C) is:

> Where any element of uncertainty exists as to the likely fate of the tree, the benefit of doubt will be given to the tree survival by not removing it until such time as its irreversible decline is obvious.

From the evidence of Dr Clunie and Mr Gould, an element of uncertainty exists about the likely fate of the pine trees. This provision indicates that the trees should



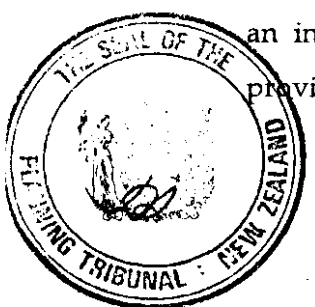
not be removed until irreversible decline is obvious. Dr Clunie's evidence does not provide a basis for finding that irreversible decline is obvious. He has not identified any unmistakable evidence of spread of pathogenic organisms or rot to the extent that would cause death of the trees. He agreed that crowns and foliage appeared to be in reasonably good health and the trees could reach an age of 100 years. Mr Gould had found no signs of decay, disease or instability, and gave them a life expectancy of a similar order.

Obviously if the appellant applies the recommended remedies to the trees, but they show unmistakable signs of irreversible decline, their removal should be reviewed. However the present condition does not qualify for removal in terms of the provision quoted.

Property Law Act

Counsel reminded us of the provisions of section 129C of the Property Law Act 1952, inserted by section 12(2) of the Property Law Amendment Act 1975. That section provides, among other things, for an occupier of residential land to apply to the District Court for an order requiring the occupier of other land to remove or trim trees on that land to prevent danger to life or health or property, obstruction of view, or other interference with reasonable enjoyment of the applicant's land for residential purposes. The Court is to have regard, among other things, to the interests of the public in the maintenance of an aesthetically pleasing environment, to the value of the tree as an amenity, and to the historical, cultural or scientific significance of the tree. The proviso to section 129C(5) (as amended by section 362 of the Resource Management Act) exempts trees the preservation of which is the subject of a requirement by a heritage protection authority, except on the grounds of loss or injury or damage to life or health or property. There is no exception for trees the subject of rules such as the respondent's general tree protection rules.

The proposed district plan contains a statement that the City Council considers itself an interested party in any proceedings in which an order is sought under that provision.



It appears that if this Tribunal, deciding the application in terms of the provisions of, and for the purpose of, the Resource Management Act 1991, decides to disallow the appeal and refuse the removal of the trees, the appellant would be entitled to apply to a District Court, which would have jurisdiction to order removal of the trees having regard to the criteria stated in section 129C of the Property Law Act, even though that removal of the trees without resource consent would contravene the Resource Management Act.

It is not clear to us that Parliament intended that in such cases, the Tribunal should not entertain resource consent applications for removal of trees, leaving the issues to be decided by the District Court. We hold that the mere existence of overlapping jurisdiction in another court, without other indication of an intention to oust the Planning Tribunal's jurisdiction, is insufficient to excuse the Planning Tribunal from hearing and determining appeals such as the present. However the possibility of costly hearings before two different courts, on different statutory considerations, leading to inconsistent determinations, does not appear to respond to the goals of efficient application processes and integrated resource management which the Resource Management Act 1991 was expected to address.

In any event, it would not be appropriate for the Planning Tribunal to anticipate the outcome of any application to the District Court under section 129C. We hold that it is our duty to decide this appeal in terms of the Resource Management Act, ignoring the possibility of an inconsistent determination by the District Court in terms of the criteria applicable by section 129C of the Property Law Act.

Evaluation

Section 104(1) of the Resource Management Act requires that when considering a resource consent application, the consent authority is to have regard to matters listed in that subsection. That requirement is expressed to be subject to Part II, which means that in the event of a conflict, the provisions of that part are to prevail

over it: *Environmental Defence Society v Mangonui County Council* [1989] 3 NZLR 257; 13 NZTPA 197 (CA). We are not aware that having regard to any of those matters in this case would conflict with any of the contents of Part II.

The items listed in section 104(1) that are relevant in this case are actual and potential effects on the environment of allowing the activity (paragraph (a)), and relevant objectives, policies, rules, or other provisions of a plan or proposed plan (paragraph (d)). The subsection also allows for having regard to any other matters the consent authority considers relevant and reasonably necessary to determine the application (paragraph (i)). We are not aware of anything in that class in this case.

Actual and potential effects

Plainly there would be a loss of visual amenity from removal of the trees. Having ourselves viewed them, we find that this would be an actual adverse effect on the environment. Mr Warren reminded us that the effect would be mitigated by the proposed planting. However even after 10 years the proposed trees would not have the scale or impact of the grove of pine trees, nor would they have the association with the history of the area as a golf course. Further, if it wishes to, and if the City Council agrees to the trees in the street, the appellant could carry out that planting anyway.

Mr Warren drew attention to the shadow effects of the trees, and the hazards for occupiers of lots on the subdivision of falling limbs from the trees. However, those would not be effects on the environment of allowing the activity the subject of the resource consent application, which is the removal of the trees. Rather they are the results of the way in which the development has been managed. We hold that they do not qualify for consideration in terms of section 104(1)(a).

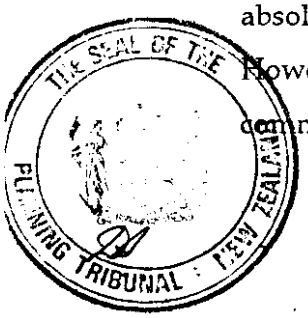
District plan provisions

Starting with the transitional district plan, Mr Warren gave the opinion that approval of removal of the pine trees would be consistent with the policy explanation in combination with the assessment criteria. Turning to the proposed district plan, the witness reminded us of the passage in the general tree protection strategy about not implying an absolute ban, and ensuring that work on trees is not done in haste nor executed without care. He considered that the great care with which the proposal to remove the trees is being considered would be consistent with that strategy. Of the policies about protecting groups of trees as an important character element in the environment, and as a food source for wildlife, Mr Warren observed that they are implemented by rules which provide for consents to be granted on assessment criteria. He found nothing in the objectives and policies for the Residential 6 zones with which the proposal is inconsistent.

Mrs Speer's evidence addressed the assessment criteria separately. Referring to the objectives and policies of the plan, she gave the opinion that the retention of the trees on this property is important as there are no others on it, and the trees contribute significantly to the amenity of the surrounding area. On the applicant's need to obtain a practicable building site, the witness deposed that trees frequently add economic value as well as amenity value and character to a site. Addressing alternatives for achievement of the appellant's objectives, she stated that the council had only received the one plan of subdivision for the property, but that other possible subdivision layouts could produce 21 residential lots while retaining the trees intact. It was acknowledged that the trees could not be relocated.

Mrs Speer adopted Ms Absolum's opinion about the contribution that the trees make to the amenity of the neighbourhood, and deposed that the trees are used for food, shelter and protection by birds, relying on Dr Jenkins's evidence.

Mr Warren was right to draw attention to the passage about not implying an absolute ban, and ensuring that work on trees is not done in haste or without care. However the district plan contemplates that in general, trees having value for the community are to be retained. The point of avoiding haste and careless work on



trees is that unhurried and careful consideration may allow for retention of trees that might have been removed, or for pruning or thinning rather than felling. Our findings earlier in this decision indicate that the subject trees have the qualities and value which qualify for retention in terms of the general tree protection rule.

The factors to the contrary are the consequences for the appellant's residential subdivision and development of the property. On the present subdivision at least one lot would not be able to be built on; and building on others would be inhibited by risk of limbs or whole trees falling. The assessment criteria expressly include an applicant's need to obtain a practicable building site. However they also include alternative methods of achieving an applicant's objectives.

The appellant chose to purchase for its development a property which had growing on it a grove of trees which were the subject of the general tree protection rules of the transitional and proposed district plans. The appellant has been able to subdivide the property so as to yield 20 residential lots anyway, on a design which ignored the existence of the trees. We are not persuaded that it would not have been able to produce a subdivision yielding 21 residential lots while retaining the trees.

For those reasons, it is our opinion that having regard to the relevant provisions of the district plan favours refusal, rather than granting, of the resource consent application for removal of the trees.

Sustainable management of resources

In terms of the proposed district plan, the application is for a restricted discretionary activity. The implications of that are that the assessment of effects required by section 88 was only to address the matters specified in the plan over which the council had restricted its discretion, although neither rule 4.3.2.6 nor rule 5C.7.3.3C specifically defines the restriction on its discretion on applications such as the present. The proviso to section 105(1)(b) directs that where the consent authority has restricted the exercise of its discretion, *conditions* may only be imposed in respect of the matters specified in the plan or proposed plan to which the consent authority

has restricted its discretion. However neither section 104 nor section 105 limits the exercise of the discretion to grant or refuse consent in such a case.

Bearing in mind the statement in section 5 about the purpose of the Act, we hold that exercise of the discretionary judgment to grant or refuse consent should be informed by that purpose, namely promoting the sustainable management (as defined in section 5(2)) of natural and physical resources. That includes efficient use and development of natural and physical resources (to which particular regard is required by section 7(b)), maintenance and enhancement of amenity values (section 7(c)), and maintenance and enhancement of the quality of the environment (section 7(f)).

Mr Warren gave the opinions that retaining the grove of trees would result in a major inefficiency in development and use of the resource represented by the subject property; that the loss of amenity value in removing the trees would be localised and fully mitigated by the proposed planting; and that the mitigation proposals would result in an improvement in the quality of the environment.

Mr Cooper submitted that efficient use of land is not to be equated only with using land for residential development and can embrace environmental protection; that it would not be efficient to ignore environmental outcomes; and that if 2 lots of a 21-lot subdivision are affected by the trees, it is still an efficient use of land, and options for redesign of the subdivision are available.

Mrs Speer gave the opinion that removal of the trees would result in an adverse visual effect for the area; that the planting proposed would not complement the quality of landscaping in the neighbourhood, and would not be sufficient to mitigate the effect of the loss of the trees.

We quote section 5:

> (1) The purpose of this Act is to promote the sustainable management of natural and physical resources.
> (2) In this Act, "sustainable management" means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while -

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

The structure of section 5(2) of the Act calls for managing development in a way which enables people and communities to provide for their social economic and cultural wellbeing and for their health and safety while doing the things listed in paragraphs (a), (b) and (c).

In this case there is a conflict between the appellant providing for its economic wellbeing by maximising its yield from the development, and people and the community providing for their social and cultural wellbeing by the retention of the trees which provide a valued local landmark and contribution to the amenity values of the neighbourhood.

Judge Sheppard and Commissioner Catchpole consider that removal of the trees would not sustain their potential to meet the needs of future generations in this neighbourhood for mature trees having landmark and heritage values. They hold that removal of the trees would not safeguard the life-supporting capacity of the ecosystem of which they are a part. They also hold that removal of the trees would not avoid, remedy or sufficiently mitigate adverse effects on the environment. They consider that application of those provisions indicates that the conflict is to be resolved by refusing consent to remove the trees.

There may also be a conflict between the contents of paragraphs (b), (c) and(f) of section 7, already mentioned. However, efficient use and development of natural and physical resources does not necessarily imply maximum financial yield for a developer. Judge Sheppard and Commissioner Catchpole accept Mr Cooper's submission that efficient use and development can be assessed more broadly. They hold that in this case the district plan, consistent with the statutory purpose, indicates that it should be. They also hold that the economic effect on the appellant's development of refusing consent for removal of the pine trees is not inconsistent with having particular regard to the efficient use and development of natural and physical resources.

In short, it is their judgment that in this case refusing consent for removal of the pine trees would serve the statutory purpose better than granting consent.

Opinion of Commissioner Easdale

Commissioner Easdale dissents from the opinions of Judge Sheppard and Commissioner Catchpole on that judgment. His own statement of his opinion follows at the end of this document.

Judgment

Having made our findings on issues of fact, and having had regard to the matters directed by section 104(1) and to the statutory purpose and other applicable provisions of Part II, we have now to come to a judgment whether resource consent for removal of the trees should be granted or refused.

Judge Sheppard and Commissioner Catchpole recognise that refusal would have the result that the freedom of the owner of the land to develop it according to its preferred design would be restricted by the continued existence of the trees, and that because of the risk of falling branches or trees, and shading effects, the value of the residential lots adjoining the trees may be reduced. They also recognise the rhetorical force of Mr Warren's claim that retention of the trees is tantamount to provision of a local reserve at the cost of a private developer, in addition to the reserves contribution paid on the subdivision.

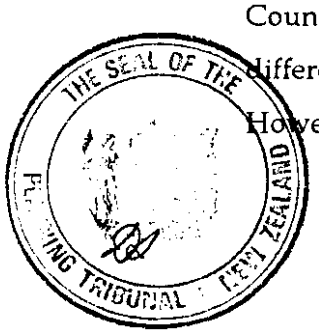
However the Resource Management Act sets in place a scheme in which the concept of sustainable management takes priority over private property rights – see *Falkner v Gisborne District Council* [1995] 3 NZLR 622 at 633; [1995] NZRMA 462 at 478. It is inherent in the nature of district plans that they impose some restraint, without compensation, on the freedom to use and develop land as the owners and occupiers might prefer. The appellant could have appealed to this Tribunal against the

respondent's requirement for payment of a reserves contribution on the subdivision, but it did not do so.

Counsel for the respondent submitted that the fact that subdivisional approval was granted, and that the development has been partly implemented, are not factors to be weighed in favour of the appellant. He added that past actions of the applicant are relevant to exercise of the discretion – not in any punitive sense, but as matters which may have contributed to the alleged unsafety of the trees. Mr Cooper contended that the appellant should not benefit from what was a wrongful act damaging the roots; and that detriment personal to the applicant arising from its own actions ought not influence the Tribunal's decision.

Judge Sheppard and Commissioner Catchpole have concluded that the shadow effects and the hazards of falling limbs are results of the way in which the appellant has chosen to plan and manage its development. The appellant bought the land when it had growing on it trees that were protected by general tree protection rules of the transitional and proposed district plans. The fate of the trees was not addressed at the outset, as reason would have required. Instead the appellant's surveyor submitted to the City Council a plan of subdivision that did not show the trees, and later, a plan showing the trees which failed to show the true extent of the spread of the canopy of the trees, as required by the relevant rule. The appellant's contactor carried out trenching works in a way that damaged roots of the trees, and that may have allowed ingress of pathogens that may ultimately harm the trees. The appellant deliberately chose to subdivide on a design that could not be fully realised without removal of the trees, and which involved placement of dwellings where they would be shaded by them and at hazard from falling limbs. The appellant completed the subdivision and proceeded with development knowing that it required resource consent for removal of the trees, and knowing that consent had not been granted. It chose to anticipate a favourable outcome.

Mr Warren sought to place responsibility for what had happened on the City Council. With hindsight the council officials might wish that they had dealt differently with the applications for subdivision consent and for building consents. However, the appellant cannot avoid responsibility for its own actions. It knew the



trees were on its property. It knew it would need resource consent to remove them. It knew that its application for that consent had not been granted.

It would not accord with the scheme of the Act about resource consents if the appellant's application was advanced in any way as a result of its having acted in anticipation of obtaining resource consent. Developers in general should not be given to expect that resource consent for removal of trees that might increase their return on a development can be procured or even enhanced by injudicious pruning or root damage to trees, or by subdivision or development in anticipation of a final grant of consent. (We accept that the present appellant did not carry out pruning or interfere with roots of the pine trees deliberately to harm them or to advance its case for removal of them. We also accept that the appellant had, ineffectively as it turned out, instructed its contractor to keep trenching works well clear of the trees.)

We find that the shadowing and hazards have been brought upon the appellant by its own actions in the way in which it has chosen to plan and manage its development. As counsel for the respondent contended, the appellant took a risk. It is left with responsibility for the consequences. Judge Sheppard and Mr Catchpole do not exclude those matters to penalise the appellant for having acted in anticipation of a favourable decision of its resource consent application. Rather they exclude them because the resource consent application has to be decided for the promotion of sustainable management of natural and physical resources.

We have found that the grove of trees the subject of this appeal perform functions of visual amenity, heritage and habitat, make a positive contribution to the quality of the environment, and are of value to the public, to wildlife and to the neighbourhood in which they are located. Judge Sheppard and Mr Catchpole hold that in those respects the pine trees are a worthy subject for retention under that provision of the proposed district plan. Removing the trees would have an adverse effect on the environment and would not be remedied or sufficiently mitigated by the replacement planting proposed.

The objectives and policies of the district plans about retention of substantial trees in the City have a place in the promotion of sustainable management of natural and

physical resources, and as such they deserve more than lip-service. In the light of our findings in this case, the majority judge that to allow removal of the pine trees would not give full weight to the value of the trees to the community, nor to the City's goal of retaining such trees where practicable. In the judgment of the majority the community values of retaining them deserves to prevail over the private interests of the appellant in removing them.

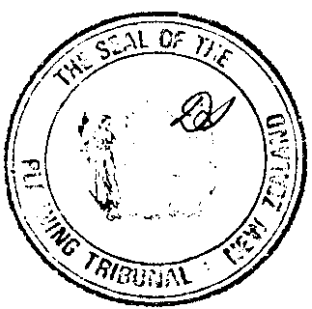
Therefore the appeal is disallowed, the respondent's decision in confirmed, and the resource consent application is refused.

This would not be an appropriate case for an award of costs, and we make no order in that respect.

Dissenting opinion of Commissioner Easdale

Having carefully considered this decision of the Tribunal I am unable to support the decision reached by the Tribunal on this matter and would record a dissenting opinion. In part the following matters, briefly expressed, have influenced my assessment.

The trees were originally planted in conjunction with a golf course development possibly as a rapidly growing species to provide quick shelter or screening between fairways and greens. On a golf course they would doubtless have been managed, supplemented and removed if over-large to ensure the best course maintenance and playing conditions. Their survival to the present is possibly to a degree fortuitous but I am unable to place particular value on the heritage aspect of the grove. They are however a considerable landscape asset and if sited on an appropriate area of land could on the evidence be expected to stand for perhaps a further forty years or until they fall of old age or structural weakness. The future life prospects of the trees is qualified in the evidence as being subject to their careful ongoing management though we were not told how this might occur.



This is not a stand of trees which can be accommodated in the yard spaces of 600 square metre residential sites. The trees are evergreen, represent a bulk some four times the area and three times the height of individual houses being built in the vicinity. The shadowing effect particularly on sites lying below the level of the trees to the south and east from at least equinox to mid winter (6 months of the year) I would rate as quite severe.

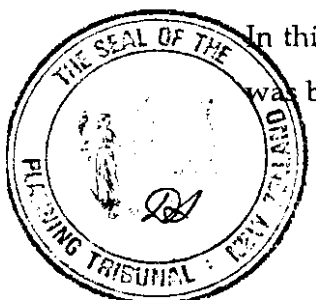
Houses which might be built on Lots 12 and 13 with the trees removed would have a shadowing effect on adjoining sites but of a significantly reduced magnitude being individually smaller and lower than the trees. The trees at close quarters have an overbearing nature which while not particularly addressed in evidence was evident on a site inspection. The house on Lot 8 was that most closely affected and in my consideration the relationship of the trees to that quite substantial house borders on the grotesque.

I am inclined to the views expressed by Dr Clunie that radiata pine is not a suitable tree species for closely built residential environments, that the trees individually are poorly formed specimens, that there is a substantial likelihood of storm breakage and the potential for breakage will increase with time.

Regardless of whether the developer stands to gain or lose the situation now existing is that ten residential lots created by way of a subdivision consent are to some degree affected in an adverse manner. Five of the ten lots have houses built and a further two have foundations laid at the time of hearing in November, following the issue of building permits. Again I incline to the further view of Dr Clunie that the siting of buildings close to these trees has precluded the option of retaining them.

The resource represented by the residential sites and buildings will far outlast the somewhat uncertain life of the trees and in my assessment the provisions of section 5 are now best served by granting the consent sought.

In this case, as I see it, council being aware that a resource consent for tree removal was being processed nevertheless granted a subdivision consent without any proper



consideration of the matters which might be raised by the tree consent application. This case I believe demonstrates the unsatisfactory results which can arise from not considering all necessary applications at the one time.

DATED at AUCKLAND this 13th day of June 1996.

DFG Sheppard,
Planning Judge

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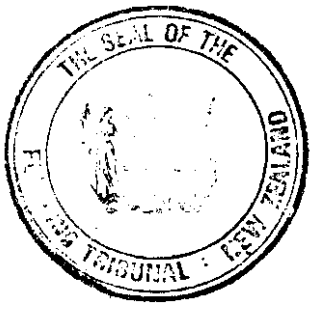

ORIGINAL

Decision No. W 029/2006

IN THE MATTER	of the Resource Management Act 1991
AND	
IN THE MATTER	of two appeals under Cl 14 of the first Schedule to the Act and an application under s85 of the Act
BETWEEN	FORE WORLD DEVELOPMENTS LIMITED and BAYSIDE VILLAS LIMITED (RMA 674/02, RMA 860/03 and ENV W0085/05) Appellants/Applicants
AND	THE NAPIER CITY COUNCIL Respondent

BEFORE THE ENVIRONMENT COURT
Environment Judge C J Thompson
Environment Commissioner W R Howie
Environment Commissioner K A Edmonds

Hearing: at Napier on 7 – 10 February and at Wellington on 13 – 17 February 2006
Site visit 8 February 2006. Closing submissions received 17 March 2006
Counsel:
P T Cavanagh QC for Fore World Developments Ltd and Bayside Villas Ltd
M B Lawson for the Napier City Council
P J Milne and M Conway for the Hawkes Bay Regional Council – s274 party
K G Smith for Director-General of Conservation – s274 party

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

DECISION

Introduction

[1] These three proceedings, heard together, concern three pieces of land on the coastline at the settlement of Bay View, north of Napier. At the time the proceedings were begun they were owned by Fore World Developments Limited and Bayside Villas Limited. Parts of one of the pieces of land have since been sold but, with the possible exception of part of the application under s85, that is largely irrelevant to the matters we have to resolve. It is convenient, if not entirely accurate, to describe the applicants/appellants as *Fore World.*

[2] Fore World's core motivation in all of this is the wish to develop the land as medium density residential subdivisions. Much summarised, Fore World wishes to have the land zoned *Main Residential* so that it can be subdivided with lot sizes of the order of 400m^2. It has confirmation that services such as water, power and telecommunications are available. With some reservations both Councils accept that, from an engineering perspective, satisfactory stormwater and sewage management could be provided. Stormwater could go to the sea and one of the pieces of land could accommodate a sewage treatment and disposal field for the houses on other sites. The City Council does however have issues from a planning and management perspective with the stormwater and sewage proposals and we shall mention those in due course. Of more immediate concern to it is the possibility of coastal erosion damaging the land and structures erected on it. These issues have been live between the parties for some years and have already resulted in other proceedings before this Court.

[3] The Regional Council broadly supports the City Council's position, but has engaged its own advice on coastal erosion issues. That advice suggests a Coastal Hazard Area smaller than that proposed by the City Council but it is prepared to support the wider zone on the basis that it offers greater precaution, a concept to which we shall return. The Director-General of Conservation joined the appeal relating to the Natural Hazards and CHZ in the Proposed Plan under s274. At the hearing the Director-General's counsel indicated that he adopted the same position as the City Council and took no further part. In different documents the area is referred to as the Coastal Hazard Zone or the Coastal Hazard Area, and there are other permutations also. For consistency and clarity we will use *Coastal Hazard Zone* (CHZ) throughout.

The land involved

[4] The three pieces of land are known, in shorthand, as Gill Road, Franklin Road and Rogers Road. Gill Road has an area of about 1.9ha. It has an existing subdivision consent for 12 residential lots and a road reserve. The road, known as Mer Place, is a cul-de-sac and is already formed. The planning history of Bay View is somewhat complex. In 1989 Napier City inherited the area from the former Hawkes Bay County, along with its then operative District Scheme. In 1992, under some priority, a new plan for the area was notified, and it has been operative since 1996. Under that Plan, the Napier City District Plan; Bay View Subdistrict, the Gill Road land is zoned *Residential* but a CHZ overlay affects it. Under the Proposed City of Napier Plan, notified in 2000, (which is the Plan under challenge here) the land is zoned *Rural Settlement* which allows for one dwelling per unserviced site with a 1000m^2 minimum area. If the land is fully serviced the minimum area reduces to 800m^2. Servicing is to be provided by a network utility operator. The seven residential lots on the seaward side of Mer Place are covered by the CHZ overlay contained in the Proposed Plan, to the extent of about 71%.

[5] New buildings or structures in the *Rural Settlement* zone and subject to the CHZ overlay will be *prohibited* activities when the Proposed Plan becomes operative (see s77C(1)(c)). In the meantime they are a *discretionary* activity. A dwelling could be erected on each lot on the landward side of Mer Place as a *restricted discretionary* activity, subject to service provision.

[6] The Rogers Road land has an area of about 1.4ha. It is a long, shallow rectangle narrowing to a point at its southern end, and lies west of the Palmerston North – Gisborne railway line. Under the Operative Napier City; Bay View Subdistrict Plan this land was zoned *Deferred Residential* under Variation 5, operative from December 1996, but the *Bay View Rural Zone* Rules continued to apply to it. The conversion of the *Deferred Residential* zoning to some form of useable residential zoning would require a plan change and, at a minimum, the provision of full servicing for stormwater and wastewater.

[7] In the Proposed Plan this land is zoned *Main Rural*. Ms Sylvia Allan, the City Council's consultant planner, told us that this allows a minimum lot size of 4ha with one dwelling per site, and that this provision is now beyond challenge. Under the current proposal put forward by Fore World for the development of the whole area this land would be used for

a community sewage treatment system and effluent field. But if, and when, the whole area is reticulated into a publicly operated sewage scheme it could be subdivided into 12 residential lots.

[8] The Franklin Road land has an area of about 8ha. It is essentially a long strip lying between the coast and the railway line. It was also zoned *Deferred Residential* by Variation 5 to the Subdistrict Plan, with the *Bay View Rural* Rules continuing to apply, and had the same CHZ over almost all of it. Under the Proposed Plan it too is zoned *Main Rural* so that the minimum lot size is 4ha with one dwelling per site. Under Variation 3 (under challenge in appeal W085/05) of the Proposed Plan the CHZ notation covers approximately half of the width of the area between its seaward boundaries and the railway.

Applicable law

[9] The occasionally vexed issue of whether a proceeding should be dealt with on the law as it stood before, or after, the 2003 amendments to the RMA (effective 1 August 2003) was given an added layer here because the appeals/application were lodged in 2002, 2003 and 2005. The 2002 appeal is straightforward enough. The 2003 application was lodged on 24 October 2003 and, if that was the determining date, the law post-amendment would apply. However it seeks changes to the Proposed Plan notified in November 2000. The 2005 appeal is against the terms of Variation 3 of the Proposed Plan which was notified pre-August 2003: - Fore World's submission being dated 17 June 2003. Overall, we deal with the three matters on the law as it stood pre-2003, but the differences are in no way decisive. Nothing turns on whether *beyond challenge* Rules are deemed to be operative under s19. There may be a somewhat lesser standard imposed on the Council in terms of a s32 report but again that is not going to be decisive in these circumstances. Nor is there any effective difference in whether the terms of the Plan are ...*not inconsistent with*... or ...*give effect to*... the terms of the Coastal Policy Statement, under s75.

[10] We agree with Mr Milne's submission that s131(1)(a) of the 2005 amendment makes it clear that the provisions of that amendment do not apply to any of these matters, and we do not understand any other party to disagree with that view.

The relief sought

[11] Isolating what relief was ultimately sought in each proceeding is not easy. That is not to be taken as a criticism of Mr Cavanagh, who was not instructed until after they had been lodged. The position continued to evolve at the hearing – a process criticised by Mr Lawson as *...planning on the hoof*, and there is some validity in that criticism. In its appeals against the Proposed District Plan and Variation 3 Fore World originally sought the complete removal of the CHZ from the Gill Road and Franklin Road land. Subsequently it sought an alternative of a reduction to a width of 15m (and later 18m) from the average vegetation line on those sites. It is to be noted that it did not seek a rezoning of the land under those appeals.

[12] We received radically differing submissions on the scope of the original submissions and appeals, including an amended notice of appeal, to cover wider relief originally sought by Fore World or put forward in submissions and evidence. Fore World sought different planning horizons, graduated risk zones and controls, amendments to objectives, policies and rules, and specific rules to permit beach renourishment in Bay View by private entities. There were also challenges to our ability to find in favour of graduated hazard zones and a Bay View beach renourishment scheme on Variation 3, on the basis the variation deals with the linear width of, and not the content of policy and controls applying within, the CHZ. Another issue was the scope of Fore World's original submissions on the variation. Resolving the proceedings on the basis of the scope of jurisdiction, while perfectly proper legally is, we suspect, unlikely to provide a long term solution to the differences between these parties. The fundamental issue of the extent of the CHZ is within scope. Once that is resolved, we can express conclusions about what are really subsidiary issues assuming, without necessarily deciding, in favour of Fore World that they are within scope.

[13] The appellant's s85 application of 24 October 2003 sought a change in the zoning from *Main Rural* and *Rural Settlement* to *Main Residential*, and a *Bay View Overlay Area*. It also involved removing the proposed *closed road* notation from part of Le Quesne Road and the rezoning of that area from *Foreshore Reserve* to *Main Residential*. Another aspect was deleting part of the CHZ, mainly from beyond a strip fronting the coast from outside a CHZ line identified by NIWA. For the Bay View Overlay Area, the application proposed a minimum lot size of 350m² (later 400m²) and the removal of any requirement for separation distances. The application also sought the scheduling of sites as *Bay View Overlay Area Wastewater Treatment Facility, Rogers Road and Franklin Road, Bay View*, thereby giving it

permitted activity status. Further changes sought were the adding of a new condition to the conditions for *permitted* and *controlled* activities:

> 5.37 Services
>
> 1. The following services shall be provided to all sites in the Bay View Overlay Area prior to the commencement of any activity provided for in the Main Residential Zone Activity Tables Rules 5.2 – 5.8, and 5.11:-
>
> Water supply, wastewater and stormwater systems that fully comply with the requirements of Chapter 66 (Code of Practice for Subdivision and Land Development, and in the case of wastewater is provided by a network utility operator),

and a requirement that the Council would restrict its discretion for *restricted discretionary* activities under Rule 5.13 Land Uses Not Complying with Conditions to:

> - the provision of services when the servicing requirements of Rule 5.37 are not complied with.

[14] In the course of the hearing, while still seeking a zoning of *Main Residential* in terms of the s85 application, Fore World refined its position. The revised proposal involved a staged approach involving three subzones:

- CHZ1 – extending 18m inland from the barrier edge line. Buildings and structures (with the exceptions noted in the District Plan) to be a *prohibited* activity.
- a *Coastal Yard* of 5m inland from the boundary of CHZ1. Buildings and structures to be a *controlled* activity if a beach renourishment scheme is in place and a *discretionary* activity if not.
- CHZ2 – extending inland to the Reinen-Hamill 2100 line (ie 26m from the barrier edge line[1]). Buildings and structures to be a *controlled* activity inland from the boundary of the Coastal Yard.
- the Council to be able to impose conditions on *controlled* activities in respect of:
  - confirmation that buildings are designed to be relocatable.
  - a requirement for buildings to be relocated when a defined trigger point is reached.
  - defining that trigger point.

The planning horizon

[15] Part of the relief sought in the appeal against the Chapter 62 provisions of the Proposed Plan is that the timeframes mentioned in the Plan should be reduced from 100 years to 20 and

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[1] Transcript p271, L 28-32

50 years. The shorter periods were said to be more consistent with international timeframes for CHZs. However we did not understand Fore World to be seriously advancing that at the hearing. Its coastal scientists were content to discuss issues within the framework of a possible 2100 erosion line. Given that the expected life of a house would almost certainly be more than 50 years, and that unless specifically limited land use consents have an indefinite life, 100 years is, we think, an appropriate period for considering coastal issues. There might even be an argument for it to be longer, but the uncertainties of attempting to predict coastal movement strain even a 100 year span. In *Bay of Plenty Regional Council v Western Bay of Plenty District Council* (A27/2002) and in *Skinner v Tauranga DC* (A163/2002) the Court regarded a 100 year period as *...sound...* in planning terms, having regard to the quality and scale of the development to be protected and the provisions of the NZCPS. We take the same view here.

Beach renourishment

[16] The coastal engineers and scientists generally agree that the stretch of foreshore from Ahuriri to Tangoio, of which Bay View forms part, was formed over thousands of years mostly from gravel and sediment being moved northwards from its source at the Tukituki River, in the southwestern corner of Hawke Bay. Something like 28,000m^3 of material comes from that river each year, with a relatively small additional contribution from erosion of the cliffs east of Clifton. However, the construction of the Port of Napier and its breakwater has interrupted the natural flow of this material around the promontory of Scinde Island, or Napier Hill. None of it now reaches the Ahuriri – Tangoio foreshore. The 1931 Hawkes Bay earthquake raised that stretch of foreshore by about 2m resulting in the mean sea level moving eastward about 20m. It took until the 1960s for that shoreline advance to be overcome but the lack of renourishing sediment and shingle allowed structure-threatening erosion to begin. The shoreline at Westshore, a few kilometres south of Bay View, began to retreat to the extent that the security of shorefront houses was a matter of concern. Longer term, there was concern about the railway line, SH 2 and even the east-west runway of the airport.

[17] The solution adopted by the Council in 1987 was to truck shingle from the beach immediately south of the Port, where it naturally stockpiles, to Westshore where it is dumped on the beach. The annual natural loss of material from Westshore has been calculated at about 9,000m^3 and, on average, about that amount is replaced by the renourishment programme. It has successfully halted the erosion.

[18] The cost of this programme is justified by the value of the existing housing and infrastructure which would be in jeopardy if erosion was not checked. Even so, at least one coastal engineer, Mr Smith, suggested that long term, the cost/benefit analysis might swing towards letting the housing and infrastructure go and replacing it in a safer location. He described this as a *managed retreat*. This is an option identified in the New Zealand Coastal Policy Statement:

> Policy 3.4.6
>
> Where existing subdivision, use or development is threatened by a coastal hazard, coastal protection works should be permitted only where they are the best practicable option for the future. The abandonment or relocation of existing structures should be considered among the options. Where coastal protection works are the best practicable option, they should be located and designed so as to avoid adverse environmental effects to the extent practicable.

It is to be noted that Policy 3.4.6 relates to existing development. Other Policies, to be mentioned later, relate to new proposals.

[19] The coastal experts do not agree about the effect on the Bay View shoreline of the Westshore renourishment. Dr Gibb for instance does not believe there is any evidence that material lost from Westshore moves as far north as Gill Road, the most southern of the Fore World sites. Mr Reinen-Hamill says that there is no clear evidence either way but is inclined to agree with Dr Gibb. Messrs Smith, Oldman and Koutsos think that the Westshore material does provide some benefit to Bay View. We return to this issue at para [83].

[20] As what is described as a *failsafe* mechanism, Fore World proposes a contractual arrangement along the lines of an apartment building Body Corporate to oblige section owners in the proposed subdivisions to pay, in perpetuity, for a beach renourishment scheme should one become necessary. Dr Mead calculates that if Dr Gibb's estimates of erosion volumes at Bay View prove correct then as a *worst case* about 2,000m^3 of material would be required each year to protect about 1.8km of shoreline. The estimated cost of that in 2006 dollars would be, he says, of the order of $40,000pa, to be divided between approximately 100 households. We accept that such an arrangement is possible. But we also share the doubts about its practical enforceability in the longer term if expense escalates and individuals, or the whole group of owners for that matter, begin to take the view that it is too burdensome and that the Council should *do something*.

[21] According to Ms Allan, her experience in other matters indicates that there is a question mark over the future availability of shingle in Hawkes Bay. For reasons presently unknown the volumes of shingle building up on the beach south of the Port seem to be less than before. There is uncertainty also about the capacity of rivers to meet future demand. She cites the recent example of an extraction consent held by Winstone Aggregates for the removal of shingle at Awatoto being reduced in volume from 50,000m^3 to 30,000m^3 per annum. In July 2005 Fore World entered into an agreement in principle with Holcim (New Zealand) Ltd for the supply and delivery of shingle to Bay View if required for beach renourishment. But we do note that it can be terminated by either party on one month's notice.

[22] No Assessment of Environmental Effects has been done for such a proposal. Part of the relief sought is an amendment to Rule 62.8 to make coastal protection works in the Council owned and administered foreshore reserve a permitted activity. In the absence of a Rule change its planning status under the District Plan is uncertain. However if the placement of renourishment material extends below mean high water springs (MHWS) a resource consent for a Coastal Plan activity would be required from the Regional Council. Obviously, there is no guarantee that a consent would be forthcoming.

[23] The provision of renourishment material, although it may be described as *soft engineering*, is still a hazard protection work. Dr Mead acknowledged that. As such, the proposal for it needs to be considered in the light of NZCPS Policy 3.4.5:

> New subdivision, use and development should be so located and designed that the need for hazard protection works is avoided.

[24] The uncertainty of its consent status, the question mark over the availability of material, doubt about the long term durability of the obligation of future owners, and its inconsistency with the NZCPS, combine to mean that we do not derive great comfort from this suggestion as a means of mitigating potential adverse effects. The proposal has certainly not been developed to anywhere near the point where we would consider modifying the planning controls to provide for it as a permitted or controlled activity.

Relocatable buildings

[25] The possibility of providing mitigation by requiring houses to be relocatable, should there be greater than expected erosion during the planning period, featured in Fore World's submissions and evidence. As mentioned in para [14] the suggestion is that the Plan be amended to enable the Council to impose a condition that any building in CHZ2 be designed to be relocatable. If a multi-storey hotel can be relocated along the Wellington waterfront, moving pretty much any house should not be an impossible challenge: - we accept the technical feasibility of the suggestion. And we accept that Mr Vernon Warren, Fore World's consultant planner might be right in saying that, thinking as an accountant might, the loss of the value of the land can be rationalised if you have *amortised* that value over the period of occupation. We doubt that most home-owners would think that way. And we share the doubts of Mr Reinen-Hamill, Mr Gavin Ide, the Regional Council's Planner, and Ms Allan about the practicability of the concept of requiring, probably more or less simultaneously, the relocation of possibly scores of houses. Among the doubts they raised were the issues of finding sufficient suitable and affordable land, possible issues over consents (relocated houses being not universally welcome in newer subdivisions), social expectations and impacts, and the sheer costs and difficulty of relocating. All of those matters would be likely, we agree, to make the possibility fraught with problems and, again, place the Council under enormous pressure to *do something*. In all, we think the suggestion will raise more issues than it would solve, and we do not need to pursue it, particularly when we consider that a single line demarcating an acceptable level of risk can be established.

Graduated Hazard Zones.

[26] We do not favour this concept either. We realise that it has been used in other situations: eg *Skinner v Tauranga District Council* (A163/02). But here we think the difficulties of application and enforcement of three lines within a relatively small overall width of land adds an unnecessary complexity when, as we shall review shortly, the evidence allows us to fix one point at which the level of risk is acceptable. The inconsistency between such a regime, and that applying on land adjacent to these sites, is another reason to avoid it.

Should there be a Coastal Hazard Zone at all?

[27] Fore World sought, as the primary relief in its Notices of Appeal, the complete removal of the CHZ from the Gill Road and Franklin Road land. It did not pursue that stance at the hearing and we are sure, both factually and having regard to the Council's obligations under

the Act (eg ss31, 74, 76 etc) that it was right not to do so. In particular, once a risk is identified as a matter of fact, these provisions of the NZCPS effectively require the creation of some cautionary or protective mechanism:

> Policy 3.4.1
>
> Local authority policy statements and plans should identify areas in the coastal environment where natural hazards exist.
>
> Policy 3.4.2
>
> Policy statements and plans should recognise the possibility of a rise in sea level, and should identify areas which would as a consequence be subject to erosion or inundation. Natural systems which are a natural defence to erosion and/or inundation should be identified and their integrity protected.
>
> Policy 3.4.3
>
> The ability of natural features such as beaches, sand dunes, mangroves, wetlands and barrier islands, to protect subdivision, use, or development should be recognised and maintained, and where appropriate, steps should be required to enhance that ability.
>
> Policy 3.4.4
>
> In relation to future subdivision, use and development, policy statements and plans should recognise that some natural features may migrate inland as the result of dynamic coastal processes (including sea level rise).

[28] At the hearing, Fore World advocated the adoption of what was referred to as the NIWA line, which we shall discuss in more detail shortly. Of the different lines put forward by the various witnesses, that is the most seaward. So the issue we must attempt to resolve is not whether there should be a CHZ on this shoreline at all but rather, what should be its extent.

What should be the extent of the Coastal Hazard Zone?

[29] In essence, this issue requires the assessment of the likelihood of the coastline eroding to any given point over the selected time horizon, and the likely consequences of that erosion if it does occur. See *Francks v Canterbury Regional Council* (High Court Christchurch, CIV2003-485-1131, Panckhurst J, 10 June 2005 para [16]). That leads us directly to the so-called precautionary principle.

The precautionary principle

[30] We can begin by reciting part of the extended definition of *effect* in s3 RMA: …

> (d) Any cumulative effect which arises over time or in combination with other effects—

regardless of the scale, intensity, duration, or frequency of the effect, and also includes—

(e) Any potential effect of high probability; and

(f) Any potential effect of low probability which has a high potential impact

It is (f) that has particular resonance here. It means that the RMA has an inbuilt requirement to have regard to potentially high impacts, even if they might be of low probability. That is of course a requirement to be cautious: - to take precautions. The references in the (s5) purpose of the RMA to...*sustaining the potential of natural and physical resources...to meet the reasonably foreseeable needs of future generations* and to ...*safeguarding the life-supporting capacity of air, water, soil and ecosystems*...have precaution inherent in them. The point is reinforced in the coastal context by this provision of the NZCPS:

Policy 3.3.1

Because there is a relative lack of understanding about coastal processes and the effects of activities on coastal processes, a precautionary approach should be adopted towards proposed activities, particularly those whose effects are as yet unknown or little understood. The provisions of the Act which authorise the classification of activities into those that are permitted, controlled, discretionary, non-complying or prohibited allow for that approach.

[31] The kind and degree of precaution to be taken depends on the level of knowledge of the risk, its likelihood of occurrence, and its consequences. We do not live in a risk-free world and the RMA does not require the avoidance of all risk. The Court in *Rotorua Bore Users Association Inc v Bay of Plenty RC* (A138/98) said this:

The underlying rationale for the approach [ie the precautionary principle] stems from the need for decision-makers actually to make decisions. It is not dependent, as some may think, on a proposition that one should be inherently conservative in assessing actual and potential effects. As Gallen J said in *Greenpeace New Zealand Inc v Minister of Fisheries* (High Court Wellington, 27 November 1995, CP 492/93)at p 32:

The fact that a dispute exists as to the basic material upon which the decision must rest does not mean that necessarily the most conservative approach must be adopted. The obligation is to consider the material and decide on the weight which can be given to it with such care as the situation requires... . At the same time I note, as counsel did, that in the end this is a weighting and not a decisive factor.

[32] We adopt that approach. There is no doubt that if the *worst case* scenario came to pass and there was severe and swift erosion along this stretch of foreshore, the endangerment of perhaps 100 homes would be regarded as a ...*high*...*impact* on the relevant environment, even

if there is unlikely to be direct threat to life and limb. In acknowledging the precautionary principle inherent in the RMA, the issue here is whether present knowledge enables us to define a CHZ and, in terms of Policy 3.3.1, set the status of activities within and close to it, so as to reduce the risk of that high potential impact actually occurring to such a level of probability that it is, having regard also to the other actual and potential effects, acceptable. As a Court, we have to assess the evidence placed before us to decide whether we can sensibly do that. We think that is possible in this case.

The evidence about the Coastal Hazard Zone

[33] The Fore World properties extend along the shore at Bay View north of Napier and sit astride the gravel barrier formed by the littoral drift, mostly northerly, earthquake uplift and the coastal processes of this section of Hawkes Bay. The material forming the barrier has been supplied mainly from the inland greywacke ranges and brought down by the rivers discharging into the sea. The gravel shore extends from Clifton in the south to Tangoio in the north. It is a feature that is superimposed on the marine sediment of the area and has been built up over some 4-6000 years. It attaches to Scinde Island or Napier Hill. Pania Reef lies offshore from the coast at Westshore but we were not told what effect that might have on the coastal processes. In the past, before uplift, the gravel deposits behaved as a barrier coast which would have been overtopped and rolled back periodically by storms from the sea.

[34] Two relatively recent changes to the shoreline processes have occurred. Construction of the port between 1876 and 1890 involved the construction of a breakwater that interrupted the passage of gravel up the coast and the 1931 earthquake raised the land at Bay View by some 2 metres, causing the beach to move some 20m seaward. The raised barrier was then high enough to prevent overtopping by the sea and is now sometimes referred to as a low coastal bluff. Drainage landward of the barrier was also altered and the Tutaekuri River adopted a new outlet south of Napier with a consequent further reduction in sediment to the barrier in the vicinity of the site.

[35] Dr Jeremy Gibb is an experienced consultant on coastal processes and he has advised the City Council on the coastal erosion hazard in the Bay View stretch of the coastline north of Napier City. His recommendations have led to the City Council declaring a CHZ that lies over a substantial part of Fore World's properties, so preventing building within that zone. Fore World in appealing the provisions has sought alternative expert coastal erosion advice

from NIWA (Mr John Oldman and Mr Ronald Smith) and the Regional Council as well has obtained expert advice on coastal stability from Tonkin and Taylor (Mr Richard Reinen-Hamill). In addition both the City Council and Fore World sought peer reviews of Dr Gibb's recommendations from overseas coastal experts. So, we have the benefit of the views of 6 experts on the stability of the Bay View coast. For convenience, we list those expert witnesses with their qualifications and positions, in Appendix 1. We include a 7th coastal scientist in the Appendix; Dr Shaw Mead. Dr Mead's evidence focussed on possible beach renourishment at Bay View, if required. He did not express a personal view about stability and was content to adopt Mr Smith's estimates.

[36] The local experts do not agree on an acceptable line delineating the hazard zone. Dr Gibb identifies an area considerably larger than the Regional Council's expert, Mr Reinen-Hamill, and both areas are larger than that recommended by the experts for Fore World. Moreover the two peer reviewers consider Dr Gibb's area in the opinion of one, too large, and in the opinion of the other, far too small. A joint statement by the experts (except for Dr Peter Cowell who was not available for the exercise) was supplied to the Court identifying the few areas of agreement and giving the broad areas of disagreement. It has therefore been necessary for us to examine each of the experts' views and reach a conclusion on the most likely threat from coastal erosion at this site.

[37] It is probably helpful to identify the components that combine to make a coast stable, eroding or accreting, partly so that we can examine each and partly because it seemed that the experts were agreed on the component parts. Variation in the position of the coast is caused by short-term fluctuations, by long-term advance or retreat of the barrier at the back of the beach and by changes in sea level. A *safety factor* may be added to the prediction and a further allowance to keep buildings further back is suggested to allow for foundation stability.

Short-term Fluctuations

[38] Short-term fluctuations are caused by the general variability of the weather with a mix of storms and calm or less stormy periods but not including extreme events or long-term trends. There seemed to be agreement that the effects of these short-term fluctuations are reflected in the active beach zone with the regular movement of sand and shingle and the absence of vegetation. At the site the width of this zone is about 40m from MHWS to the

edge of the vegetation or toe of the barrier scarp. The experts agree that the short-term fluctuation at a level a little above the MHWS is about 12m.

[39] Changes in the active beach profile have been measured periodically using cross-sections and the results are presented often as changes in the beach volume measured above a datum. That seems to be a convenient way of tracking changes in the beach from time to time. Generally they would be short-term fluctuations as they refer just to the active beach but they would provide an indication of any long-term accretion of the beach since that material would pile up against the barrier and the volume would grow. A trend of reducing volume may signal an up and coming attack on the barrier and provide early warning of long-term erosion.

Long-term Trend

[40] Long-term trends are described by the long-term changes in position of the barrier scarp at the back of the beach. This location was variously referred to as the barrier edge, the edge of the vegetation or the toe of the barrier. We will adopt this reference position as the toe of the barrier scarp. Dr Gibb uses the MHWS line as his reference point for his estimate of the overall width of the hazard zone but used the toe of the barrier scarp to estimate long-term trends. After some debate in cross examination the experts appeared to agree that the toe of the barrier scarp is well enough defined to be a suitable reference point for determining long-term trends and also for measuring the distance inland to the edge of a hazard zone. Assessment of the long-term trend is a key and dominant factor in the prediction of the future position of the coast, particularly if it is eroding.

[41] There was no agreement between the experts on the long-term trend.

[42] Dr Gibb considers there is evidence of a consistent erosional trend at the site. He estimates that for the southern portion of the site the long-term erosion rate is 0.3m/yr and for the northern portion 0.15m/yr. Over a 100 yr period coastal retreat would amount to some $30m^2$. Mr Reinen-Hamill adopted a long-term erosion rate of 0.05m/yr or 5m over 100 years[3]. Mr Smith considered that a ... *100 year return period storm event will most likely cause*

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[2] Gibb EIC Table E-2 and Reinen-Hamill EIC paragraph 37.

[3] Reinen-Hamill EIC attachment C and paragraph 37.

short-term erosion of up to 10-12m from the beach face but will not reach the base of the upper scarp...[4]. He is of the view that long-term the beach is very slowly accreting[5], and that the proposed *...sub-division is unlikely to be endangered by coastal hazards over the next 100 years provided structures are located landward of the coastal erosion hazard zone proposed by... Mr Oldman.*[6] Mr Oldman's coastal erosion hazard zone extends 15m landward from the vegetation line[7], later described as the barrier edge[8]. We take the references to *...the base of the upper scarp*...and the...*barrier edge*...to be to what we refer to as the toe of the barrier scarp.

[43] Fore World asked Dr Robert Young, whose primary focus of research over the last 20 years has been applied coastal processes, to peer review Dr Gibb's recommendations. Dr Young observes that the barrier crest is 7m above MHWS and not overtopped by waves. It is fronted by a wide robust beach without visible indicators of erosion or shoreline retreat. He records that all indicators point to stability[9].

[44] The City Council also sought a peer review of Dr Gibb's recommendations. It chose Dr Cowell. Mr Smith's, Mr Oldman's and Mr Reinen-Hamill's conclusions were also included in his review. He considers that all of the estimates of erosion underestimate the recognised factors and, although underestimating the threat, Dr Gibb has used the available data to best assess the coastal hazard[10].

[45] The evidence of the beach position over the years consists of cross-sections of the beach and a series of aerial photographs.

[46] Two main series of cross-sections are available – the Railway series from 1916 to 1961 and the Hawkes Bay series from 1974 to the present. Additional cross-sections for specific purposes have been surveyed in more recent times and where relevant the experts have used

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[4] Smith EIC paragraph 63.

[5] Smith EIC paragraph 57.

[6] Smith EIC paragraphs 64.

[7] Oldman EIC paragraph 58.

[8] Oldman supplementary statement paragraph 10.

[9] Young EIC paragraph 23.

[10] Cowell EIC paragraph 37.

this information as well. Some of the locations of the cross-sections in each of the main series apparently do not quite coincide so while their shapes can be compared it is not always accurate to combine the records to show changes in beach volume over time. Interpretation of the cross-sections or beach profiles have been complicated by the uplift of the earthquake, the paucity of measured points on the active beach profile in the older surveys and some possible variability in the actual line of each profile survey. There did not seem to be dispute about the accuracy of the surveys themselves.

[47] The aerial photographs permit stereoscopic viewing and the location of the toe of the barrier scarp or the edge of the vegetation. In order to compare old and new aerial photographs with sufficient accuracy the photographs have to be ortho-rectified by locating precisely some known positions in the photograph and then adjusting the whole photograph to be true to the known positions. Some adjustments made in this manner can be of a magnitude similar to changes identified as indicating trend changes over time.

[48] Much of the argument we heard was about the accuracy of deductions from both the beach profile cross-sections and from the aerial photographs and about whether changes identified were short term or long term ones.

[49] From the aerial photographs Dr Gibb measured the position of the toe of the barrier scarp over the length of the site for the periods 1936 to 1962 and from 1962 to 2001[11]. He reported a slight erosional trend was evident at the southern end of the site during the first period, but over the rest of the site the toe of the barrier scarp remained stable or slightly accreting. Overall he considered the trend to be stable in this period of 26 years. It was also the period of readjustment following the earthquake. During the later period of 39 years Dr Gibb measured from the aerial photographs a trend that has been erosional over most of the site's frontage at a rate of 0.28m/yr with an uncertainty of $\pm$ 0.10.

[50] From 10 years of recent survey at 6 profiles in the vicinity of the site Dr Gibb has estimated a loss in beach volume that he considers is consistent with the retreat he observes in the toe of the barrier scarp in the aerial photographs[12].

[11] Gibb EIC figure 7.
[12] Gibb EIC paragraph 70.

[51] Mr Reinen-Hamill considered the coast to be mildly erosional with a long-term erosion of 5m in 100 years. He based this on his examination of the beach profiles at the site and to the north and south of the site. He said:

> The long-term record at profile HB15 *(a beach profile cross-section some 2385m south of the southern end of the site and towards Westshore)* shows a trend of erosion, with significant erosion from 1984 to 1986. Since 1986 the beach profile has recovered, but still shows a long-term erosion trend of around 0.12m/year based on the data set from 1916 to 2002. HB16 *(a beach profile cross-section some 765m south of the southern end of the site)* shows accretion since the 1970s. However, since 1987 the rate of accretion has reduced significantly. All of the more recent data sets to the north (HB17 to HB20) show shoreline retreat at the MHWS.[13]

[52] In respect of the profile at HB16 he observed that over the period from 1937 to 2002 the toe of the barrier scarp had receded 3m or equivalent to a rate of 0.046m/yr, a rate very similar to his overall assessment of 5m in 100 years[14]. Mr Reinen-Hamill did agree with Mr Cavanagh in cross-examination[15] that at the MHWS level the profile at HB16 over a period of 27 years did show accretion at 0.9m/yr but he considered that to be the fluctuating nature of the active beach and in other periods the profile shows erosion.

[53] In response to a question from Mr Milne, Mr Reinen-Hamill said it was important to consider the *big picture* when examining coastal processes. In this case he said:

> What we have here is very clearly a coastline with very little natural sediment inputs closely effectively to zero, I believe, for the length of the coast, and processes that reduce the volume of sediment including, as Mr Smith also noted, some leakage to the north and abrasion. So given that setting, I believe we were looking at a coast with marginal stability, based on sediment supply and geo-indicators.[16]

[54] Mr Smith on the other hand considers the coast at the site to be mildly accreting or at least stable. He is a geographer who has studied and has had ongoing first hand experience of the nature of this coast over the period from 1968 to the present. He considers the aerial

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[13] Reinen-Hamill EIC paragraph 45.

[14] Reinen-Hamill Rebuttal paragraph 4.

[15] Cavanagh XX Reinen-Hamill transcript p 258 line 35.

[16] Milne X Reinen-Hamill transcript p238 lines 27-33.

photographs are of limited accuracy and he prefers to use the historic and recent beach profile data to evaluate any long-term trend. Those data show, he says, that the barrier crest at the site has been in the same position since the earthquake. He said he had not observed any erosion of the barrier crest in the 38 years he has been visiting that coast. Processes on this part of the coast are complicated because he said the earthquake uplifted the barrier crest to beyond the reach of the sea, and gravel, eroded from the Westshore beach to the south, built a new beach against the raised barrier with the result of a presently stable to accreting shore at the site.

[55] The reduced remains of an old shipwreck, the *Fanny,* currently buried above MHWS in front of Gill Road, is in the same position as it was in 1956 and that gives Mr Smith further confidence that the coast at this site is at least stable.

[56] He says that *...the Bay View coast between Fannin Street and Franklin Road has been quite stable over the last 68 years.*[17] A recent profile cross-section at the Mer Place subdivision just on the southern boundary of the site has shown some retreat of the barrier crest between 1995 and 2001, but he attributes that to vehicular activity there.

[57] Mr Smith responded to Dr Gibb's view that over the last 10 years the beach volume at Bay View (i.e. the volume of gravel and sand in the active beach zone above a datum) showed a loss of some 10,000m^3 per year would mean erosion at Bay View on the scale occurring at Westshore. He said that has not been observed and that it would be obvious if it occurred.

[58] In cross examination Mr Lawson asked Mr Smith about his conclusions in a 1993 NIWA report he authored, that a zero sediment transport coastline north of Napier would naturally adopt a position landward of the present coast over the stretch from Westshore to north of the Esk River including the present site. That is, that the present coast at the site would retreat and part of the airport would be threatened. Mr Smith agreed that was his prediction in that report but that it was only likely in several hundred years, not the time frame of 100 years we are dealing with in this case, and if no protection works or sediment

[17] Smith Rebuttal paragraph 5 lines 21,22.

renourishment activities were undertaken. Mr Smith agreed that *...in the very, very, very long term it will eventually erode.*[18]

[59] In his rebuttal evidence Mr Smith introduced 10 beach profile cross-sections located along the frontage of the site that had been surveyed in 1937, 1961 and 2006. Mr Lawson cross-examined Mr Smith extensively about the interpretation of those records. It was established that any erosion of the barrier scarp that showed up on the cross-sections would be significant when considering any long-term trend because there was no natural mechanism for the barrier scarp to be reinstated as it was above the level able to be reached by even storm waves. However changes in the active beach profile were less informative about any trend since the beach changed regularly, although Mr Smith explained that a convex profile signified a beach with plenty of sand and gravel while a concave profile showed a lack of material.

[60] On three of those cross-sections describing 600m of coast at the site Mr Smith agreed there had been erosion of the barrier scarp with a 6–7m retreat being apparent at one of them[19]. This conformed to the cross-section produced by Mr Andrew Taylor, a surveyor called by the City Council. Mr Lawson suggested that with this evidence Mr Smith's assumption that the beach was accreting was not supported. Mr Smith replied:

> No, the beach is stable. The barrier crest has obviously retreated. The cause of the retreat we do not know, in that small area. ...The data says there has been some small retreat there. Now the work of Dr Young says the same thing, where he has done his photographic analysis. That the at least the vegetation line has retreated at that point. And the photograph data agrees with the survey data, and therefore I would think the best you could say about that whole section of coast, because we are not just looking at just one little piece, we are looking at the full section, it is stable. If we want to isolate out one little section, then yes, I will say there has been erosion of the upper foreshore and a piece taken out of the crest[20].

[61] Three further beach profile cross-sections were also produced by Mr Smith in his rebuttal statement. They were referred to as A, B, and C and were located at Mer Place at the southern end of the site. The cross-sections had been surveyed in March 1995, February 2001,

[18] Transcript page 119 line 49.
[19] Transcript page 128 lines 6-9, page 129 line 40.
[20] Transcript page 129 lines 24-29.

March 2004 and December 2005. Mr Lawson pointed out to Mr Smith that retreat of the scarp was again evident but Mr Smith said:

> I can't eliminate erosion, and I can't eliminate human intervention. The key places where you have mentioned there is some retreat of the scarp are both possibly areas where wave action could get there, but more importantly they are also the same places where humans access the beach and have done historically[21].

[62] Clearly Mr Smith acknowledges some localized retreat of the barrier scarp, attributing some of that to human activity, but remains of the view that overall the coast in the vicinity of the site is stable. In the very long term he agrees the tendency of the zero sediment transport coast will be to move inland. We assess that the localized retreat of the barrier scarp of 6-7m during the period of 1961 to 2006 amounts to 0.14m/yr.

[63] Mr Oldman, a NIWA scientist with qualifications in physics and mathematics, reviewed Dr Gibb's estimates of the coastal erosion hazard zone and made an estimate of his own based on Mr Smith's opinion that the long-term trend is stable.

[64] As mentioned, the City Council decided to obtain a peer review of the various estimates of the CHZ. Dr Gibb arranged that with Dr Cowell. He provided a comprehensive 84 page technical review. He found that the CMC (Gibb) and Tonkin and Taylor (Reinen-Hamill) estimates included most of the elements required to define the hazard zone but that they were all substantially underestimated. He considered the NIWA (Smith and Oldman) estimate to be too narrow to be credible. He viewed the 1962 ortho-rectified aerial photographs that Dr Gibb relied upon and confirmed he was satisfied that the barrier scarp was identified correctly, a point that had been challenged by Dr Young. Dr Cowell considers that a further 50m should be added to Dr Gibb's erosion hazard line[22].

[65] For Fore World, Dr Young reviewed Dr Gibb's work. He was particularly critical of the use of the coastal erosion hazard formula that the other experts used although he agreed that the main elements of coastal erosion were represented in it. He considered that it was not possible to make adequate estimates of the individual parameters let alone assess their

[21] Transcript page 137 lines 40-44.
[22] Transcript page 376 line 48.

accuracy. Much of the range of Dr Gibb's estimates stems in his view from the inability to define the parameters in the formula accurately or consistently. He considered that examination of the past movements in the coast and a consensus of experts was the best way of assessing the extent of likely coastal erosion and he agreed that movement of the barrier scarp was the key consideration. That may be an idealist's approach, but it was not lost on us that here we had 6 experts considering the same information, with a notable absence of consensus.

[66] Dr Young concluded that the site was basically stable, although he did agree that there appeared from his examination of the aerial photographs to have been retreat of the vegetation line on the northern part of the coast[23]. He considered that a set back of development on the Fore World property from the bluff or vegetation line of 10–20m would be reasonable[24]. He thought that Dr Gibb had overestimated changes in the position of the barrier scarp from the aerial photographs possibly because of a misinterpretation of that feature in the 1962 series of photographs. We apprehend also that the scale of the photographs also may have affected the accuracy of their interpretation. Both Dr Gibb and Dr Young maintained their views on this matter and we have not found it possible to resolve that issue because the evidence of the aerial photographs was not provided.

[67] Mr Smith and Mr Oldman consider in the long term that the barrier scarp is stable and will remain so although in one instance erosion of the barrier scarp of 6-7m is acknowledged. If that rate of erosion were projected into the future it would indicate 14m of erosion in 100 years. Mr Reinen-Hamill considers the coast marginally stable and recommends an allowance of 5m of erosion over the 100 year period again measured from the toe of the barrier scarp. Dr Gibb considers the trend is erosional and estimates long-term erosion over 100 years will be 30m, again measured from the toe of the barrier scarp. Dr Young considers the coast is basically stable but recommends a hazard zone of 10-20m. Dr Cowell considers 30m is too little.

[68] Assessing the long-term trend of the position of the coast from historical data is a key step in predicting the likely future position of the coast. Variability of the beach position is

[23] Transcript page 203 lines 37–41.
[24] Young EIC paragraph 24.

high within the active beach zone with profiles showing substantial movement. At the toe of the barrier scarp or vegetation edge the variability is much less. We conclude that the toe of the barrier scarp is a satisfactory position from which to assess past trends and from which to estimate the likely future position of the coast.

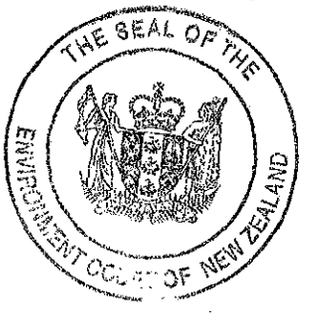
[69] We accept that, overall, this coast is retreating in the very long term under a zero sediment transport condition. The reduced sediment supply resulting from port works and the earthquake uplift also point to an erosional trend. On the other hand renourishment at Westshore, while not yet, may in the longer term, if continued, help to overcome an erosional trend. While we accept that the coast is not rapidly eroding, and for a substantial period may be stable, we are of the view that some erosion of the barrier scarp indicates in the long term some erosion is likely and it is prudent to avoid development in the erosion prone area.

[70] We are also of the view that if future long-term rates of erosion were to be as high as 0.3m/yr, reflecting that of the past, then more significant changes to the historical beach profile cross-sections over the last 45 years would have been evident particularly in the position of the barrier scarp.

[71] Because the barrier scarp has been elevated by the earthquake above the level reached by wave action any erosion of the barrier scarp in the past and in the future is permanent, is not camouflaged by subsequent accretion and records any long-term erosion of the coast. Based on the evidence of measured barrier scarp erosion we are of the view that the long-term trend of the position of the barrier scarp at the site is likely to place the feature in 100 years time about 14m landward of the present barrier scarp position. Based on all the evidence we have heard that is our assessment of the estimate of the likely long-term portion of future coastal movement at the site.

Sea Level Change Effects

[72] Sea level is predicted to rise in the future, perhaps at a rate greater than over recent times. That process results in the wave action occurring at a higher elevation on the shore and so causing some retreat of the shore.



[73] Dr Gibb assessed sea level rise at the site as 2mm/yr[25]. This result was based on the global estimates by the Intergovernmental Panel on Climate Change (IPCC) dated 2001 of 3.64mm/yr less the local relative sea level rise of 1.73mm/yr[26]. Mr Reinen-Hamill refers to an historic sea level rise of 1.7mm/yr,[27] and a future increase in sea level by 2060 of 0.2m and by 2100 of 0.5m[28]. Mr Oldman adopted a rate of sea level rise of 3.2mm/yr stemming from using the upper level of the most likely prediction from the IPCC report 2001[29].

[74] We accept Dr Gibb's assessment as a reasonably based estimate of sea level rise.

[75] Then comes the more disputed step of converting that estimate into shoreline retreat. A formula, referred to as the *Bruun Rule*, was used by some and criticized by others on the basis that it was developed for sand shores and not gravel ones. In practice the formula is merely the result of assuming that as the shore retreats under increasing sea level it reforms at a slope similar to the original one but to landward of it. For our purposes that seems a reasonable assumption. On sandy shores with a low cross-sectional slope sea level rise will cause a greater excursion inland than on gravel shores with a steep slope. Dr Gibb assessed the retreat by 2100 at 2.7m and rounded that to 3m, Mr Oldman 2.1m and Mr Reinen-Hamill at 10.3m, the latter result due largely to adopting a significantly shallower sloping beach. Dr Gibb explained he adopted a seaward limit to the beach where the slope and material changed to become the reasonably flat seabed. That satisfies us too and so we adopt Dr Gibb's estimate of 3m for likely future shoreline retreat due to projected sea level rise.

Safety Factor

[76] The so-called safety factor incorporated into locating the extent of the CHZ is contentious. Dr Gibb has added a safety factor of 17-20m to the sum of the other factors considered in estimating the extent of the coastal erosion hazard. Mr Oldman included just 0.7m relating to the sea level rise estimate but he added the 12m of short-term fluctuations in the active beach to his estimate of erosion landward of the barrier scarp. Mr Reinen-Hamill said he had included an allowance for a safety factor in his estimates of sea level rise effects

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[25] Gibb-EIC Table E-2.

[26] Gibb-report 2002 table 9.

[27] Reinen-Hamill Rebuttal paragraph17.

[28] Reinen-Hamill 2002 Report page 48.

[29] Oldman EIC paragraph 54.

and by adding the short-term fluctuations of 10.8m to his estimate of erosion landward of the barrier scarp.

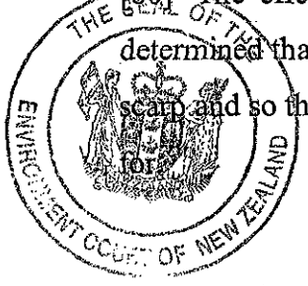
[77] The approach used to assess this safety factor has been to estimate the uncertainty in each of the factors of erosion, or their constituents, and then to add them up using the recognised mathematical process of the square root of the sum of the squares of the uncertainties. Dr Young criticizes this approach as being unscientific since the uncertainties are little better than a guess and do not have a foundation that is reproducible and transparent.

[78] That approach may be appropriate to give some idea of the range of certainty of the total estimate of erosion if the uncertainty of each variable can be rationally assessed. For example we have adopted the most likely amount of long-term erosion over the next 100 years is 14m based on measured retreat of the barrier scarp in the past. There is no rational way of assessing how accurate that future prediction is. It depends not only on the accuracy of the survey, which we are told is good, but also on the repetition of the past into the future and that is an assumption. The reality is that the estimated extent of future erosion is simply the most likely outcome based on the evidence. Consequently we are not convinced that the approach used is helpful and in any event the result is not a factor of safety; it is some sort of estimate of uncertainty. We consider that having made estimates of the most likely value of the principal contributors to the coastal erosion, it would be better to simply add a buffer if some allowance for unknown or unmeasured factors is to be made.

Other Factors

[79] Some of the changes in the beach profile cross-sections and in the volume of beach material indicated by those measurements showed some correlation to the Interdecadal Pacific Oscillation (IPO). The negative phase 1947-1976 was a storm-dominated period and coincided with erosion of the active beach while during the positive phase 1976-1998 accretion of the beach occurred. At present the IPO is negative with 14-24 years to run and Dr Gibb predicts a period of beach erosion.

[80] The effects of this phenomenon are reflected in the active beach profile. We have determined that the coastal erosion hazard zone should be measured from the toe of the barrier scarp and so these fluctuations in the active beach zone do not need to be separately accounted



[81] There are other *climate change* factors that may be relevant. Sea level rise has been accounted for but increased storminess, if in fact that is a future threat, might be reason to consider a buffer additional to our assessment of coastal erosion.

[82] Reference was made in evidence that an allowance should be made for the foundation requirements of any buildings next to the edge of the designated coastal erosion hazard zone. For instance if there was an erosion scarp formed at the edge of the hazard zone then buildings ought to be kept back from that feature. We are of the view that is a structural matter and better considered in the building permit process.

[83] As discussed in paras [16] to [18] significant erosion has been experienced at Westshore, well south of the site, and renourishment of the gravels is being pursued there to alleviate the erosion. As there is a northerly sediment flow along the beach a possibility was that some residual benefit might be being felt at Bay View, so hiding any erosion tendency. Dr Gibb considers any effect has not so far extended north of Snapper Park Motor Camp, which is south of the site, and in the absence of empirical evidence to the contrary we accept that, for present purposes.

Overall assessment

[84] The process of erosion on the coast, if it occurs, will be episodic and incremental. It will not reach its full extent suddenly. Opportunity therefore exists for measures to be taken if the erosion becomes worse than predicted. It is not a situation where it is necessary to be overly cautious but it would be prudent to provide for a buffer in addition to the estimated extent of the coastal erosion to make some allowance for the factors that have not been estimated and included in the hazard zone. That buffer should be of the order of 25% of the sum of the estimated distance.

[85] Mr Reinen-Hamill included the short-term fluctuations, as agreed by the expert witnesses, of 12m in the active beach into an assessment of any retreat of the barrier scarp. The ground proffered was that some effect from short-term active beach fluctuations could manifest itself in movement of the barrier scarp and so it was conservative to include it. Dr Gibb did not advocate that. We think if any allowance for these short-term fluctuations in the active beach was to be made then it seems the smaller fluctuations experienced higher up the

active beach profile would be the more logical. But we do not see the need to include short-term fluctuations in the active beach because any resulting movement in the barrier scarp would be measured by the position of the barrier scarp itself.

[86] The primary elements of erosion – long term trends and sea level rise – have been assessed. There are other factors– such as climate change and the general settlement mentioned in the evidence – which might contribute but which are almost impossible to empirically assess. How much allowance should be made for them cumulatively is a matter of judgement. In our view a buffer allowance of 25% is within the appropriate range. Consequently, on the evidence we have heard, we estimate that the most likely position of the toe of the barrier scarp, landward from the existing surveyed toe, after a period of 100 years is given by the sum of long-term erosion of 14m; allowance for sea level rise of 3m; the distance to the top of the scarp from the toe of 2m, and a buffer of 25% being 4.75m, all measurements being horizontal.

[87] We conclude that a CHZ should be identified at the site and that it should extend landward from the surveyed toe of the existing barrier scarp a distance of 24m.

Section 32 RMA

[88] The provisions of s32 are relevant to the two appeals. We record that over the course of 9 days of hearing we received exhaustive analysis of possible alternative methods and the costs and benefits of various permutations of controls which might be appropriate. An assessment of what might be appropriate to best achieve the purpose of the RMA requires an evaluation of that material. We have outlined our evaluation process and the factors that have lead us to the conclusions reached. We have focussed on the substantive merits of the Plan provisions, and also note that there was nothing in the way in which the Council dealt with its responsibilities under the law as it stood at the time which has been influential in any way: - see *Kirkland v Dunedin CC* [2001] 12 NZRMA 529.

Proposed District Plan - Coastal hazard area policy and rules – Chapter 62

[89] Appeal RMA 674/02 particularly relates to Chapter 62 provisions. It creates the CHZ area, which works as an overlay, leaving the zone rules in place. The relevant objectives are to manage the effects of natural hazards on land uses throughout the City (Objective 62.3) and to control the effects of land uses and development on areas subject to natural hazards

throughout the City (Objective 62.4). Related policies are to control the subdivision, use and development of land to ensure that risks to the community are avoided, remedied, or mitigated (62.3.4) and to direct development away from areas known to be subject to natural hazards (62.4.1). Principal reasons include consideration of the effects land uses can have on the hazards themselves and any increased risk to the environment. Also the intention to avoid the risk to life and property where possible by directing development away from hazard areas.

[90] Within the coastal hazard area identified on the planning maps, *prohibited* activities are these land uses:

- Any new building and/or structure, other than network utility operations, fences and coastal protection works, and
- The relocation of a building or structure, other than network utility operations, fences and coastal protection works.

[91] The Proposed Plan defines *building* to mean any temporary or permanent moveable or immovable structure. A retaining wall below 1.5 metres in height, wall or fence below 2 metres, driveway or paving below 1 metre, pergola under 2 metres and awning or canopy under 3 metres does not qualify as a building. Also some tanks and pools are not buildings. *Structure* has the meaning given it in the RMA...*any building, equipment, device, or other facility made by people and which is fixed to land, and includes any raft*... This definition would catch most, if not all, items exempt from the definition of building.

[92] The Proposed Plan defines a *fence* as ...*any wall other than a retaining wall or structure below 2 metres in height. Coastal protection works* are:... *any structure used to reduce risks posed by coastal erosion and/or inundation to human life, property or the environment and may include, but not limited to, sea walls, groynes and gabions, but does not include beach renourishment.* A network utility operation is: ... *a service, operation or activity undertaken by a network utility operator.* It would therefore not include pipes, septic tanks and access roads put in place by the landowner and not part of the Council's network.

[93] Provided the provisions of s36(2) Building Act 1991 can be satisfied, the repair, maintenance and minor alterations of coastal protection works, buildings and structures and maintenance and repair of network utility operations, in existence at 11 November 2000, are *permitted* activities. *Controlled* activities include new network utility operations, with control

reserved to the effects on the erosion hazard and degree of protection works. Land development not otherwise *prohibited*, and new coastal protection works, are *discretionary* activities. *Land development* includes subdivision. Other activities are *restricted discretionary*, with the Council's discretion confined to assessing effects on the erosion hazard and degree of protection works.

[94] Section 36(2) Building Act 1991 gave the Council the ability to grant a building consent where it considers the building work itself will not accelerate, worsen, or result in coastal erosion of the land or any other property. The Council must be satisfied that there is adequate provision to either protect the land, building work or any other property or to restore any damage to the land or other property. A condition of the building consent is an entry on the Certificate of Title to that effect. The Building Act 2004 repealed this section, but contains a similar provision: - see s74.

[95] By itself then, the Proposed Plan, if made operative with its the current wording, would really only allow the landowner to use the land in its existing state, with planting or landscaping a possibility. Applying to subdivide the land is a possibility, but would be pointless unless it involved adjoining land that could accommodate both buildings and services. The Council as network utility operator could locate services in the CHZ area with consent, but the landowner could not.

[96] We do not understand Fore World to contest the appropriateness of the objectives, policies and rules for the CHZ in the Proposed Plan. Fore World sought that the CHZ line should extend no further than 18m inland from the barrier edge, but we have found a line inland of that point justified on the evidence.

Operative plan

[97] For completeness, we mention that the Operative Plan has a CHZ area overlay on the Gill and Franklin Road areas and taking precedence over the existing zoning. A policy is to impose a coastal hazard definition based on the rate of erosion applied to a 100 year period with a safety factor distance of 50m built into the calculation. Another policy is to limit new residential development to those areas within the boundaries of the existing residential area and where the hazard is not considered to be great over the expected life of the building, as 50 years defined under the Building Act. All subdivision is a *discretionary* activity. New

dwellings are *discretionary* activities subject to criteria stating the building should be capable of being removed and a s36(2) Building Act 1991 notation will be placed on the title warning of erosion risk.

Zoning of Gill Road, Rogers Road and Franklin Road land

[98] We now look at the zoning of the three areas of land and what they could be used for, given the extent of the CHZ overlay necessary to achieve sustainable management under the RMA. We understand that outside of the Coastal Hazard appeals, there are no live appeals against the Proposed Plan zoning for the Fore World land as *Rural Settlement* and *Main Rural.*

[99] We did not receive submissions or evidence that made the position clear in terms of which rules of the Proposed Plan are now beyond challenge as they relate to the *Rural Settlement* and *Main Rural* zones. There could be some general appeals on the *Main Rural* and *Rural Settlement* rules still to be decided, but our attention was only drawn to some rules that are now beyond challenge. We therefore consider both the Proposed Plan and, for completeness, the Operative Bay View Section of the City of Napier District Plan (operative December 1996).

Gill Road

[100] The 1.9 ha piece of land has a *Rural Settlement* zoning under the Proposed Plan. There are 12 residential lots on either side of Mer Place (titles issued June 1999), the existing cul-de-sac. Adjoining the railway line, four of the sections have an area of 800m^2, with the one at the end of the cul-de-sac 818m^2. The sections on the seaward side between Mer Place and the esplanade reserve range from 1342m^2 to 1741m^2 in area.

[101] Any *residential activity* (the use of land and buildings including accessory buildings such as garages, carports and storage sheds by a household) is a *permitted* activity provided it complies with the relevant conditions in the *Rural Settlement* zone activity and condition tables. A note advises consultation with HBRC for any building or activity requiring services on unserviced sites and that the Council may request evidence of compliance with the Regional Council's regional plan for water, stormwater and/or wastewater. Under the density condition in respect of unserviced sites the maximum density must not exceed one dwelling unit per site provided the net site area is not less than 1000m^2.

[102] As the land is not fully serviced, a house could not be erected on each of the inland lots, all less than 1000m^2 in area, without a *restricted discretionary* activity consent. The Council's discretion is restricted to effects on infrastructural services, stormwater run-off, sewage/effluent/waste disposal as well as a number of other matters. Given the Council has already given consent to what was clearly intended as a residential subdivision, we would not expect the other matters like amenity values to be an issue preventing the grant of consent to reasonable building proposals for the sections. In addition, the subdivision consent appears to contemplate on-site wastewater treatment.

[103] While the seaward lots are over 1000m^2 in area, part of each lot is subject to the CHZ overlay rules making building a *prohibited* activity within it. Outside the CHZ overlay, a house and its associated structures for servicing would be a *permitted* activity. There is sufficient land for the owners to build houses and associated services outside the CHZ and to use the land that cannot be built on for landscaping and garden.

[104] We also note that there are conditions on the subdivision consent carried through in a consent notice under s224 RMA as a covenant binding subsequent owners of the land. The consent prohibits construction of any structure within Lots 1 to 7 marked A2 to G2, a line extending back from the esplanade reserve to a greater extent than the CHZ line we have adopted. This area must also have appropriate landscaping and planting to mitigate the effects of erosion or inundation by the sea. On those parts of Lots 1 to 7 marked A1 to G1, extending back from the no building line a further distance, all building consents will be issued subject to s36 Building Act 1991. If the effluent disposal on Lots 1-12 is to be by way of on site waste water disposal, installation details and design must be presented for approval in conjunction with any building consent application.

[105] In terms of possibilities other than the existing subdivision, we note that new subdivision is a *controlled* activity for a site with a 1500m^2 minimum area, or 800m^2 if the land is fully serviced by a network utility operator. Full servicing involves water supply, waste water and stormwater to meet the Council's engineering standards in Chapter 66 of the Proposed Plan. If the density control is not met, the activity becomes a *restricted discretionary* activity, with the matters of discretion being related to those arising from the lack of servicing, among others. As earlier described, in the CHZ overlay new buildings or

structures, with limited exceptions, are *prohibited* activities. *Discretionary* activities are retirement complexes, residential consolidation development, residential care facilities, day care centres, travellers' accommodation and education facilities. Land uses not complying with conditions are *restricted discretionary* activities and others not mentioned are *discretionary.*

[106] For completeness, we mention that under the Operative Napier City District Plan; Bay View Subdistrict, the *Residential* zoning would allow the Gill Road land to be subdivided to lot sizes of 800m^2 as a *controlled* activity. The minimum lot size would be reduced to 600m^2 if the site were to be fully serviced with a water supply and satisfactory effluent disposal by means of an on-site or community system at the developer's expense. There is a shape factor of 18m by 18m, and other standards also apply.

[107] One dwelling could be located as a *permitted* activity on each site subject to the same minimum site area as for subdivision as well as compliance with a range of other performance standards. For a multi unit development, there needs to be an additional 350m^2 for each and every unit. The zone rules specify multi unit development will not be permitted until a fully serviced sewerage system is available. As mentioned earlier, as a CHZ overlay covers the land, all subdivision is a *discretionary* activity. In addition, all new dwellings are *discretionary* activities subject to criteria stating the building should be capable of being removed and a s36(2) Building Act 1991 notation placed on the title warning of erosion risk.

Rogers Road and Franklin Road – Proposed Plan

[108] Rogers Road and Franklin Road are both zoned *Main Rural* under the Proposed Plan. Further subdivision of both areas of land would require consent as a *restricted discretionary* activity, with both lots too small to be further subdivided as a *controlled* activity. One dwelling could be placed on each piece of land, along with a supplementary residential unit and a home occupation employing up to 3 non-residents. A wide range of agricultural, horticultural and viticultural activities are *permitted* activities, along with rural processing, forestry, home occupations, smaller scale residential care facilities, day care centres, education facilities and travellers' accommodation. Generally, other activities are either *restricted discretionary* or *discretionary* activities. The location of buildings would be limited by the rules covering the CHZ.

[109] Land development, but excluding multi unit development, and relocation of buildings are *controlled* activities. For subdivision as a *restricted discretionary* activity, discretion is restricted to matters contained in Chapter 66 (Volume II – Code of Practice for Subdivision and Land Development) and effects on amenity values, rural character and infrastructural servicing. Retirement complexes, camping grounds, roadside stalls, factory farming, commercial and industrial activities are *discretionary* activities and the catch-all for other activities is *restricted discretionary.*

Rogers Road and Franklin Road - Operative Plan

[110] Turning again to the Operative Plan, all the land is shown as *Deferred Residential.* The *Deferred Residential* Zone applies the rules of the *Bay View Rural* Zone *...until such time that the land has been fully serviced and the Council has resolved that Residential Development may proceed. This process will need to be accomplished by way of a formal change to the district plan.* The plan also states for Lots 1 and 2 DP 22640 –

> The Council will consider making this land fully residential when the following is completed:
>
> Full services are available at the owners (sic) expense.
>
> An environmental impact assessment be prepared.
>
> That the boundary for the residential area be set at 40 metres including from mean high water springs mark.
>
> That the 40 metres would be vested as Foreshore Reserve.

[111] So in the meantime the Bay View Rural Zone provisions apply. Ms Allan gave evidence that these provide for a range of rural uses, and one dwelling plus one family flat per property as a *permitted* activity. As a *controlled* activity, there is a minimum subdivision size of 1.5 hectares, with all sites required to provide an adequate water supply and also a satisfactory effluent disposal by means of an on-site system at the developer's expense. The CHZ provisions, as described earlier, overlay the *Rural* zoning on the Franklin Road land. These mean a landowner would need to seek *discretionary* activity consents to subdivide and also to place relocatable buildings on the new lots created in these areas.

[112] The thrust of Mr Vernon Warren's evidence, as planning witness for Fore World, was that there was no credible use of the land under the planning regime in the Proposed Plan. Ms Allan gave evidence that it is not unusual in Napier to live in rural environments on land parcels the size of the two lots and make no or little productive use of land. People have an

off-farm income and the large size of the lots retains the rural amenity and character and wide range of land uses. There is also the ability to seek consents for other activities, including subdivision and further residential use.

[113] Mr Warren sought to persuade us that there would be little chance of successfully applying to subdivide and use the land for residential purposes. He gave evidence about a subdivision scheme plan designed to comply with the *Main Residential* Zone as amended by the proposed *Bay View Overlay Area* Rules. This provided for 90 lots on the Franklin Road land ranging in size from 400m^2 to 912m^2, with larger lots within the CHZ based on the NIWA line. The scheme involves forming the already vested (but unformed) portion of Le Quesne Road from Franklin Road to the point where the land widens (approximately 435m) and extending further to a cul-de-sac head to provide the primary access.

[114] The subdivision scheme plan also shows the Rogers Road land subdivided into 12 lots, if and when its use for wastewater treatment is not required once the development is connected to a public reticulated sewage system. In the meantime the Rogers Road land would be used for a local sewage treatment facility to be operated by a local utility operator. Fore World proposes that the residential area could be serviced by an extended Council wastewater reticulation system eventually and the soakage fields decommissioned and remediated if necessary. Under the proposed scheduling of Rogers Road, a wastewater treatment system would be a *permitted* activity. However, resource consents would be required from the Regional Council for the use of the land for this purpose.

[115] Mr Warren maintained that an application for residential subdivision and development along those lines would fail in the context of the District Plan. His conclusions may be correct for the density, design and servicing arrangements for residential development proposed by Fore World. They would not necessarily be valid for a different subdivision and development proposal with a lower density.

[116] Ms Allan found it difficult to conceive of a situation where the need to apply for a *restricted discretionary* consent could be said to be contrary to the criteria in s85. She concluded that the objectives, policies, standards and assessment criteria would have to be *completely unreasonable*... and *...that's not the situation here.* Ms Allan considered the Plan Change sought in the s85 application, seeking an intensity of development greater than in

most other residential areas in the City, did not recognise the area's character and constraints; and did not accord with national, regional or district planning documents; or achieve sustainable management. However, she considered that it may be possible for an application within the *Rural* zoning to achieve some further subdivision and development, but at an *...appropriate...* low density, and effectively transitional to the mixed foreshore reserve, and neighbouring residential and rural land.

[117] In discussions prior to the hearing, the City Council suggested Fore World should make an application for subdivision of its land with lot sizes in excess of 1500m^2, which would enable building platforms to be established clear of the CHZ. In making this suggestion, the Council was mindful it had granted a similar application to Bay Homes Limited in July 2002 for land in the *Main Rural* zone immediately to the west of the Fore World land. Ultimately, this land was rezoned *Rural Settlement*. The result is that the Fore World land is surrounded on three sides by *Rural Settlement* zone with the remaining side being the coast. Subdivision with sites in excess of 1500m^2 would be consistent with the surrounding *Rural Settlement* zone. Houses would be outside of the identified CHZ with gardens and soft landscaping within it. Another alternative was to look at a variation for *Rural Settlement* zoning, with subdivision down to 1500m^2 with sites including land within the hazard area.

[118] Mr Warren did not provide any evidence on alternative subdivision designs, including their servicing and economics. Instead the Fore World case centred on what could be designed to meet the standards proposed in the s85 application. Mr Andrew Taylor, a surveyor experienced in subdivision work gave evidence for the City Council. He expressed the view that there were options to configure a large lot subdivision on the Franklin Road site.

[119] Mr Brian Nicholls, a Director and majority shareholder of Fore World, agreed he could still apply for a large lot subdivision with building sites outside of the hazard area and sections running down into the hazard area. He expressed his difficulty as that it is *...not what I had under the deferred residential zone originally.* Ms Allan did not accept that this was the case, pointing out that Fore World was never able to rely on *permitted* activity status to undertake development of the land under the Operative Plan. She said the deferred zoning was not a Council commitment, but an undertaking to re-look at the situation when land could be serviced, with Fore World paying for Council provided services. She reminded us that a Plan

Change would be required to uplift the deferral and the outcome of that process could not be guaranteed.

[120] Lest it be thought that we have overlooked the points, we record that the s85 process does not require that s32 be complied with: - see *Steven v Christchurch City Council* [1998] NZRMA 289. We also record that we heard nothing to suggest that s74, requiring the territorial authority to have regard to the regional planning statement, regional plan, and other relevant planning documents mentioned in the section, had not been complied with.

Conclusions about section 85

[121] We find that the CHZ and rules would not prevent the residential use of the lots in the Mer Place subdivision provided there is adequate servicing. Interestingly, the area prohibited for building and required for landscaping by the subdivision consent and subject to a covenant on the titles, covers a wider area than the CHZ. We add that there is also the opportunity to apply to use the land outside of the CHZ for other purposes, or indeed to re-subdivide the total area, if desired.

[122] It is not in dispute that both the Rogers Road and Franklin Road sites are shingly, with poor soil structure, and are of low productivity. They would not support economically viable pastoral or horticultural uses. From that start point Fore World argues that because the land is not capable of economic use as farmland, the zoning of *Main Rural* in the Proposed Plan renders it incapable of reasonable use. But, with respect to those who support the Fore World view, that does not follow. It is not the zoning of the land which makes it of low productivity, it is the inherent quality of the land itself. Nor does low productivity of itself mean that a rural zoning of some kind is inappropriate, and an urban zoning of some kind appropriate. There are parts of many farms which are of low productivity: - scree-covered hillsides and stony river beds are two examples which come to mind. But they would not, for that reason, be given a zoning different from the land surrounding them. The choice of an appropriate zoning is driven by a matrix of factors in which such things as location, servicing ability and the nature of the surrounding area may be as influential as the quality of the land itself. Nor does a landowner's wish to use the land in a way that maximises its value make that use alone reasonable, and others unreasonable.

[123] Put another way, although this land might not be capable of economically viable farming use, that does not mean that medium density residential becomes a reasonable use, still less the only reasonable use. Other factors might indicate against that outcome. One cannot lose sight of the fact that by their qualities of type, configuration, locality and, for some of two of Fore World's sites the existence of an acknowledged coastal hazard, some pieces of land might be difficult to use in any but the most passive ways. In those cases it is fallacious to blame the zoning for the problem.

[124] Fore World is able to use both the Rogers Road and Franklin Road land areas for a range of *permitted* activities under the Proposed Plan. In addition, Fore World could apply for a range of uses, including residential subdivision of the Franklin Road land not involving buildings and structures in the CHZ. Residential subdivision and development of the area outside the CHZ is feasible, with suitable servicing, although the section yield may not be what Fore World desires. As with Gill Road, the sections could take in some of the CHZ as outdoor space for the houses located outside the hazard line.

[125] The Proposed Plan provisions, with the CHZ prohibitions and restrictions in place (subject to what we have said earlier) do not render the land incapable of reasonable use. Reasonable use is not synonymous with optimum financial return, as we mention elsewhere. There is the ability to undertake a range of *permitted* activities or to apply for consents for all activities, except buildings and structures in the CHZ. We do not accept that the need to apply for consent for other activities as, at worst, a *discretionary* activity imposes an unreasonable restriction on the use of land, or imposes an unreasonable burden on an owner.

Conclusions on appeals

[126] For the reasons we set out, we are satisfied that the Plan provisions challenged in the appeals (ie Chapter 62 and Variation 3) do achieve the purpose of the Act – the sustainable management of natural and physical resources. They give effect to the CHZ, which in turn is a response to the requirements of the New Zealand Coastal Policy Statement. Equally, for the reasons discussed, we are entirely satisfied that the alternative provisions put forward by Fore World; eg private beach renourishement, requirements for relocatable housing, a shortened planning horizon, and the like, would not achieve that purpose.

Summary of conclusions – and Direction

[127] RMA 674/02. 1. The CHZ is not removed (and this was not, ultimately, sought by Fore World). The extent of the CHZ on the Fore World land is to be 24m from the toe of the existing barrier scarp, rather than the 18m sought by Fore World at the hearing. Within the CHZ building (with the exceptions already noted in the Proposed Plan) is to be a *prohibited* activity. There will not be graduated hazard zones. 2. Private beach renourishment will not be provided for in the Proposed Plan. 3. The planning horizon is appropriately set at 100 years. 4. There should be no further amendment to Chapter 62 of the Proposed Plan.

[128] RMA0860/03. The zoning of the pieces of land under the Proposed Plan does not, in terms of s85, render Fore World's interest in any of the pieces of land incapable of reasonable use, or place an unfair and unreasonable burden on any person having an interest in any of those pieces of land. There is, therefore, no case to rezone any of those pieces of land to some form of residential zoning.

[129] ENV0085/05. The extent of the CHZ under Variation 3 of the Proposed Plan is set at 24m from the toe of the existing barrier scarp.

[130] The City Council is to prepare the changes to the Proposed Plan necessary to give effect to the conclusions we have come to, and we ask that it submit those changes to the Court for confirmation by 31 May 2006.

Costs

[131] Any application for costs should be lodged within 20 working days from the date of issue of this Decision, and any responses within a further 15 working days.

Dated at Wellington this 13th day of April 2006

For the Court

C J Thompson

Environment Judge

Issued:

Appendix 1 Coastal Geomorphology and Engineering witnesses.

For Fore World Developments Ltd and Bayside Villas Ltd

Dr Shaw Trevor Mead. PhD in Earth Sciences. Environmental Scientist and Director of ASR Ltd.

Mr John Warwick Oldman. B.Sc in Physics and Maths. Scientist in the Coastal and Estuarine Group of the National Institute of Water and Atmospheric Research Ltd. (NIWA)

Mr Ronald Keith Smith. MA(Hons) in Geography. Scientist in the Coastal and Estuarine Group of the National Institute of Water and Atmospheric Research Ltd. (NIWA)

Dr Robert Steven Young. PhD in Coastal Geology. Associate Professor of Geology at Western Carolina University.

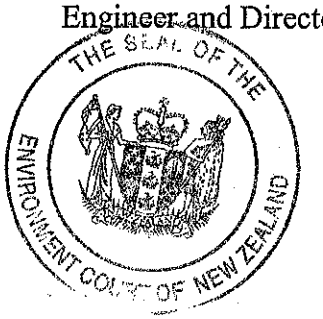
For the Napier City Council

Dr Peter John Cowell. PhD in Coastal Morphodynamics. Senior Lecturer at the University of Sydney, Institute of Marine Science.

Dr Jeremy Galwey Gibb. PhD in Geology. Director of Coastal Management Consultancy Ltd.

For the Hawkes Bay Regional Council

Mr Richard Anthony Reinen-Hamill. Master of Civil Engineering (Coastal). Senior Coastal Engineer and Director of Tonkin & Taylor Ltd.



ORIGINAL

Decision No A 51/96

IN THE MATTER	of the Resource Management Act 1991
AND	
IN THE MATTER	of an appeal under section 120
BETWEEN	NEW ZEALAND SUNCERN CONSTRUCTION LIMITED
	(Appeal RMA 48/95)
	Appellant
AND	THE AUCKLAND CITY COUNCIL
	Respondent

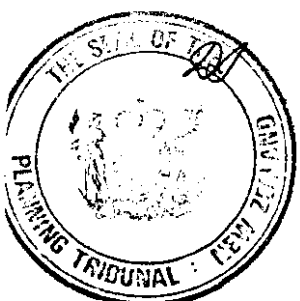
BEFORE THE PLANNING TRIBUNAL

Planning Judge DFG Sheppard (presiding)
Mr P A Catchpole
Mr F Easdale

HEARING at AUCKLAND on 30 and 31 October, 1 and 2 November 1995, and 22 April 1996

Appearances

Mr PT Cavanagh QC for the appellant
Mr MLS Cooper for respondent
Ms D M Ewen and Mr G M Shieff, persons having interests in the proceedings.



DECISION

Introduction

This is an appeal under section 120 of the Resource Management Act 1991 against refusal of resource consent to remove a grove of 9 pine trees at Meadowbank, Auckland. The appeal turns on the value of the trees to the local community, shading of adjoining properties, the hazard to occupiers of adjoining properties of falling branches, and the expected life of the trees if they are not removed.

The trees are growing on a property which was bought by the appellant early in 1994. The land fronts Gerard Way and Grand Drive, Meadowbank, and has a total area of 1.2434 hectares. The appellant has since subdivided that land into lots for residential building sites, and has constructed substantial homes on many of them.

District plans

The transitional district plan contains general tree protection rules in ordinance 12.10:3 which apply to the residential zones including the Residential 5 zone in which the appellant's property is found. We quote clause (b):

> (b) Without the prior written consent of the Council, no person shall—
>
> (i) Cut, damage, alter, injure, destroy or partially destroy any tree (including the roots) over 6 m in height or with a girth (measured at breast height) greater than 600 mm;
>
> (ii) Carry on, conduct or undertake any use, excavation, construction, work or other activity in, on, or under, in relation to, or in the vicinity of, any tree described in (i) above, which endangers or is likely to endanger that tree.

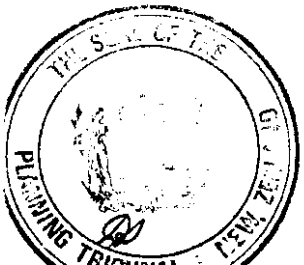
Clause (d) of the ordinance sets out criteria for assessing applications under clause (b). However the assessment criteria for the proposed district plan incorporate the content of those for the transitional district plan, so we do not need to quote the latter.

The explanation of the general tree protection control is contained in paragraph 12.03:2, relevant passages of which state:

> The purpose of this particular control is to ensure that the general tree cover within the City is retained wherever possible...
> The main objective of the Ordinance is to ensure that those trees and areas of bush which make a positive contribution to the quality of the environment, both visual and physical, are retained and conserved. This does not imply an absolute prohibition on the cutting or removal of general tree cover but rather that work on mature trees is controlled and may in appropriate cases be prohibited.

The proposed district plan contains a rule on general tree protection which, in application to the Residential 6a zone in which the appellant's property is found, is beyond challenge by appeal. Relevant passages of rule 5C.7.3.3C (incorporating amendments made by decisions on submissions) are—

> The following rule applies to every site on the Isthmus.
>
> A. No person shall, without a resource consent (except as provided for below):
> i) Cut, damage, alter, injure, destroy or partially destroy the following trees.
>
> In the Residential ... 6 ... zones:
> - indigenous trees (including the roots) over 6m in height or with a girth (measured at 1.4m above the ground) greater than 600 mm.
>
> - exotic trees (including the roots) over 8m in height or with a girth (measured at 1.4m above the ground) greater than 600 mm.
>
> ...
> ii) Carry on, conduct or undertake any use, excavation, deposition of material, construction, work, emplacement of services, storage, or other activity in, on above or under, the dripline (branch spread) of any tree described in (i) above, which in the opinion of Council endangers or is likely to endanger that tree.
>
> Exceptions to this control
>
> - Any regular minor trimming or maintenance ...
>
> - The removal of any tree of part of a tree that is dead or that is suffering from an untreatable disease which has caused a significant decline in its health (Evidence shall be produced if required).
> Note: Where any element of uncertainty exists as to the likely fate of the tree, the benefit of doubt will be given to the tree survival by not removing it until such time as its irreversible decline is obvious. Before removing any affected tree, consultation with the Council's arborist is strongly advised.
>
> - Work immediately necessary to avoid injury to persons or damage to property. In such circumstances the person undertaking the work shall notify the Council in writing within 7 days ...
>
> ...
> Any application for the Council's consent to carry out any of the activities described in (i) and (ii) above, shall be by way of an application for a restricted discretionary activity (refer clause 4.3.2.6).
> In assessing an application the Council shall consider the guidelines for the carrying out of works in the vicinity of trees continued in Annexure 5 and the following matters:
>
> - The Plan objectives and policies, particularly those in respect of the zone involved.
> - The applicants need to obtain a practicable building site, access, a parking area, or install engineering services to the land.
> - Any alternative methods which maybe available to the applicant in the achievement of his/her objectives, including consideration of variation to specified development



controls where this would encourage retention and enhancement of existing large trees on the site.
- Whether the tree can be relocated.
- All previous applications made in respect of the land which involved consideration of treescape conservation.
- The extent to which the tree or trees contribute to the amenity of the neighbourhood, both visual and physical, including contributions as habitats for birds and other animals
- Any function the tree may have in conservation of water and soil.

Conditions may be imposed as part of any consent ...and may include the following:

...

- The requirement to provide a replacement tree or trees (where a tree(s) is removed) elsewhere on the site or in the near vicinity, where this is appropriate. The replacement tree(s) shall be of a size and species which is approved by the Council, having regard to the amenity of the area. Indigenous trees are favoured for their role as a food resource and habitat for native birds.

The general strategy for protection of trees (paragraph 5C 7.3.2) refers to the importance contribution of trees in the sustainable management of natural and physical resources of the Auckland Isthmus; and states that trees play a role in sustaining the ecological balance between nature and technology, and contribute to the community's health and well-being. It identifies important environmental functions of trees in the City, including visual amenity, noise buffers, weather shields, land stabilisers, atmospheric effects, heritage and habitat.

The particular strategy for general tree protection, and expected outcomes, are stated at paragraph 5C 7.3.2. We quote passages material to this case, incorporating amendments made by decisions on submissions.

C. General Tree Protection

The Plan makes provision for the protection of trees over a certain size throughout the district. The purpose of this particular control is to ensure that the existing general tree cover within the City is retained wherever possible. The rules are designed to reduce the risk of serious or irreversible damage being done to the local environment through unnecessary or undesirable tree removal.
Although the tree control has as its main motivation the retention and conservation of trees which make a positive contribution to the quality of the environment, it does not imply an absolute ban on the cutting or removal of trees. Rather it is to ensure that any work on trees is neither done in haste nor executed without care. In appropriate cases consent may be refused.

D. Expected Outcomes

It is expected that the provisions will result in the retention of trees of value to the public, to wildlife and the neighbourhood in which they are located...
There should also be a reduction in the risk of serious or irreparable damage being done to the local environment through tree removals or works to trees that are unnecessary or that will have an adverse effect on the amenities of the neighbourhood...

It was common ground that removal of the trees on the appellant's property is within the scope of the general tree protection rules of both the transitional district plan and the proposed district plan, and that resource consent is needed for that work in terms of both instruments. As the relevant provisions of the proposed district plan are now beyond challenge by appeal, we will focus on them. Although the transitional plan still has effect at law, for practical purposes the general tree protection provisions of the proposed plan have virtually replaced those in the transitional plan.

Subdivision consent

Application was made by the appellant to the City Council on 4 July 1994 for subdivision consent to subdivide the property into 22 residential lots (later amended to 21 lots). The stems of the trees are growing on three of those lots, and their driplines extend over two other lots. The trees form a grove covering an area of about 850 square metres including the spread of the canopy, and are about 30 metres in height.

Neither the scheme plan of subdivision, nor the original application, made any mention of the trees. The land surveyor who prepared and submitted the plan of subdivision on behalf of the appellant, Mr D A Turner, acknowledged in evidence that he had been aware that the trees were there. He also acknowledged that the subdivision had been designed on the basis that the trees would be removed. The application lodged by Mr Turner stated that to the best of his knowledge no other resource consent was necessary.

In response to a request by City Council officials, a plan titled "Plan of trees to be removed" was submitted to the council in August 1994 by Mr Turner, showing the centre position of each pine tree relative to adjacent lot boundaries. However that plan did not show the extent of the drip-lines of the trees. It showed an outer line of the grove of trees which Mr Turner described in evidence as "symbolic only, to indicate that the features shown were trees". Although practising as a consulting surveyor, Mr Turner stated in evidence that at the time he presented that plan he

had not been aware of rule 11.5.4.1 B of the proposed district plan which requires that applications for subdivision consent are to be accompanied by a plan illustrating the proposed subdivision which is to show, among other details, "all trees and bush including the spread of the canopy".

A planning consultant called on behalf of the appellant , Mr VRC Warren, deposed that in his experience tree plans supplied by surveyors normally present the position of the trunk and a symbolic representation of a tree unless otherwise requested. We observe that the rule of the proposed plan that the scheme plan of subdivision show the spread of the canopy is a requirement otherwise.

There is no basis on which we should reject Mr Turner's evidence that he did not know of that requirement. However he had accepted a professional engagement to present an application for consent to a subdivision of land in the Auckland isthmus on behalf of the appellant. In accepting that engagement it was his responsibility to make himself familiar with the legal requirements applicable to it, and to comply with them.

Although the application for subdivision consent submitted by Mr Turner stated that to the best of his knowledge no other resource consent was necessary, because of the district rules already quoted resource consent was indeed necessary for removal of the trees. An application for resource consent to remove the trees was made by the appellant to the City Council on 16 August 1994. A person whose signature is indecipherable, purporting to act on behalf of a development services manager of the City Council, granted the subdivision consent on 12 September 1994. It appears from the report to the development services manager on the subdivision application that he had been informed that the developer had applied to remove the pine trees, and that he had also been given to understand that removal of the pine trees was not necessary in order to create building sites on the affected lots. That advice was based on examination of the plan of the trees submitted by Mr Turner.

Although it might have been expected that a site visit would have revealed the true extent of the canopy spread, it appears that the subdivisions officer who prepared the report on the subdivision did not realise that the canopy spread is greater than

appeared from Mr Turner's plan, and that he did not realise that some of the lots that would be created could not be built on if the trees were not removed. The subdivisions officer did not consider it his responsibility to measure the extent of the trees to verify what had been shown on the plan submitted by a registered surveyor, and his superior officer testified that having received information from a registered surveyor who is generally reliable, they had little reason to question the information given.

There were no conditions imposed on the subdivision consent about preserving the trees the subject of this appeal, but the report on the subdivision application referred to the separate application for consent to remove the trees then being processed.

On 8 December 1995 the respondent sealed the survey plan of the subdivision, and it was lodged on the appellant's behalf with the Department of Survey and Land Information for deposit on 9 December 1995. The subdivision plans have subsequently been approved as to survey.

The representative of the appellant who was called to give evidence was its property manager Mr P Gray. He deposed that he did not know when Lots 7, 8, 12, 13 and 14 had been sold, but he acknowledged that at the time they were sold the application for consent to remove the trees was unresolved. At least the building consent for a dwelling on Lot 8 was tagged "resource consent required". We find that the dwellings on Lots 7, 8, 10, 11 and 14 were commenced at times when the application to remove the trees had not been decided, or after consent to remove them had been refused and before this decision on the appeal against that refusal.

Replacement planting

It was the appellant's case that the effect of removing the trees would be mitigated by planting of tree specimens better suited to a residential environment. A landscape architect called for the appellant, Mr J L Goodwin, had prepared a plan for plantings on the front of the properties and the street berm, and proposed that they be irrigated to enhance success and growth rates. In brief, the plantings on

Gerard Way would be Queensland Box and magnolia grandiflora on the street berms, and flowering cherry and pin oak in the front yards; and on Grand Drive, melia on one berm and magnolia grandiflora on the other berm and in front yards, with flowering cherry within the properties too. Mr Goodwin estimated that the trees would reach some 4 to 6 metres high, 5 years after planting; and 6 to 10 metres high, 10 years after planting. After that, growth would tend to slow down as the trees start to reach a semi-mature state. In cross-examination Mr Goodwin gave the opinion that the planting would be desirable irrespective of removal of the pine trees, as it would not replace them but provide a different feature.

A botanist and environmental consultant called for the appellant, Dr NMU Clunie, was generally supportive of the planting plan produced by Mr Goodwin, and gave the opinion that in about 10 years that planting would have reached sufficient size to provide a good treescape for the area, and good habitat for avifauna (birds).

Mr Warren gave the opinion that the planting proposed would be more attuned to the visual character and amenity of the surrounding residential environment than the pine trees, and over time would make a contribution to habitat for birds that would be superior to that provided by the pine trees.

A consultant landscape architect called for the respondent, Ms M J Absolum, accepted that the proposed plantings would soften the streetscape, but considered the species selected were not entirely suitable for planting in narrow street berms.

Although we accept that planting such as that proposed by Mr Goodwin would enhance the amenity values of the properties in the appellant's subdivision and its neighbourhood, we do not consider that it would remedy or mitigate the adverse effect on the environment of removing the pine trees. The latter, because of their size and position, the fact that they have been standing there for about 60 years, and their association with earlier use of the land as a golf course, have landmark significance which could not be replaced by the new plantings, at least for many years. The new planting would provide a habitat for birds, and because of its diversity of species, it would be superior to the habitat provided by the pine trees

alone. However the combination of the new plantings and the existing pine trees would provide a habitat that would be better still.

Community value

The strategy of the general tree protection control is related to the contribution that trees make to the quality of the environment; and the expected outcome is retention of trees of value to the public, to wildlife and the neighbourhood in which they are located. It was the respondent's case that the subject trees form a remarkable stand of trees in an area where other planting is nowhere near as mature, contribute in a very significant way to the amenity of the area, that they form a local landmark, and that they are also an ecological resource.

The appellant accepted that the subject trees have local visual significance because they are growing on elevated land. However its counsel, Mr Cavanagh QC, contended that from many locations and particularly from more distant areas, views of the trees are often blocked by intervening housing, and that the trees do not constitute a significant visual feature. Counsel also maintained that generally, pine trees are not a species to be found in residential areas, being usually associated with forestry or farming.

Dr Clunie deposed that with the building of nearby houses, the lower part of the trees will become obscured from most vantage points, but he acknowledged that the upper canopy would be visible from some vantage points in the locality and would have some landscape significance.

Mr Goodwin gave the opinions that the trees are a significant visual feature for residents in the immediate neighbourhood, and contribute to the amenity of that area; but that beyond that immediate area, although often visible and sometimes quite prominent, they do not constitute a significant visual feature. He also deposed that there are no other tree stands of such scale and prominence within the immediate neighbourhood, although there is maturing vegetation creating a high standard of visual amenity and appropriate streetscape character. He considered

that in the long term pine trees are not appropriate for a fully developed residential area.

Mr Warren deposed that although a prominent local landscape element, the pine trees contribute less to the visual amenity of the nearby residential properties than they do to the visual amenity of streetscape. He observed that once development is completed, the lower third of the grove will be hidden behind the houses, which he considered would significantly reduce the prominence of the grove as a visual element. Mr Warren also stated that pines are not a food tree, and offered the opinion that they do not make more than a minor contribution to habitat for birds and animals.

Two residents of the area, Mrs Ewen and Mr Shieff, gave evidence which was said to represent the views of a large number of residents of the area. In summary those views were that the trees are valued for their contribution to the visual amenity of the area, and for softening the outline of the rooftops; that they are a landmark and a visual link with the golf course; and the proposed new plantings would not replace them.

Ms Absolum deposed that the group of trees is a local landmark, creating a focal point on the intersection of Gerard Way and Grand Drive, and a gateway effect for the subdivision; that they are visible from many locations in the neighbourhood; that they are an important landscape feature of the landscape, and that they retain a reference to the history of the area.

A research scientist specialising in the ecology and behaviour of birds, Dr P Jenkins, was also called on behalf of the respondent. Dr Jenkins reviewed scientific literature on bird habitats in pine trees. He gave the opinion that the grove of trees could become an oasis of bird life if a diversity of other trees were planted within the fenced area; and that the diversity should not be reduced by cutting down the pines.

Paragraph 5C 7.3.2 of the proposed district plan identifies visual amenity, heritage and habitat among the environmental functions of trees in the City. It states as a main motivation the retention of trees which make a positive contribution to the

quality of the environment, and records an expected outcome of retention of trees of value to the public, to wildlife, and to the neighbourhood in which they are located.

Having ourselves viewed them, we find that the grove of trees the subject of this appeal perform functions of visual amenity, heritage and habitat, make a positive contribution to the quality of the environment, and are of value to the public, to wildlife and to the neighbourhood in which they are located. We accept that with continuing development of the suburb, the lower parts of the trees will be obscured from view from some vantage points. In our opinion, that does not disqualify them from protection under rule 5C 7.3.3 C. We hold that in those respects the pine trees are a worthy subject for retention under that provision of the proposed district plan.

Shading

It was the appellant's case that lots to the south and southwest of the trees are affected by shading; that 7 of the lots would be affected with more than 50 % of the property covered for part of the day; that at the equinoxes, two lots would receive very little sunlight after 2 pm.

Those claims were supported by the evidence of Mr K R Miller, a director of a company engaged in photogrammetric mapping and computer-aided view and shadow simulations of proposed developments. In cross-examination the witness agreed that he had not considered whether the sites would be shaded anyway by the landform rising from the sites up to the Remuera Road ridge; nor had he considered the extent to which some of the sites would be shaded by dwellings on others of the sites. He accepted that some of the buildings would cast shadows on others.

Mr Warren acknowledged that the shadowing effects are characteristics of the site which predate development proposals. In cross-examination, he accepted that people live in houses that are subject to shading, and that the houses on Lots 12 and 13 cast shadows on other lots in the subdivision.

A planning consultant called on behalf of the respondent, Mrs S M Speer, deposed that the site's topography causes shadowing of houses built on it; that the houses on Lots 1 to 8 lose the afternoon sun as they lie to the east of higher ground where a shopping centre has been established; and that Lots 9 and 10 would be in shadow even if the trees are removed, as they lie at the bottom of a hill; and that 2-storey houses on Lots 12 and 13 would throw shadow over the houses on Lots 9 and 10.

We find that the trees contribute to the shading of lots created by the appellant's subdivision. That was capable of being discovered at the time the subdivision was designed. On the evidence we are not able to quantify how much shading of those lots would occur even if the trees were removed, as a result of the lie of the land, and of buildings already erected or those that may be erected. For those reasons we place little weight on shading effects in evaluating the appellant's case for removal of the trees.

Falling branches

It was also the appellant's case that many of the trees have potential for progressive splitting and breakage of heavy parts of the crown structure, and there is a likelihood of windthrow which would be hazardous for houses in the immediate vicinity.

Dr Clunie testified that recent pruning of some large limbs from trees at the northern end of the stand had opened the northern face of the stand, exposing trees in the northern part of the stand to increased potential for wind breakage. In particular he considered that weight imbalance in the crown of one of the trees had been exacerbated by recent removal of limbs on the north-west side of the lower stem. He also reported that a substantial limb had been removed from the southwestern side of the trunk of another of the trees at the level of the primary crotch, and that this junction was becoming suspect.

Dr Clunie gave the opinions that the potential for splitting and breakage of large and heavy parts of the crown structure in many of the trees is substantial, that this

potential would increase progressively; that it would be imprudent to build a dwelling within 30 metres of the trunk, or 20 metres of the dripline, of those trees. He considered that to do so would be a substantial and avoidable risk to life and property. He concluded that no satisfactory measures could be taken to modify the stand to make it safe in close proximity to the houses. In cross-examination the witness agreed that the trees might stand for many years, but affirmed that they might break in a storm at any time.

Mr Warren adopted Dr Clunie's evidence and deposed that while the trees remain, no building platform is available on Lots 12 and 13; that it would not be prudent to build on Lots 7, 8 and 9; and that parts of Lots 10, 11 and 14 are compromised. A dwelling has been built on Lot 8, but he would have advised against it.

An arborist employed by the City Council, Mr B C Gould, considered that there is only a moderate risk of a tree falling, and that the branches overhanging the house on Lot 8 could be trimmed to remove the overhang without affecting the stability of the trees.

We find that there is a risk of branches falling from the trees. (There is also a lower risk of a whole tree being windthrown, but we address that in the next section of this decision.) The risk of falling limbs can be reduced by skilled pruning, as described by Mr Gould.

Moreover, the risk of branches falling from the pine trees was capable of being discovered before the subdivision was designed. The appellant has chosen to subdivide and development its property as if the pine trees were not there, although it knew that it was not entitled to remove them without resource consent, which it did not have. Purchasers of the lots created by the subdivision have bought in the knowledge of the trees and could readily have obtained advice about the possibility of limbs falling.

We find that the appellant and its purchasers have accepted the risk. We also find that the risk is capable of being managed. In our opinion, that risk is not a weighty consideration in favour of removal of the trees.

Expected life

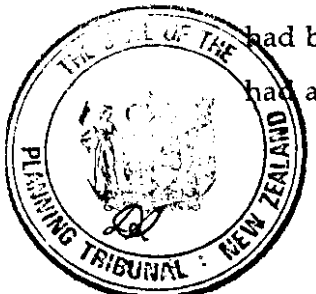
The trees were planted about 1935 as part of the development of a golf course. A drainage trench cut about 10 years ago some 3 metres to the north of two trees on the Lot 8 boundary would have severed all roots of the trees, but they continued apparently healthy.

In October and November 1994 a contractor engaged by the appellant excavated a stormwater trench very close to one of the trees at the boundary of Lot 8. The work damaged the roots of the trees.

On 17 January 1995 there was a meeting on the site of representatives of the appellant and the respondent to consider whether, in terms of rule 5C 7.3.3 C.A (ii), excavation and other works on Lot 8 of the subdivision close to two of the trees would be likely to endanger the trees. The works were approved, and the relevant building consents were issued, it being considered that they would not compromise the pine trees. Some of the earthworks had been carried out before the application had been made, and were legalised retrospectively by the consent. The conditions of consent required that trenching be hand-dug and any tree roots over 50 millimetres in diameter were to be cleanly sawn.

In May 1995 the appellant was granted discretionary activity consent to construct a house on Lot 8 under the drip-line of the trees, it having been considered that if the proposed works were carried out in compliance with the conditions of consent, the health of the trees would not be affected.

Dr Clunie deposed that the work carried out had included a deep ground cut to within 2.5 metres of the northern side of the trunk, that all roots which extended to the north were severed along that cut; and that a shallower cut to within 1.9 metres of the trunk had severed surface and subsurface roots there. The ten-year old trench had been cut to a deeper level than the later work, so damage to the original roots had already been done. He gave the opinion that damage to the roots of two of the

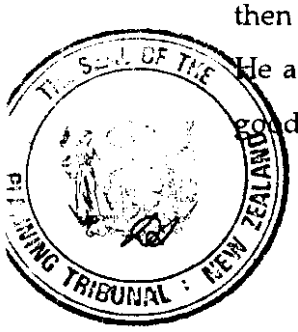


trees is likely to have a significant adverse effect on the health and ultimately the stability of those trees. He explained that the root cutting had damaged the roots, tearing and shattering them inwards and that the root damage very likely will be the site of ingress of pathogenic fungi, that rot is likely to develop and spread progressively into the root collar and lower trunk, and sooner or later will undermine the structural integrity of the trees and lead to their collapse. Dr Clunie considered that if there is spread of pathogenic fungi, the trees would become unstable in about 5 or 7 years. He gave the opinion that building too close to the pine trees has precluded the option of retaining them, because of the danger to life and property.

In cross-examination the witness stated that the trees are in moderately good health for their age, and that there was no evidence of any major setback to their growth in recent years. Although he agreed that remedial measures for the damage to the roots would be useful, it was by no means certain that they would prevent fungal ingress. He told the Tribunal that if the stand remained intact, it was possible that the trees would reach an age of 100 years, although they would require ongoing maintenance. Both Dr Clunie and Mr Gould considered that to ensure mutual physical support the stand would need to be kept intact.

Following a further inspection jointly with Mr Gould, and a later inspection with Mr Gray, Dr Clunie could not discount either that fungal and microbial incursion and wood rot may have been contained within the root, or that it may have spread or be spreading into the base of the trunk. From his own experience, Dr Clunie gave the opinion that it is unlikely that decay would have been contained effectively, and that it is more likely that it has spread extensively into the root area at the stem base. This would increase greatly the likelihood of windthrow of either or both of the trees that had suffered root damage. In his experience there may be no external evidence of decay on pine trees which are undermined and windthrown.

In cross-examination Dr Clunie agreed that there could well be many roots, other then in the sector to the north and northeast of the trees, that have not been affected. He agreed that the crowns and foliage of those trees appeared to be in reasonably good health.



Mr Gould's additional evidence following the joint inspection with Dr Clunie was that there is no definitive way of quantifying the extent of the problem. Mr Gould confirmed that the trunks, main branches and canopy foliage appear normal and typical, and that he had not observed any sign or evidence to suggest ill-health. If the trunks or major roots were severely rotted, he would expect to see signs of decline or dieback in the upper crowns, but no such signs were evident. Nor had he found any signs of instability, such as soil heaving or cracks. He gave the opinion that there is a more than 50-50 probability of the trees surviving and having a substantial life span ahead.

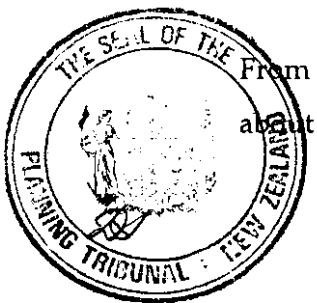
Mr Gould gave the opinion in evidence that overall the general health and condition of the trees appears good, with no signs of significant decay, disease or instability. He considered that they have a life expectancy in excess of 50 years, providing there are no radical changes to their immediate environment, especially in the rootzone area. He added that it there has been any ingress of pathogenic fungi, it is not sufficiently advanced to be of any significance, and there was no significant danger of the trees falling. He had seen no signs of fungal attack or rot.

Mr Gould had examined the damage to the roots of the two trees, and was confident that with pruning, backfilling, fertilising and watering root growth could be promoted. A fungicide could be added to the fertiliser. He deposed that despite the root damage, about 70% of the root system exists and is serving the tree quite adequately.

The proposed district plan makes express provision for the uncertainty that can arise when expert witnesses offer differing opinions about the life of a tree the subject of the general tree protection control. The provision (inserted in rule 5C 7.3.3 C) is:

> Where any element of uncertainty exists as to the likely fate of the tree, the benefit of doubt will be given to the tree survival by not removing it until such time as its irreversible decline is obvious.

From the evidence of Dr Clunie and Mr Gould, an element of uncertainty exists about the likely fate of the pine trees. This provision indicates that the trees should



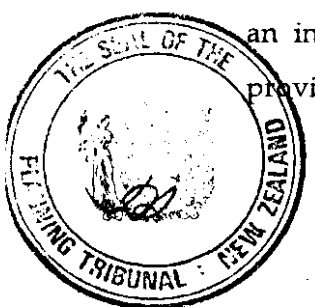
not be removed until irreversible decline is obvious. Dr Clunie's evidence does not provide a basis for finding that irreversible decline is obvious. He has not identified any unmistakable evidence of spread of pathogenic organisms or rot to the extent that would cause death of the trees. He agreed that crowns and foliage appeared to be in reasonably good health and the trees could reach an age of 100 years. Mr Gould had found no signs of decay, disease or instability, and gave them a life expectancy of a similar order.

Obviously if the appellant applies the recommended remedies to the trees, but they show unmistakable signs of irreversible decline, their removal should be reviewed. However the present condition does not qualify for removal in terms of the provision quoted.

Property Law Act

Counsel reminded us of the provisions of section 129C of the Property Law Act 1952, inserted by section 12(2) of the Property Law Amendment Act 1975. That section provides, among other things, for an occupier of residential land to apply to the District Court for an order requiring the occupier of other land to remove or trim trees on that land to prevent danger to life or health or property, obstruction of view, or other interference with reasonable enjoyment of the applicant's land for residential purposes. The Court is to have regard, among other things, to the interests of the public in the maintenance of an aesthetically pleasing environment, to the value of the tree as an amenity, and to the historical, cultural or scientific significance of the tree. The proviso to section 129C(5) (as amended by section 362 of the Resource Management Act) exempts trees the preservation of which is the subject of a requirement by a heritage protection authority, except on the grounds of loss or injury or damage to life or health or property. There is no exception for trees the subject of rules such as the respondent's general tree protection rules.

The proposed district plan contains a statement that the City Council considers itself an interested party in any proceedings in which an order is sought under that provision.



It appears that if this Tribunal, deciding the application in terms of the provisions of, and for the purpose of, the Resource Management Act 1991, decides to disallow the appeal and refuse the removal of the trees, the appellant would be entitled to apply to a District Court, which would have jurisdiction to order removal of the trees having regard to the criteria stated in section 129C of the Property Law Act, even though that removal of the trees without resource consent would contravene the Resource Management Act.

It is not clear to us that Parliament intended that in such cases, the Tribunal should not entertain resource consent applications for removal of trees, leaving the issues to be decided by the District Court. We hold that the mere existence of overlapping jurisdiction in another court, without other indication of an intention to oust the Planning Tribunal's jurisdiction, is insufficient to excuse the Planning Tribunal from hearing and determining appeals such as the present. However the possibility of costly hearings before two different courts, on different statutory considerations, leading to inconsistent determinations, does not appear to respond to the goals of efficient application processes and integrated resource management which the Resource Management Act 1991 was expected to address.

In any event, it would not be appropriate for the Planning Tribunal to anticipate the outcome of any application to the District Court under section 129C. We hold that it is our duty to decide this appeal in terms of the Resource Management Act, ignoring the possibility of an inconsistent determination by the District Court in terms of the criteria applicable by section 129C of the Property Law Act.

Evaluation

Section 104(1) of the Resource Management Act requires that when considering a resource consent application, the consent authority is to have regard to matters listed in that subsection. That requirement is expressed to be subject to Part II, which means that in the event of a conflict, the provisions of that part are to prevail

over it: *Environmental Defence Society v Mangonui County Council* [1989] 3 NZLR 257; 13 NZTPA 197 (CA). We are not aware that having regard to any of those matters in this case would conflict with any of the contents of Part II.

The items listed in section 104(1) that are relevant in this case are actual and potential effects on the environment of allowing the activity (paragraph (a)), and relevant objectives, policies, rules, or other provisions of a plan or proposed plan (paragraph (d)). The subsection also allows for having regard to any other matters the consent authority considers relevant and reasonably necessary to determine the application (paragraph (i)). We are not aware of anything in that class in this case.

Actual and potential effects

Plainly there would be a loss of visual amenity from removal of the trees. Having ourselves viewed them, we find that this would be an actual adverse effect on the environment. Mr Warren reminded us that the effect would be mitigated by the proposed planting. However even after 10 years the proposed trees would not have the scale or impact of the grove of pine trees, nor would they have the association with the history of the area as a golf course. Further, if it wishes to, and if the City Council agrees to the trees in the street, the appellant could carry out that planting anyway.

Mr Warren drew attention to the shadow effects of the trees, and the hazards for occupiers of lots on the subdivision of falling limbs from the trees. However, those would not be effects on the environment of allowing the activity the subject of the resource consent application, which is the removal of the trees. Rather they are the results of the way in which the development has been managed. We hold that they do not qualify for consideration in terms of section 104(1)(a).

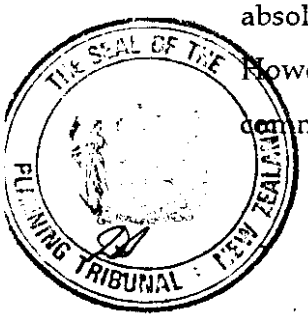
District plan provisions

Starting with the transitional district plan, Mr Warren gave the opinion that approval of removal of the pine trees would be consistent with the policy explanation in combination with the assessment criteria. Turning to the proposed district plan, the witness reminded us of the passage in the general tree protection strategy about not implying an absolute ban, and ensuring that work on trees is not done in haste nor executed without care. He considered that the great care with which the proposal to remove the trees is being considered would be consistent with that strategy. Of the policies about protecting groups of trees as an important character element in the environment, and as a food source for wildlife, Mr Warren observed that they are implemented by rules which provide for consents to be granted on assessment criteria. He found nothing in the objectives and policies for the Residential 6 zones with which the proposal is inconsistent.

Mrs Speer's evidence addressed the assessment criteria separately. Referring to the objectives and policies of the plan, she gave the opinion that the retention of the trees on this property is important as there are no others on it, and the trees contribute significantly to the amenity of the surrounding area. On the applicant's need to obtain a practicable building site, the witness deposed that trees frequently add economic value as well as amenity value and character to a site. Addressing alternatives for achievement of the appellant's objectives, she stated that the council had only received the one plan of subdivision for the property, but that other possible subdivision layouts could produce 21 residential lots while retaining the trees intact. It was acknowledged that the trees could not be relocated.

Mrs Speer adopted Ms Absolum's opinion about the contribution that the trees make to the amenity of the neighbourhood, and deposed that the trees are used for food, shelter and protection by birds, relying on Dr Jenkins's evidence.

Mr Warren was right to draw attention to the passage about not implying an absolute ban, and ensuring that work on trees is not done in haste or without care. However the district plan contemplates that in general, trees having value for the community are to be retained. The point of avoiding haste and careless work on



trees is that unhurried and careful consideration may allow for retention of trees that might have been removed, or for pruning or thinning rather than felling. Our findings earlier in this decision indicate that the subject trees have the qualities and value which qualify for retention in terms of the general tree protection rule.

The factors to the contrary are the consequences for the appellant's residential subdivision and development of the property. On the present subdivision at least one lot would not be able to be built on; and building on others would be inhibited by risk of limbs or whole trees falling. The assessment criteria expressly include an applicant's need to obtain a practicable building site. However they also include alternative methods of achieving an applicant's objectives.

The appellant chose to purchase for its development a property which had growing on it a grove of trees which were the subject of the general tree protection rules of the transitional and proposed district plans. The appellant has been able to subdivide the property so as to yield 20 residential lots anyway, on a design which ignored the existence of the trees. We are not persuaded that it would not have been able to produce a subdivision yielding 21 residential lots while retaining the trees.

For those reasons, it is our opinion that having regard to the relevant provisions of the district plan favours refusal, rather than granting, of the resource consent application for removal of the trees.

Sustainable management of resources

In terms of the proposed district plan, the application is for a restricted discretionary activity. The implications of that are that the assessment of effects required by section 88 was only to address the matters specified in the plan over which the council had restricted its discretion, although neither rule 4.3.2.6 nor rule 5C.7.3.3C specifically defines the restriction on its discretion on applications such as the present. The proviso to section 105(1)(b) directs that where the consent authority has restricted the exercise of its discretion, *conditions* may only be imposed in respect of the matters specified in the plan or proposed plan to which the consent authority

has restricted its discretion. However neither section 104 nor section 105 limits the exercise of the discretion to grant or refuse consent in such a case.

Bearing in mind the statement in section 5 about the purpose of the Act, we hold that exercise of the discretionary judgment to grant or refuse consent should be informed by that purpose, namely promoting the sustainable management (as defined in section 5(2)) of natural and physical resources. That includes efficient use and development of natural and physical resources (to which particular regard is required by section 7(b)), maintenance and enhancement of amenity values (section 7(c)), and maintenance and enhancement of the quality of the environment (section 7(f)).

Mr Warren gave the opinions that retaining the grove of trees would result in a major inefficiency in development and use of the resource represented by the subject property; that the loss of amenity value in removing the trees would be localised and fully mitigated by the proposed planting; and that the mitigation proposals would result in an improvement in the quality of the environment.

Mr Cooper submitted that efficient use of land is not to be equated only with using land for residential development and can embrace environmental protection; that it would not be efficient to ignore environmental outcomes; and that if 2 lots of a 21-lot subdivision are affected by the trees, it is still an efficient use of land, and options for redesign of the subdivision are available.

Mrs Speer gave the opinion that removal of the trees would result in an adverse visual effect for the area; that the planting proposed would not complement the quality of landscaping in the neighbourhood, and would not be sufficient to mitigate the effect of the loss of the trees.

We quote section 5:

> (1) The purpose of this Act is to promote the sustainable management of natural and physical resources.
> (2) In this Act, "sustainable management" means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while -

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

The structure of section 5(2) of the Act calls for managing development in a way which enables people and communities to provide for their social economic and cultural wellbeing and for their health and safety while doing the things listed in paragraphs (a), (b) and (c).

In this case there is a conflict between the appellant providing for its economic wellbeing by maximising its yield from the development, and people and the community providing for their social and cultural wellbeing by the retention of the trees which provide a valued local landmark and contribution to the amenity values of the neighbourhood.

Judge Sheppard and Commissioner Catchpole consider that removal of the trees would not sustain their potential to meet the needs of future generations in this neighbourhood for mature trees having landmark and heritage values. They hold that removal of the trees would not safeguard the life-supporting capacity of the ecosystem of which they are a part. They also hold that removal of the trees would not avoid, remedy or sufficiently mitigate adverse effects on the environment. They consider that application of those provisions indicates that the conflict is to be resolved by refusing consent to remove the trees.

There may also be a conflict between the contents of paragraphs (b), (c) and(f) of section 7, already mentioned. However, efficient use and development of natural and physical resources does not necessarily imply maximum financial yield for a developer. Judge Sheppard and Commissioner Catchpole accept Mr Cooper's submission that efficient use and development can be assessed more broadly. They hold that in this case the district plan, consistent with the statutory purpose, indicates that it should be. They also hold that the economic effect on the appellant's development of refusing consent for removal of the pine trees is not inconsistent with having particular regard to the efficient use and development of natural and physical resources.

In short, it is their judgment that in this case refusing consent for removal of the pine trees would serve the statutory purpose better than granting consent.

Opinion of Commissioner Easdale

Commissioner Easdale dissents from the opinions of Judge Sheppard and Commissioner Catchpole on that judgment. His own statement of his opinion follows at the end of this document.

Judgment

Having made our findings on issues of fact, and having had regard to the matters directed by section 104(1) and to the statutory purpose and other applicable provisions of Part II, we have now to come to a judgment whether resource consent for removal of the trees should be granted or refused.

Judge Sheppard and Commissioner Catchpole recognise that refusal would have the result that the freedom of the owner of the land to develop it according to its preferred design would be restricted by the continued existence of the trees, and that because of the risk of falling branches or trees, and shading effects, the value of the residential lots adjoining the trees may be reduced. They also recognise the rhetorical force of Mr Warren's claim that retention of the trees is tantamount to provision of a local reserve at the cost of a private developer, in addition to the reserves contribution paid on the subdivision.

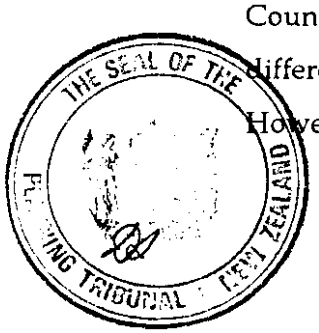
However the Resource Management Act sets in place a scheme in which the concept of sustainable management takes priority over private property rights – see *Falkner v Gisborne District Council* [1995] 3 NZLR 622 at 633; [1995] NZRMA 462 at 478. It is inherent in the nature of district plans that they impose some restraint, without compensation, on the freedom to use and develop land as the owners and occupiers might prefer. The appellant could have appealed to this Tribunal against the

respondent's requirement for payment of a reserves contribution on the subdivision, but it did not do so.

Counsel for the respondent submitted that the fact that subdivisional approval was granted, and that the development has been partly implemented, are not factors to be weighed in favour of the appellant. He added that past actions of the applicant are relevant to exercise of the discretion – not in any punitive sense, but as matters which may have contributed to the alleged unsafety of the trees. Mr Cooper contended that the appellant should not benefit from what was a wrongful act damaging the roots; and that detriment personal to the applicant arising from its own actions ought not influence the Tribunal's decision.

Judge Sheppard and Commissioner Catchpole have concluded that the shadow effects and the hazards of falling limbs are results of the way in which the appellant has chosen to plan and manage its development. The appellant bought the land when it had growing on it trees that were protected by general tree protection rules of the transitional and proposed district plans. The fate of the trees was not addressed at the outset, as reason would have required. Instead the appellant's surveyor submitted to the City Council a plan of subdivision that did not show the trees, and later, a plan showing the trees which failed to show the true extent of the spread of the canopy of the trees, as required by the relevant rule. The appellant's contactor carried out trenching works in a way that damaged roots of the trees, and that may have allowed ingress of pathogens that may ultimately harm the trees. The appellant deliberately chose to subdivide on a design that could not be fully realised without removal of the trees, and which involved placement of dwellings where they would be shaded by them and at hazard from falling limbs. The appellant completed the subdivision and proceeded with development knowing that it required resource consent for removal of the trees, and knowing that consent had not been granted. It chose to anticipate a favourable outcome.

Mr Warren sought to place responsibility for what had happened on the City Council. With hindsight the council officials might wish that they had dealt differently with the applications for subdivision consent and for building consents. However, the appellant cannot avoid responsibility for its own actions. It knew the



trees were on its property. It knew it would need resource consent to remove them. It knew that its application for that consent had not been granted.

It would not accord with the scheme of the Act about resource consents if the appellant's application was advanced in any way as a result of its having acted in anticipation of obtaining resource consent. Developers in general should not be given to expect that resource consent for removal of trees that might increase their return on a development can be procured or even enhanced by injudicious pruning or root damage to trees, or by subdivision or development in anticipation of a final grant of consent. (We accept that the present appellant did not carry out pruning or interfere with roots of the pine trees deliberately to harm them or to advance its case for removal of them. We also accept that the appellant had, ineffectively as it turned out, instructed its contractor to keep trenching works well clear of the trees.)

We find that the shadowing and hazards have been brought upon the appellant by its own actions in the way in which it has chosen to plan and manage its development. As counsel for the respondent contended, the appellant took a risk. It is left with responsibility for the consequences. Judge Sheppard and Mr Catchpole do not exclude those matters to penalise the appellant for having acted in anticipation of a favourable decision of its resource consent application. Rather they exclude them because the resource consent application has to be decided for the promotion of sustainable management of natural and physical resources.

We have found that the grove of trees the subject of this appeal perform functions of visual amenity, heritage and habitat, make a positive contribution to the quality of the environment, and are of value to the public, to wildlife and to the neighbourhood in which they are located. Judge Sheppard and Mr Catchpole hold that in those respects the pine trees are a worthy subject for retention under that provision of the proposed district plan. Removing the trees would have an adverse effect on the environment and would not be remedied or sufficiently mitigated by the replacement planting proposed.

The objectives and policies of the district plans about retention of substantial trees in the City have a place in the promotion of sustainable management of natural and

physical resources, and as such they deserve more than lip-service. In the light of our findings in this case, the majority judge that to allow removal of the pine trees would not give full weight to the value of the trees to the community, nor to the City's goal of retaining such trees where practicable. In the judgment of the majority the community values of retaining them deserves to prevail over the private interests of the appellant in removing them.

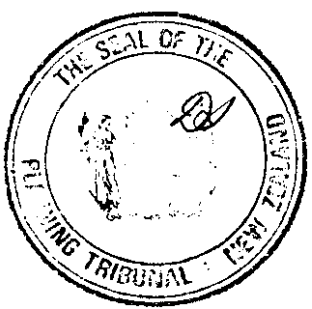
Therefore the appeal is disallowed, the respondent's decision in confirmed, and the resource consent application is refused.

This would not be an appropriate case for an award of costs, and we make no order in that respect.

Dissenting opinion of Commissioner Easdale

Having carefully considered this decision of the Tribunal I am unable to support the decision reached by the Tribunal on this matter and would record a dissenting opinion. In part the following matters, briefly expressed, have influenced my assessment.

The trees were originally planted in conjunction with a golf course development possibly as a rapidly growing species to provide quick shelter or screening between fairways and greens. On a golf course they would doubtless have been managed, supplemented and removed if over-large to ensure the best course maintenance and playing conditions. Their survival to the present is possibly to a degree fortuitous but I am unable to place particular value on the heritage aspect of the grove. They are however a considerable landscape asset and if sited on an appropriate area of land could on the evidence be expected to stand for perhaps a further forty years or until they fall of old age or structural weakness. The future life prospects of the trees is qualified in the evidence as being subject to their careful ongoing management though we were not told how this might occur.



This is not a stand of trees which can be accommodated in the yard spaces of 600 square metre residential sites. The trees are evergreen, represent a bulk some four times the area and three times the height of individual houses being built in the vicinity. The shadowing effect particularly on sites lying below the level of the trees to the south and east from at least equinox to mid winter (6 months of the year) I would rate as quite severe.

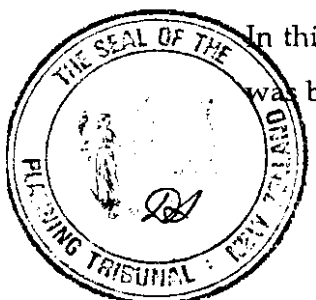
Houses which might be built on Lots 12 and 13 with the trees removed would have a shadowing effect on adjoining sites but of a significantly reduced magnitude being individually smaller and lower than the trees. The trees at close quarters have an overbearing nature which while not particularly addressed in evidence was evident on a site inspection. The house on Lot 8 was that most closely affected and in my consideration the relationship of the trees to that quite substantial house borders on the grotesque.

I am inclined to the views expressed by Dr Clunie that radiata pine is not a suitable tree species for closely built residential environments, that the trees individually are poorly formed specimens, that there is a substantial likelihood of storm breakage and the potential for breakage will increase with time.

Regardless of whether the developer stands to gain or lose the situation now existing is that ten residential lots created by way of a subdivision consent are to some degree affected in an adverse manner. Five of the ten lots have houses built and a further two have foundations laid at the time of hearing in November, following the issue of building permits. Again I incline to the further view of Dr Clunie that the siting of buildings close to these trees has precluded the option of retaining them.

The resource represented by the residential sites and buildings will far outlast the somewhat uncertain life of the trees and in my assessment the provisions of section 5 are now best served by granting the consent sought.

In this case, as I see it, council being aware that a resource consent for tree removal was being processed nevertheless granted a subdivision consent without any proper



consideration of the matters which might be raised by the tree consent application. This case I believe demonstrates the unsatisfactory results which can arise from not considering all necessary applications at the one time.

DATED at AUCKLAND this 13th day of June 1996.

DFG Sheppard,
Planning Judge

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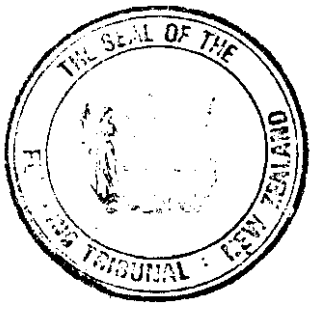

ORIGINAL

Decision No. W 029/2006

IN THE MATTER	of the Resource Management Act 1991
AND	
IN THE MATTER	of two appeals under Cl 14 of the first Schedule to the Act and an application under s85 of the Act
BETWEEN	FORE WORLD DEVELOPMENTS LIMITED and BAYSIDE VILLAS LIMITED (RMA 674/02, RMA 860/03 and ENV W0085/05) Appellants/Applicants
AND	THE NAPIER CITY COUNCIL Respondent

BEFORE THE ENVIRONMENT COURT
Environment Judge C J Thompson
Environment Commissioner W R Howie
Environment Commissioner K A Edmonds

Hearing: at Napier on 7 – 10 February and at Wellington on 13 – 17 February 2006
Site visit 8 February 2006. Closing submissions received 17 March 2006
Counsel:
P T Cavanagh QC for Fore World Developments Ltd and Bayside Villas Ltd
M B Lawson for the Napier City Council
P J Milne and M Conway for the Hawkes Bay Regional Council – s274 party
K G Smith for Director-General of Conservation – s274 party

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

DECISION

Introduction

[1] These three proceedings, heard together, concern three pieces of land on the coastline at the settlement of Bay View, north of Napier. At the time the proceedings were begun they were owned by Fore World Developments Limited and Bayside Villas Limited. Parts of one of the pieces of land have since been sold but, with the possible exception of part of the application under s85, that is largely irrelevant to the matters we have to resolve. It is convenient, if not entirely accurate, to describe the applicants/appellants as *Fore World.*

[2] Fore World's core motivation in all of this is the wish to develop the land as medium density residential subdivisions. Much summarised, Fore World wishes to have the land zoned *Main Residential* so that it can be subdivided with lot sizes of the order of 400m^2. It has confirmation that services such as water, power and telecommunications are available. With some reservations both Councils accept that, from an engineering perspective, satisfactory stormwater and sewage management could be provided. Stormwater could go to the sea and one of the pieces of land could accommodate a sewage treatment and disposal field for the houses on other sites. The City Council does however have issues from a planning and management perspective with the stormwater and sewage proposals and we shall mention those in due course. Of more immediate concern to it is the possibility of coastal erosion damaging the land and structures erected on it. These issues have been live between the parties for some years and have already resulted in other proceedings before this Court.

[3] The Regional Council broadly supports the City Council's position, but has engaged its own advice on coastal erosion issues. That advice suggests a Coastal Hazard Area smaller than that proposed by the City Council but it is prepared to support the wider zone on the basis that it offers greater precaution, a concept to which we shall return. The Director-General of Conservation joined the appeal relating to the Natural Hazards and CHZ in the Proposed Plan under s274. At the hearing the Director-General's counsel indicated that he adopted the same position as the City Council and took no further part. In different documents the area is referred to as the Coastal Hazard Zone or the Coastal Hazard Area, and there are other permutations also. For consistency and clarity we will use *Coastal Hazard Zone* (CHZ) throughout.

The land involved

[4] The three pieces of land are known, in shorthand, as Gill Road, Franklin Road and Rogers Road. Gill Road has an area of about 1.9ha. It has an existing subdivision consent for 12 residential lots and a road reserve. The road, known as Mer Place, is a cul-de-sac and is already formed. The planning history of Bay View is somewhat complex. In 1989 Napier City inherited the area from the former Hawkes Bay County, along with its then operative District Scheme. In 1992, under some priority, a new plan for the area was notified, and it has been operative since 1996. Under that Plan, the Napier City District Plan; Bay View Subdistrict, the Gill Road land is zoned *Residential* but a CHZ overlay affects it. Under the Proposed City of Napier Plan, notified in 2000, (which is the Plan under challenge here) the land is zoned *Rural Settlement* which allows for one dwelling per unserviced site with a 1000m^2 minimum area. If the land is fully serviced the minimum area reduces to 800m^2. Servicing is to be provided by a network utility operator. The seven residential lots on the seaward side of Mer Place are covered by the CHZ overlay contained in the Proposed Plan, to the extent of about 71%.

[5] New buildings or structures in the *Rural Settlement* zone and subject to the CHZ overlay will be *prohibited* activities when the Proposed Plan becomes operative (see s77C(1)(c)). In the meantime they are a *discretionary* activity. A dwelling could be erected on each lot on the landward side of Mer Place as a *restricted discretionary* activity, subject to service provision.

[6] The Rogers Road land has an area of about 1.4ha. It is a long, shallow rectangle narrowing to a point at its southern end, and lies west of the Palmerston North – Gisborne railway line. Under the Operative Napier City; Bay View Subdistrict Plan this land was zoned *Deferred Residential* under Variation 5, operative from December 1996, but the *Bay View Rural Zone* Rules continued to apply to it. The conversion of the *Deferred Residential* zoning to some form of useable residential zoning would require a plan change and, at a minimum, the provision of full servicing for stormwater and wastewater.

[7] In the Proposed Plan this land is zoned *Main Rural*. Ms Sylvia Allan, the City Council's consultant planner, told us that this allows a minimum lot size of 4ha with one dwelling per site, and that this provision is now beyond challenge. Under the current proposal put forward by Fore World for the development of the whole area this land would be used for

a community sewage treatment system and effluent field. But if, and when, the whole area is reticulated into a publicly operated sewage scheme it could be subdivided into 12 residential lots.

[8] The Franklin Road land has an area of about 8ha. It is essentially a long strip lying between the coast and the railway line. It was also zoned *Deferred Residential* by Variation 5 to the Subdistrict Plan, with the *Bay View Rural* Rules continuing to apply, and had the same CHZ over almost all of it. Under the Proposed Plan it too is zoned *Main Rural* so that the minimum lot size is 4ha with one dwelling per site. Under Variation 3 (under challenge in appeal W085/05) of the Proposed Plan the CHZ notation covers approximately half of the width of the area between its seaward boundaries and the railway.

Applicable law

[9] The occasionally vexed issue of whether a proceeding should be dealt with on the law as it stood before, or after, the 2003 amendments to the RMA (effective 1 August 2003) was given an added layer here because the appeals/application were lodged in 2002, 2003 and 2005. The 2002 appeal is straightforward enough. The 2003 application was lodged on 24 October 2003 and, if that was the determining date, the law post-amendment would apply. However it seeks changes to the Proposed Plan notified in November 2000. The 2005 appeal is against the terms of Variation 3 of the Proposed Plan which was notified pre-August 2003: - Fore World's submission being dated 17 June 2003. Overall, we deal with the three matters on the law as it stood pre-2003, but the differences are in no way decisive. Nothing turns on whether *beyond challenge* Rules are deemed to be operative under s19. There may be a somewhat lesser standard imposed on the Council in terms of a s32 report but again that is not going to be decisive in these circumstances. Nor is there any effective difference in whether the terms of the Plan are ...*not inconsistent with*... or ...*give effect to*... the terms of the Coastal Policy Statement, under s75.

[10] We agree with Mr Milne's submission that s131(1)(a) of the 2005 amendment makes it clear that the provisions of that amendment do not apply to any of these matters, and we do not understand any other party to disagree with that view.

The relief sought

[11] Isolating what relief was ultimately sought in each proceeding is not easy. That is not to be taken as a criticism of Mr Cavanagh, who was not instructed until after they had been lodged. The position continued to evolve at the hearing – a process criticised by Mr Lawson as *...planning on the hoof*, and there is some validity in that criticism. In its appeals against the Proposed District Plan and Variation 3 Fore World originally sought the complete removal of the CHZ from the Gill Road and Franklin Road land. Subsequently it sought an alternative of a reduction to a width of 15m (and later 18m) from the average vegetation line on those sites. It is to be noted that it did not seek a rezoning of the land under those appeals.

[12] We received radically differing submissions on the scope of the original submissions and appeals, including an amended notice of appeal, to cover wider relief originally sought by Fore World or put forward in submissions and evidence. Fore World sought different planning horizons, graduated risk zones and controls, amendments to objectives, policies and rules, and specific rules to permit beach renourishment in Bay View by private entities. There were also challenges to our ability to find in favour of graduated hazard zones and a Bay View beach renourishment scheme on Variation 3, on the basis the variation deals with the linear width of, and not the content of policy and controls applying within, the CHZ. Another issue was the scope of Fore World's original submissions on the variation. Resolving the proceedings on the basis of the scope of jurisdiction, while perfectly proper legally is, we suspect, unlikely to provide a long term solution to the differences between these parties. The fundamental issue of the extent of the CHZ is within scope. Once that is resolved, we can express conclusions about what are really subsidiary issues assuming, without necessarily deciding, in favour of Fore World that they are within scope.

[13] The appellant's s85 application of 24 October 2003 sought a change in the zoning from *Main Rural* and *Rural Settlement* to *Main Residential*, and a *Bay View Overlay Area*. It also involved removing the proposed *closed road* notation from part of Le Quesne Road and the rezoning of that area from *Foreshore Reserve* to *Main Residential*. Another aspect was deleting part of the CHZ, mainly from beyond a strip fronting the coast from outside a CHZ line identified by NIWA. For the Bay View Overlay Area, the application proposed a minimum lot size of 350m² (later 400m²) and the removal of any requirement for separation distances. The application also sought the scheduling of sites as *Bay View Overlay Area Wastewater Treatment Facility, Rogers Road and Franklin Road, Bay View*, thereby giving it

permitted activity status. Further changes sought were the adding of a new condition to the conditions for *permitted* and *controlled* activities:

> 5.37 Services
>
> 1. The following services shall be provided to all sites in the Bay View Overlay Area prior to the commencement of any activity provided for in the Main Residential Zone Activity Tables Rules 5.2 – 5.8, and 5.11:-
>
> Water supply, wastewater and stormwater systems that fully comply with the requirements of Chapter 66 (Code of Practice for Subdivision and Land Development, and in the case of wastewater is provided by a network utility operator),

and a requirement that the Council would restrict its discretion for *restricted discretionary* activities under Rule 5.13 Land Uses Not Complying with Conditions to:

> - the provision of services when the servicing requirements of Rule 5.37 are not complied with.

[14] In the course of the hearing, while still seeking a zoning of *Main Residential* in terms of the s85 application, Fore World refined its position. The revised proposal involved a staged approach involving three subzones:

- CHZ1 – extending 18m inland from the barrier edge line. Buildings and structures (with the exceptions noted in the District Plan) to be a *prohibited* activity.
- a *Coastal Yard* of 5m inland from the boundary of CHZ1. Buildings and structures to be a *controlled* activity if a beach renourishment scheme is in place and a *discretionary* activity if not.
- CHZ2 – extending inland to the Reinen-Hamill 2100 line (ie 26m from the barrier edge line[1]). Buildings and structures to be a *controlled* activity inland from the boundary of the Coastal Yard.
- the Council to be able to impose conditions on *controlled* activities in respect of:
  - confirmation that buildings are designed to be relocatable.
  - a requirement for buildings to be relocated when a defined trigger point is reached.
  - defining that trigger point.

The planning horizon

[15] Part of the relief sought in the appeal against the Chapter 62 provisions of the Proposed Plan is that the timeframes mentioned in the Plan should be reduced from 100 years to 20 and

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[1] Transcript p271, L 28-32

50 years. The shorter periods were said to be more consistent with international timeframes for CHZs. However we did not understand Fore World to be seriously advancing that at the hearing. Its coastal scientists were content to discuss issues within the framework of a possible 2100 erosion line. Given that the expected life of a house would almost certainly be more than 50 years, and that unless specifically limited land use consents have an indefinite life, 100 years is, we think, an appropriate period for considering coastal issues. There might even be an argument for it to be longer, but the uncertainties of attempting to predict coastal movement strain even a 100 year span. In *Bay of Plenty Regional Council v Western Bay of Plenty District Council* (A27/2002) and in *Skinner v Tauranga DC* (A163/2002) the Court regarded a 100 year period as *...sound...* in planning terms, having regard to the quality and scale of the development to be protected and the provisions of the NZCPS. We take the same view here.

Beach renourishment

[16] The coastal engineers and scientists generally agree that the stretch of foreshore from Ahuriri to Tangoio, of which Bay View forms part, was formed over thousands of years mostly from gravel and sediment being moved northwards from its source at the Tukituki River, in the southwestern corner of Hawke Bay. Something like 28,000m^3 of material comes from that river each year, with a relatively small additional contribution from erosion of the cliffs east of Clifton. However, the construction of the Port of Napier and its breakwater has interrupted the natural flow of this material around the promontory of Scinde Island, or Napier Hill. None of it now reaches the Ahuriri – Tangoio foreshore. The 1931 Hawkes Bay earthquake raised that stretch of foreshore by about 2m resulting in the mean sea level moving eastward about 20m. It took until the 1960s for that shoreline advance to be overcome but the lack of renourishing sediment and shingle allowed structure-threatening erosion to begin. The shoreline at Westshore, a few kilometres south of Bay View, began to retreat to the extent that the security of shorefront houses was a matter of concern. Longer term, there was concern about the railway line, SH 2 and even the east-west runway of the airport.

[17] The solution adopted by the Council in 1987 was to truck shingle from the beach immediately south of the Port, where it naturally stockpiles, to Westshore where it is dumped on the beach. The annual natural loss of material from Westshore has been calculated at about 9,000m^3 and, on average, about that amount is replaced by the renourishment programme. It has successfully halted the erosion.

[18] The cost of this programme is justified by the value of the existing housing and infrastructure which would be in jeopardy if erosion was not checked. Even so, at least one coastal engineer, Mr Smith, suggested that long term, the cost/benefit analysis might swing towards letting the housing and infrastructure go and replacing it in a safer location. He described this as a *managed retreat*. This is an option identified in the New Zealand Coastal Policy Statement:

> Policy 3.4.6
>
> Where existing subdivision, use or development is threatened by a coastal hazard, coastal protection works should be permitted only where they are the best practicable option for the future. The abandonment or relocation of existing structures should be considered among the options. Where coastal protection works are the best practicable option, they should be located and designed so as to avoid adverse environmental effects to the extent practicable.

It is to be noted that Policy 3.4.6 relates to existing development. Other Policies, to be mentioned later, relate to new proposals.

[19] The coastal experts do not agree about the effect on the Bay View shoreline of the Westshore renourishment. Dr Gibb for instance does not believe there is any evidence that material lost from Westshore moves as far north as Gill Road, the most southern of the Fore World sites. Mr Reinen-Hamill says that there is no clear evidence either way but is inclined to agree with Dr Gibb. Messrs Smith, Oldman and Koutsos think that the Westshore material does provide some benefit to Bay View. We return to this issue at para [83].

[20] As what is described as a *failsafe* mechanism, Fore World proposes a contractual arrangement along the lines of an apartment building Body Corporate to oblige section owners in the proposed subdivisions to pay, in perpetuity, for a beach renourishment scheme should one become necessary. Dr Mead calculates that if Dr Gibb's estimates of erosion volumes at Bay View prove correct then as a *worst case* about 2,000m^3 of material would be required each year to protect about 1.8km of shoreline. The estimated cost of that in 2006 dollars would be, he says, of the order of $40,000pa, to be divided between approximately 100 households. We accept that such an arrangement is possible. But we also share the doubts about its practical enforceability in the longer term if expense escalates and individuals, or the whole group of owners for that matter, begin to take the view that it is too burdensome and that the Council should *do something*.

[21] According to Ms Allan, her experience in other matters indicates that there is a question mark over the future availability of shingle in Hawkes Bay. For reasons presently unknown the volumes of shingle building up on the beach south of the Port seem to be less than before. There is uncertainty also about the capacity of rivers to meet future demand. She cites the recent example of an extraction consent held by Winstone Aggregates for the removal of shingle at Awatoto being reduced in volume from 50,000m^3 to 30,000m^3 per annum. In July 2005 Fore World entered into an agreement in principle with Holcim (New Zealand) Ltd for the supply and delivery of shingle to Bay View if required for beach renourishment. But we do note that it can be terminated by either party on one month's notice.

[22] No Assessment of Environmental Effects has been done for such a proposal. Part of the relief sought is an amendment to Rule 62.8 to make coastal protection works in the Council owned and administered foreshore reserve a permitted activity. In the absence of a Rule change its planning status under the District Plan is uncertain. However if the placement of renourishment material extends below mean high water springs (MHWS) a resource consent for a Coastal Plan activity would be required from the Regional Council. Obviously, there is no guarantee that a consent would be forthcoming.

[23] The provision of renourishment material, although it may be described as *soft engineering*, is still a hazard protection work. Dr Mead acknowledged that. As such, the proposal for it needs to be considered in the light of NZCPS Policy 3.4.5:

> New subdivision, use and development should be so located and designed that the need for hazard protection works is avoided.

[24] The uncertainty of its consent status, the question mark over the availability of material, doubt about the long term durability of the obligation of future owners, and its inconsistency with the NZCPS, combine to mean that we do not derive great comfort from this suggestion as a means of mitigating potential adverse effects. The proposal has certainly not been developed to anywhere near the point where we would consider modifying the planning controls to provide for it as a permitted or controlled activity.

Relocatable buildings

[25] The possibility of providing mitigation by requiring houses to be relocatable, should there be greater than expected erosion during the planning period, featured in Fore World's submissions and evidence. As mentioned in para [14] the suggestion is that the Plan be amended to enable the Council to impose a condition that any building in CHZ2 be designed to be relocatable. If a multi-storey hotel can be relocated along the Wellington waterfront, moving pretty much any house should not be an impossible challenge: - we accept the technical feasibility of the suggestion. And we accept that Mr Vernon Warren, Fore World's consultant planner might be right in saying that, thinking as an accountant might, the loss of the value of the land can be rationalised if you have *amortised* that value over the period of occupation. We doubt that most home-owners would think that way. And we share the doubts of Mr Reinen-Hamill, Mr Gavin Ide, the Regional Council's Planner, and Ms Allan about the practicability of the concept of requiring, probably more or less simultaneously, the relocation of possibly scores of houses. Among the doubts they raised were the issues of finding sufficient suitable and affordable land, possible issues over consents (relocated houses being not universally welcome in newer subdivisions), social expectations and impacts, and the sheer costs and difficulty of relocating. All of those matters would be likely, we agree, to make the possibility fraught with problems and, again, place the Council under enormous pressure to *do something*. In all, we think the suggestion will raise more issues than it would solve, and we do not need to pursue it, particularly when we consider that a single line demarcating an acceptable level of risk can be established.

Graduated Hazard Zones.

[26] We do not favour this concept either. We realise that it has been used in other situations: eg *Skinner v Tauranga District Council* (A163/02). But here we think the difficulties of application and enforcement of three lines within a relatively small overall width of land adds an unnecessary complexity when, as we shall review shortly, the evidence allows us to fix one point at which the level of risk is acceptable. The inconsistency between such a regime, and that applying on land adjacent to these sites, is another reason to avoid it.

Should there be a Coastal Hazard Zone at all?

[27] Fore World sought, as the primary relief in its Notices of Appeal, the complete removal of the CHZ from the Gill Road and Franklin Road land. It did not pursue that stance at the hearing and we are sure, both factually and having regard to the Council's obligations under

the Act (eg ss31, 74, 76 etc) that it was right not to do so. In particular, once a risk is identified as a matter of fact, these provisions of the NZCPS effectively require the creation of some cautionary or protective mechanism:

> Policy 3.4.1
>
> Local authority policy statements and plans should identify areas in the coastal environment where natural hazards exist.
>
> Policy 3.4.2
>
> Policy statements and plans should recognise the possibility of a rise in sea level, and should identify areas which would as a consequence be subject to erosion or inundation. Natural systems which are a natural defence to erosion and/or inundation should be identified and their integrity protected.
>
> Policy 3.4.3
>
> The ability of natural features such as beaches, sand dunes, mangroves, wetlands and barrier islands, to protect subdivision, use, or development should be recognised and maintained, and where appropriate, steps should be required to enhance that ability.
>
> Policy 3.4.4
>
> In relation to future subdivision, use and development, policy statements and plans should recognise that some natural features may migrate inland as the result of dynamic coastal processes (including sea level rise).

[28] At the hearing, Fore World advocated the adoption of what was referred to as the NIWA line, which we shall discuss in more detail shortly. Of the different lines put forward by the various witnesses, that is the most seaward. So the issue we must attempt to resolve is not whether there should be a CHZ on this shoreline at all but rather, what should be its extent.

What should be the extent of the Coastal Hazard Zone?

[29] In essence, this issue requires the assessment of the likelihood of the coastline eroding to any given point over the selected time horizon, and the likely consequences of that erosion if it does occur. See *Francks v Canterbury Regional Council* (High Court Christchurch, CIV2003-485-1131, Panckhurst J, 10 June 2005 para [16]). That leads us directly to the so-called precautionary principle.

The precautionary principle

[30] We can begin by reciting part of the extended definition of *effect* in s3 RMA: …

> (d) Any cumulative effect which arises over time or in combination with other effects—

regardless of the scale, intensity, duration, or frequency of the effect, and also includes—

(e) Any potential effect of high probability; and

(f) Any potential effect of low probability which has a high potential impact

It is (f) that has particular resonance here. It means that the RMA has an inbuilt requirement to have regard to potentially high impacts, even if they might be of low probability. That is of course a requirement to be cautious: - to take precautions. The references in the (s5) purpose of the RMA to...*sustaining the potential of natural and physical resources...to meet the reasonably foreseeable needs of future generations* and to ...*safeguarding the life-supporting capacity of air, water, soil and ecosystems*...have precaution inherent in them. The point is reinforced in the coastal context by this provision of the NZCPS:

Policy 3.3.1

Because there is a relative lack of understanding about coastal processes and the effects of activities on coastal processes, a precautionary approach should be adopted towards proposed activities, particularly those whose effects are as yet unknown or little understood. The provisions of the Act which authorise the classification of activities into those that are permitted, controlled, discretionary, non-complying or prohibited allow for that approach.

[31] The kind and degree of precaution to be taken depends on the level of knowledge of the risk, its likelihood of occurrence, and its consequences. We do not live in a risk-free world and the RMA does not require the avoidance of all risk. The Court in *Rotorua Bore Users Association Inc v Bay of Plenty RC* (A138/98) said this:

The underlying rationale for the approach [ie the precautionary principle] stems from the need for decision-makers actually to make decisions. It is not dependent, as some may think, on a proposition that one should be inherently conservative in assessing actual and potential effects. As Gallen J said in *Greenpeace New Zealand Inc v Minister of Fisheries* (High Court Wellington, 27 November 1995, CP 492/93)at p 32:

The fact that a dispute exists as to the basic material upon which the decision must rest does not mean that necessarily the most conservative approach must be adopted. The obligation is to consider the material and decide on the weight which can be given to it with such care as the situation requires... . At the same time I note, as counsel did, that in the end this is a weighting and not a decisive factor.

[32] We adopt that approach. There is no doubt that if the *worst case* scenario came to pass and there was severe and swift erosion along this stretch of foreshore, the endangerment of perhaps 100 homes would be regarded as a ...*high*...*impact* on the relevant environment, even

if there is unlikely to be direct threat to life and limb. In acknowledging the precautionary principle inherent in the RMA, the issue here is whether present knowledge enables us to define a CHZ and, in terms of Policy 3.3.1, set the status of activities within and close to it, so as to reduce the risk of that high potential impact actually occurring to such a level of probability that it is, having regard also to the other actual and potential effects, acceptable. As a Court, we have to assess the evidence placed before us to decide whether we can sensibly do that. We think that is possible in this case.

The evidence about the Coastal Hazard Zone

[33] The Fore World properties extend along the shore at Bay View north of Napier and sit astride the gravel barrier formed by the littoral drift, mostly northerly, earthquake uplift and the coastal processes of this section of Hawkes Bay. The material forming the barrier has been supplied mainly from the inland greywacke ranges and brought down by the rivers discharging into the sea. The gravel shore extends from Clifton in the south to Tangoio in the north. It is a feature that is superimposed on the marine sediment of the area and has been built up over some 4-6000 years. It attaches to Scinde Island or Napier Hill. Pania Reef lies offshore from the coast at Westshore but we were not told what effect that might have on the coastal processes. In the past, before uplift, the gravel deposits behaved as a barrier coast which would have been overtopped and rolled back periodically by storms from the sea.

[34] Two relatively recent changes to the shoreline processes have occurred. Construction of the port between 1876 and 1890 involved the construction of a breakwater that interrupted the passage of gravel up the coast and the 1931 earthquake raised the land at Bay View by some 2 metres, causing the beach to move some 20m seaward. The raised barrier was then high enough to prevent overtopping by the sea and is now sometimes referred to as a low coastal bluff. Drainage landward of the barrier was also altered and the Tutaekuri River adopted a new outlet south of Napier with a consequent further reduction in sediment to the barrier in the vicinity of the site.

[35] Dr Jeremy Gibb is an experienced consultant on coastal processes and he has advised the City Council on the coastal erosion hazard in the Bay View stretch of the coastline north of Napier City. His recommendations have led to the City Council declaring a CHZ that lies over a substantial part of Fore World's properties, so preventing building within that zone. Fore World in appealing the provisions has sought alternative expert coastal erosion advice

from NIWA (Mr John Oldman and Mr Ronald Smith) and the Regional Council as well has obtained expert advice on coastal stability from Tonkin and Taylor (Mr Richard Reinen-Hamill). In addition both the City Council and Fore World sought peer reviews of Dr Gibb's recommendations from overseas coastal experts. So, we have the benefit of the views of 6 experts on the stability of the Bay View coast. For convenience, we list those expert witnesses with their qualifications and positions, in Appendix 1. We include a 7th coastal scientist in the Appendix; Dr Shaw Mead. Dr Mead's evidence focussed on possible beach renourishment at Bay View, if required. He did not express a personal view about stability and was content to adopt Mr Smith's estimates.

[36] The local experts do not agree on an acceptable line delineating the hazard zone. Dr Gibb identifies an area considerably larger than the Regional Council's expert, Mr Reinen-Hamill, and both areas are larger than that recommended by the experts for Fore World. Moreover the two peer reviewers consider Dr Gibb's area in the opinion of one, too large, and in the opinion of the other, far too small. A joint statement by the experts (except for Dr Peter Cowell who was not available for the exercise) was supplied to the Court identifying the few areas of agreement and giving the broad areas of disagreement. It has therefore been necessary for us to examine each of the experts' views and reach a conclusion on the most likely threat from coastal erosion at this site.

[37] It is probably helpful to identify the components that combine to make a coast stable, eroding or accreting, partly so that we can examine each and partly because it seemed that the experts were agreed on the component parts. Variation in the position of the coast is caused by short-term fluctuations, by long-term advance or retreat of the barrier at the back of the beach and by changes in sea level. A *safety factor* may be added to the prediction and a further allowance to keep buildings further back is suggested to allow for foundation stability.

Short-term Fluctuations

[38] Short-term fluctuations are caused by the general variability of the weather with a mix of storms and calm or less stormy periods but not including extreme events or long-term trends. There seemed to be agreement that the effects of these short-term fluctuations are reflected in the active beach zone with the regular movement of sand and shingle and the absence of vegetation. At the site the width of this zone is about 40m from MHWS to the

edge of the vegetation or toe of the barrier scarp. The experts agree that the short-term fluctuation at a level a little above the MHWS is about 12m.

[39] Changes in the active beach profile have been measured periodically using cross-sections and the results are presented often as changes in the beach volume measured above a datum. That seems to be a convenient way of tracking changes in the beach from time to time. Generally they would be short-term fluctuations as they refer just to the active beach but they would provide an indication of any long-term accretion of the beach since that material would pile up against the barrier and the volume would grow. A trend of reducing volume may signal an up and coming attack on the barrier and provide early warning of long-term erosion.

Long-term Trend

[40] Long-term trends are described by the long-term changes in position of the barrier scarp at the back of the beach. This location was variously referred to as the barrier edge, the edge of the vegetation or the toe of the barrier. We will adopt this reference position as the toe of the barrier scarp. Dr Gibb uses the MHWS line as his reference point for his estimate of the overall width of the hazard zone but used the toe of the barrier scarp to estimate long-term trends. After some debate in cross examination the experts appeared to agree that the toe of the barrier scarp is well enough defined to be a suitable reference point for determining long-term trends and also for measuring the distance inland to the edge of a hazard zone. Assessment of the long-term trend is a key and dominant factor in the prediction of the future position of the coast, particularly if it is eroding.

[41] There was no agreement between the experts on the long-term trend.

[42] Dr Gibb considers there is evidence of a consistent erosional trend at the site. He estimates that for the southern portion of the site the long-term erosion rate is 0.3m/yr and for the northern portion 0.15m/yr. Over a 100 yr period coastal retreat would amount to some $30m^2$. Mr Reinen-Hamill adopted a long-term erosion rate of 0.05m/yr or 5m over 100 years[3]. Mr Smith considered that a ... *100 year return period storm event will most likely cause*

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[2] Gibb EIC Table E-2 and Reinen-Hamill EIC paragraph 37.

[3] Reinen-Hamill EIC attachment C and paragraph 37.

short-term erosion of up to 10-12m from the beach face but will not reach the base of the upper scarp...[4]. He is of the view that long-term the beach is very slowly accreting[5], and that the proposed *...sub-division is unlikely to be endangered by coastal hazards over the next 100 years provided structures are located landward of the coastal erosion hazard zone proposed by... Mr Oldman.*[6] Mr Oldman's coastal erosion hazard zone extends 15m landward from the vegetation line[7], later described as the barrier edge[8]. We take the references to *...the base of the upper scarp*...and the...*barrier edge*...to be to what we refer to as the toe of the barrier scarp.

[43] Fore World asked Dr Robert Young, whose primary focus of research over the last 20 years has been applied coastal processes, to peer review Dr Gibb's recommendations. Dr Young observes that the barrier crest is 7m above MHWS and not overtopped by waves. It is fronted by a wide robust beach without visible indicators of erosion or shoreline retreat. He records that all indicators point to stability[9].

[44] The City Council also sought a peer review of Dr Gibb's recommendations. It chose Dr Cowell. Mr Smith's, Mr Oldman's and Mr Reinen-Hamill's conclusions were also included in his review. He considers that all of the estimates of erosion underestimate the recognised factors and, although underestimating the threat, Dr Gibb has used the available data to best assess the coastal hazard[10].

[45] The evidence of the beach position over the years consists of cross-sections of the beach and a series of aerial photographs.

[46] Two main series of cross-sections are available – the Railway series from 1916 to 1961 and the Hawkes Bay series from 1974 to the present. Additional cross-sections for specific purposes have been surveyed in more recent times and where relevant the experts have used

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[4] Smith EIC paragraph 63.

[5] Smith EIC paragraph 57.

[6] Smith EIC paragraphs 64.

[7] Oldman EIC paragraph 58.

[8] Oldman supplementary statement paragraph 10.

[9] Young EIC paragraph 23.

[10] Cowell EIC paragraph 37.

this information as well. Some of the locations of the cross-sections in each of the main series apparently do not quite coincide so while their shapes can be compared it is not always accurate to combine the records to show changes in beach volume over time. Interpretation of the cross-sections or beach profiles have been complicated by the uplift of the earthquake, the paucity of measured points on the active beach profile in the older surveys and some possible variability in the actual line of each profile survey. There did not seem to be dispute about the accuracy of the surveys themselves.

[47] The aerial photographs permit stereoscopic viewing and the location of the toe of the barrier scarp or the edge of the vegetation. In order to compare old and new aerial photographs with sufficient accuracy the photographs have to be ortho-rectified by locating precisely some known positions in the photograph and then adjusting the whole photograph to be true to the known positions. Some adjustments made in this manner can be of a magnitude similar to changes identified as indicating trend changes over time.

[48] Much of the argument we heard was about the accuracy of deductions from both the beach profile cross-sections and from the aerial photographs and about whether changes identified were short term or long term ones.

[49] From the aerial photographs Dr Gibb measured the position of the toe of the barrier scarp over the length of the site for the periods 1936 to 1962 and from 1962 to 2001[11]. He reported a slight erosional trend was evident at the southern end of the site during the first period, but over the rest of the site the toe of the barrier scarp remained stable or slightly accreting. Overall he considered the trend to be stable in this period of 26 years. It was also the period of readjustment following the earthquake. During the later period of 39 years Dr Gibb measured from the aerial photographs a trend that has been erosional over most of the site's frontage at a rate of 0.28m/yr with an uncertainty of $\pm$ 0.10.

[50] From 10 years of recent survey at 6 profiles in the vicinity of the site Dr Gibb has estimated a loss in beach volume that he considers is consistent with the retreat he observes in the toe of the barrier scarp in the aerial photographs[12].

[11] Gibb EIC figure 7.
[12] Gibb EIC paragraph 70.

[51] Mr Reinen-Hamill considered the coast to be mildly erosional with a long-term erosion of 5m in 100 years. He based this on his examination of the beach profiles at the site and to the north and south of the site. He said:

> The long-term record at profile HB15 *(a beach profile cross-section some 2385m south of the southern end of the site and towards Westshore)* shows a trend of erosion, with significant erosion from 1984 to 1986. Since 1986 the beach profile has recovered, but still shows a long-term erosion trend of around 0.12m/year based on the data set from 1916 to 2002. HB16 *(a beach profile cross-section some 765m south of the southern end of the site)* shows accretion since the 1970s. However, since 1987 the rate of accretion has reduced significantly. All of the more recent data sets to the north (HB17 to HB20) show shoreline retreat at the MHWS.[13]

[52] In respect of the profile at HB16 he observed that over the period from 1937 to 2002 the toe of the barrier scarp had receded 3m or equivalent to a rate of 0.046m/yr, a rate very similar to his overall assessment of 5m in 100 years[14]. Mr Reinen-Hamill did agree with Mr Cavanagh in cross-examination[15] that at the MHWS level the profile at HB16 over a period of 27 years did show accretion at 0.9m/yr but he considered that to be the fluctuating nature of the active beach and in other periods the profile shows erosion.

[53] In response to a question from Mr Milne, Mr Reinen-Hamill said it was important to consider the *big picture* when examining coastal processes. In this case he said:

> What we have here is very clearly a coastline with very little natural sediment inputs closely effectively to zero, I believe, for the length of the coast, and processes that reduce the volume of sediment including, as Mr Smith also noted, some leakage to the north and abrasion. So given that setting, I believe we were looking at a coast with marginal stability, based on sediment supply and geo-indicators.[16]

[54] Mr Smith on the other hand considers the coast at the site to be mildly accreting or at least stable. He is a geographer who has studied and has had ongoing first hand experience of the nature of this coast over the period from 1968 to the present. He considers the aerial

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[13] Reinen-Hamill EIC paragraph 45.

[14] Reinen-Hamill Rebuttal paragraph 4.

[15] Cavanagh XX Reinen-Hamill transcript p 258 line 35.

[16] Milne X Reinen-Hamill transcript p238 lines 27-33.

photographs are of limited accuracy and he prefers to use the historic and recent beach profile data to evaluate any long-term trend. Those data show, he says, that the barrier crest at the site has been in the same position since the earthquake. He said he had not observed any erosion of the barrier crest in the 38 years he has been visiting that coast. Processes on this part of the coast are complicated because he said the earthquake uplifted the barrier crest to beyond the reach of the sea, and gravel, eroded from the Westshore beach to the south, built a new beach against the raised barrier with the result of a presently stable to accreting shore at the site.

[55] The reduced remains of an old shipwreck, the *Fanny,* currently buried above MHWS in front of Gill Road, is in the same position as it was in 1956 and that gives Mr Smith further confidence that the coast at this site is at least stable.

[56] He says that *...the Bay View coast between Fannin Street and Franklin Road has been quite stable over the last 68 years.*[17] A recent profile cross-section at the Mer Place subdivision just on the southern boundary of the site has shown some retreat of the barrier crest between 1995 and 2001, but he attributes that to vehicular activity there.

[57] Mr Smith responded to Dr Gibb's view that over the last 10 years the beach volume at Bay View (i.e. the volume of gravel and sand in the active beach zone above a datum) showed a loss of some 10,000m^3 per year would mean erosion at Bay View on the scale occurring at Westshore. He said that has not been observed and that it would be obvious if it occurred.

[58] In cross examination Mr Lawson asked Mr Smith about his conclusions in a 1993 NIWA report he authored, that a zero sediment transport coastline north of Napier would naturally adopt a position landward of the present coast over the stretch from Westshore to north of the Esk River including the present site. That is, that the present coast at the site would retreat and part of the airport would be threatened. Mr Smith agreed that was his prediction in that report but that it was only likely in several hundred years, not the time frame of 100 years we are dealing with in this case, and if no protection works or sediment

[17] Smith Rebuttal paragraph 5 lines 21,22.

renourishment activities were undertaken. Mr Smith agreed that *...in the very, very, very long term it will eventually erode.*[18]

[59] In his rebuttal evidence Mr Smith introduced 10 beach profile cross-sections located along the frontage of the site that had been surveyed in 1937, 1961 and 2006. Mr Lawson cross-examined Mr Smith extensively about the interpretation of those records. It was established that any erosion of the barrier scarp that showed up on the cross-sections would be significant when considering any long-term trend because there was no natural mechanism for the barrier scarp to be reinstated as it was above the level able to be reached by even storm waves. However changes in the active beach profile were less informative about any trend since the beach changed regularly, although Mr Smith explained that a convex profile signified a beach with plenty of sand and gravel while a concave profile showed a lack of material.

[60] On three of those cross-sections describing 600m of coast at the site Mr Smith agreed there had been erosion of the barrier scarp with a 6–7m retreat being apparent at one of them[19]. This conformed to the cross-section produced by Mr Andrew Taylor, a surveyor called by the City Council. Mr Lawson suggested that with this evidence Mr Smith's assumption that the beach was accreting was not supported. Mr Smith replied:

> No, the beach is stable. The barrier crest has obviously retreated. The cause of the retreat we do not know, in that small area. ...The data says there has been some small retreat there. Now the work of Dr Young says the same thing, where he has done his photographic analysis. That the at least the vegetation line has retreated at that point. And the photograph data agrees with the survey data, and therefore I would think the best you could say about that whole section of coast, because we are not just looking at just one little piece, we are looking at the full section, it is stable. If we want to isolate out one little section, then yes, I will say there has been erosion of the upper foreshore and a piece taken out of the crest[20].

[61] Three further beach profile cross-sections were also produced by Mr Smith in his rebuttal statement. They were referred to as A, B, and C and were located at Mer Place at the southern end of the site. The cross-sections had been surveyed in March 1995, February 2001,

[18] Transcript page 119 line 49.
[19] Transcript page 128 lines 6-9, page 129 line 40.
[20] Transcript page 129 lines 24-29.

March 2004 and December 2005. Mr Lawson pointed out to Mr Smith that retreat of the scarp was again evident but Mr Smith said:

> I can't eliminate erosion, and I can't eliminate human intervention. The key places where you have mentioned there is some retreat of the scarp are both possibly areas where wave action could get there, but more importantly they are also the same places where humans access the beach and have done historically[21].

[62] Clearly Mr Smith acknowledges some localized retreat of the barrier scarp, attributing some of that to human activity, but remains of the view that overall the coast in the vicinity of the site is stable. In the very long term he agrees the tendency of the zero sediment transport coast will be to move inland. We assess that the localized retreat of the barrier scarp of 6-7m during the period of 1961 to 2006 amounts to 0.14m/yr.

[63] Mr Oldman, a NIWA scientist with qualifications in physics and mathematics, reviewed Dr Gibb's estimates of the coastal erosion hazard zone and made an estimate of his own based on Mr Smith's opinion that the long-term trend is stable.

[64] As mentioned, the City Council decided to obtain a peer review of the various estimates of the CHZ. Dr Gibb arranged that with Dr Cowell. He provided a comprehensive 84 page technical review. He found that the CMC (Gibb) and Tonkin and Taylor (Reinen-Hamill) estimates included most of the elements required to define the hazard zone but that they were all substantially underestimated. He considered the NIWA (Smith and Oldman) estimate to be too narrow to be credible. He viewed the 1962 ortho-rectified aerial photographs that Dr Gibb relied upon and confirmed he was satisfied that the barrier scarp was identified correctly, a point that had been challenged by Dr Young. Dr Cowell considers that a further 50m should be added to Dr Gibb's erosion hazard line[22].

[65] For Fore World, Dr Young reviewed Dr Gibb's work. He was particularly critical of the use of the coastal erosion hazard formula that the other experts used although he agreed that the main elements of coastal erosion were represented in it. He considered that it was not possible to make adequate estimates of the individual parameters let alone assess their

[21] Transcript page 137 lines 40-44.
[22] Transcript page 376 line 48.

accuracy. Much of the range of Dr Gibb's estimates stems in his view from the inability to define the parameters in the formula accurately or consistently. He considered that examination of the past movements in the coast and a consensus of experts was the best way of assessing the extent of likely coastal erosion and he agreed that movement of the barrier scarp was the key consideration. That may be an idealist's approach, but it was not lost on us that here we had 6 experts considering the same information, with a notable absence of consensus.

[66] Dr Young concluded that the site was basically stable, although he did agree that there appeared from his examination of the aerial photographs to have been retreat of the vegetation line on the northern part of the coast[23]. He considered that a set back of development on the Fore World property from the bluff or vegetation line of 10–20m would be reasonable[24]. He thought that Dr Gibb had overestimated changes in the position of the barrier scarp from the aerial photographs possibly because of a misinterpretation of that feature in the 1962 series of photographs. We apprehend also that the scale of the photographs also may have affected the accuracy of their interpretation. Both Dr Gibb and Dr Young maintained their views on this matter and we have not found it possible to resolve that issue because the evidence of the aerial photographs was not provided.

[67] Mr Smith and Mr Oldman consider in the long term that the barrier scarp is stable and will remain so although in one instance erosion of the barrier scarp of 6-7m is acknowledged. If that rate of erosion were projected into the future it would indicate 14m of erosion in 100 years. Mr Reinen-Hamill considers the coast marginally stable and recommends an allowance of 5m of erosion over the 100 year period again measured from the toe of the barrier scarp. Dr Gibb considers the trend is erosional and estimates long-term erosion over 100 years will be 30m, again measured from the toe of the barrier scarp. Dr Young considers the coast is basically stable but recommends a hazard zone of 10-20m. Dr Cowell considers 30m is too little.

[68] Assessing the long-term trend of the position of the coast from historical data is a key step in predicting the likely future position of the coast. Variability of the beach position is

[23] Transcript page 203 lines 37–41.
[24] Young EIC paragraph 24.

high within the active beach zone with profiles showing substantial movement. At the toe of the barrier scarp or vegetation edge the variability is much less. We conclude that the toe of the barrier scarp is a satisfactory position from which to assess past trends and from which to estimate the likely future position of the coast.

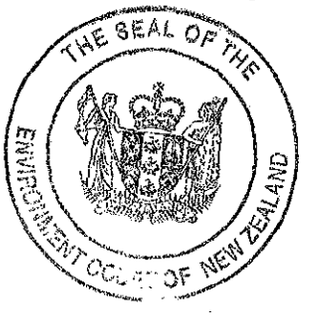
[69] We accept that, overall, this coast is retreating in the very long term under a zero sediment transport condition. The reduced sediment supply resulting from port works and the earthquake uplift also point to an erosional trend. On the other hand renourishment at Westshore, while not yet, may in the longer term, if continued, help to overcome an erosional trend. While we accept that the coast is not rapidly eroding, and for a substantial period may be stable, we are of the view that some erosion of the barrier scarp indicates in the long term some erosion is likely and it is prudent to avoid development in the erosion prone area.

[70] We are also of the view that if future long-term rates of erosion were to be as high as 0.3m/yr, reflecting that of the past, then more significant changes to the historical beach profile cross-sections over the last 45 years would have been evident particularly in the position of the barrier scarp.

[71] Because the barrier scarp has been elevated by the earthquake above the level reached by wave action any erosion of the barrier scarp in the past and in the future is permanent, is not camouflaged by subsequent accretion and records any long-term erosion of the coast. Based on the evidence of measured barrier scarp erosion we are of the view that the long-term trend of the position of the barrier scarp at the site is likely to place the feature in 100 years time about 14m landward of the present barrier scarp position. Based on all the evidence we have heard that is our assessment of the estimate of the likely long-term portion of future coastal movement at the site.

Sea Level Change Effects

[72] Sea level is predicted to rise in the future, perhaps at a rate greater than over recent times. That process results in the wave action occurring at a higher elevation on the shore and so causing some retreat of the shore.



[73] Dr Gibb assessed sea level rise at the site as 2mm/yr[25]. This result was based on the global estimates by the Intergovernmental Panel on Climate Change (IPCC) dated 2001 of 3.64mm/yr less the local relative sea level rise of 1.73mm/yr[26]. Mr Reinen-Hamill refers to an historic sea level rise of 1.7mm/yr,[27] and a future increase in sea level by 2060 of 0.2m and by 2100 of 0.5m[28]. Mr Oldman adopted a rate of sea level rise of 3.2mm/yr stemming from using the upper level of the most likely prediction from the IPCC report 2001[29].

[74] We accept Dr Gibb's assessment as a reasonably based estimate of sea level rise.

[75] Then comes the more disputed step of converting that estimate into shoreline retreat. A formula, referred to as the *Bruun Rule*, was used by some and criticized by others on the basis that it was developed for sand shores and not gravel ones. In practice the formula is merely the result of assuming that as the shore retreats under increasing sea level it reforms at a slope similar to the original one but to landward of it. For our purposes that seems a reasonable assumption. On sandy shores with a low cross-sectional slope sea level rise will cause a greater excursion inland than on gravel shores with a steep slope. Dr Gibb assessed the retreat by 2100 at 2.7m and rounded that to 3m, Mr Oldman 2.1m and Mr Reinen-Hamill at 10.3m, the latter result due largely to adopting a significantly shallower sloping beach. Dr Gibb explained he adopted a seaward limit to the beach where the slope and material changed to become the reasonably flat seabed. That satisfies us too and so we adopt Dr Gibb's estimate of 3m for likely future shoreline retreat due to projected sea level rise.

Safety Factor

[76] The so-called safety factor incorporated into locating the extent of the CHZ is contentious. Dr Gibb has added a safety factor of 17-20m to the sum of the other factors considered in estimating the extent of the coastal erosion hazard. Mr Oldman included just 0.7m relating to the sea level rise estimate but he added the 12m of short-term fluctuations in the active beach to his estimate of erosion landward of the barrier scarp. Mr Reinen-Hamill said he had included an allowance for a safety factor in his estimates of sea level rise effects

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[25] Gibb-EIC Table E-2.

[26] Gibb-report 2002 table 9.

[27] Reinen-Hamill Rebuttal paragraph17.

[28] Reinen-Hamill 2002 Report page 48.

[29] Oldman EIC paragraph 54.

and by adding the short-term fluctuations of 10.8m to his estimate of erosion landward of the barrier scarp.

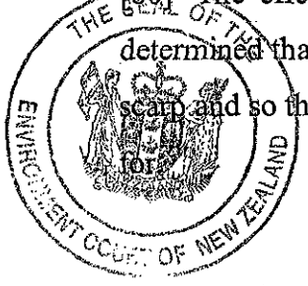
[77] The approach used to assess this safety factor has been to estimate the uncertainty in each of the factors of erosion, or their constituents, and then to add them up using the recognised mathematical process of the square root of the sum of the squares of the uncertainties. Dr Young criticizes this approach as being unscientific since the uncertainties are little better than a guess and do not have a foundation that is reproducible and transparent.

[78] That approach may be appropriate to give some idea of the range of certainty of the total estimate of erosion if the uncertainty of each variable can be rationally assessed. For example we have adopted the most likely amount of long-term erosion over the next 100 years is 14m based on measured retreat of the barrier scarp in the past. There is no rational way of assessing how accurate that future prediction is. It depends not only on the accuracy of the survey, which we are told is good, but also on the repetition of the past into the future and that is an assumption. The reality is that the estimated extent of future erosion is simply the most likely outcome based on the evidence. Consequently we are not convinced that the approach used is helpful and in any event the result is not a factor of safety; it is some sort of estimate of uncertainty. We consider that having made estimates of the most likely value of the principal contributors to the coastal erosion, it would be better to simply add a buffer if some allowance for unknown or unmeasured factors is to be made.

Other Factors

[79] Some of the changes in the beach profile cross-sections and in the volume of beach material indicated by those measurements showed some correlation to the Interdecadal Pacific Oscillation (IPO). The negative phase 1947-1976 was a storm-dominated period and coincided with erosion of the active beach while during the positive phase 1976-1998 accretion of the beach occurred. At present the IPO is negative with 14-24 years to run and Dr Gibb predicts a period of beach erosion.

[80] The effects of this phenomenon are reflected in the active beach profile. We have determined that the coastal erosion hazard zone should be measured from the toe of the barrier scarp and so these fluctuations in the active beach zone do not need to be separately accounted



[81] There are other *climate change* factors that may be relevant. Sea level rise has been accounted for but increased storminess, if in fact that is a future threat, might be reason to consider a buffer additional to our assessment of coastal erosion.

[82] Reference was made in evidence that an allowance should be made for the foundation requirements of any buildings next to the edge of the designated coastal erosion hazard zone. For instance if there was an erosion scarp formed at the edge of the hazard zone then buildings ought to be kept back from that feature. We are of the view that is a structural matter and better considered in the building permit process.

[83] As discussed in paras [16] to [18] significant erosion has been experienced at Westshore, well south of the site, and renourishment of the gravels is being pursued there to alleviate the erosion. As there is a northerly sediment flow along the beach a possibility was that some residual benefit might be being felt at Bay View, so hiding any erosion tendency. Dr Gibb considers any effect has not so far extended north of Snapper Park Motor Camp, which is south of the site, and in the absence of empirical evidence to the contrary we accept that, for present purposes.

Overall assessment

[84] The process of erosion on the coast, if it occurs, will be episodic and incremental. It will not reach its full extent suddenly. Opportunity therefore exists for measures to be taken if the erosion becomes worse than predicted. It is not a situation where it is necessary to be overly cautious but it would be prudent to provide for a buffer in addition to the estimated extent of the coastal erosion to make some allowance for the factors that have not been estimated and included in the hazard zone. That buffer should be of the order of 25% of the sum of the estimated distance.

[85] Mr Reinen-Hamill included the short-term fluctuations, as agreed by the expert witnesses, of 12m in the active beach into an assessment of any retreat of the barrier scarp. The ground proffered was that some effect from short-term active beach fluctuations could manifest itself in movement of the barrier scarp and so it was conservative to include it. Dr Gibb did not advocate that. We think if any allowance for these short-term fluctuations in the active beach was to be made then it seems the smaller fluctuations experienced higher up the

active beach profile would be the more logical. But we do not see the need to include short-term fluctuations in the active beach because any resulting movement in the barrier scarp would be measured by the position of the barrier scarp itself.

[86] The primary elements of erosion – long term trends and sea level rise – have been assessed. There are other factors– such as climate change and the general settlement mentioned in the evidence – which might contribute but which are almost impossible to empirically assess. How much allowance should be made for them cumulatively is a matter of judgement. In our view a buffer allowance of 25% is within the appropriate range. Consequently, on the evidence we have heard, we estimate that the most likely position of the toe of the barrier scarp, landward from the existing surveyed toe, after a period of 100 years is given by the sum of long-term erosion of 14m; allowance for sea level rise of 3m; the distance to the top of the scarp from the toe of 2m, and a buffer of 25% being 4.75m, all measurements being horizontal.

[87] We conclude that a CHZ should be identified at the site and that it should extend landward from the surveyed toe of the existing barrier scarp a distance of 24m.

Section 32 RMA

[88] The provisions of s32 are relevant to the two appeals. We record that over the course of 9 days of hearing we received exhaustive analysis of possible alternative methods and the costs and benefits of various permutations of controls which might be appropriate. An assessment of what might be appropriate to best achieve the purpose of the RMA requires an evaluation of that material. We have outlined our evaluation process and the factors that have lead us to the conclusions reached. We have focussed on the substantive merits of the Plan provisions, and also note that there was nothing in the way in which the Council dealt with its responsibilities under the law as it stood at the time which has been influential in any way: - see *Kirkland v Dunedin CC* [2001] 12 NZRMA 529.

Proposed District Plan - Coastal hazard area policy and rules – Chapter 62

[89] Appeal RMA 674/02 particularly relates to Chapter 62 provisions. It creates the CHZ area, which works as an overlay, leaving the zone rules in place. The relevant objectives are to manage the effects of natural hazards on land uses throughout the City (Objective 62.3) and to control the effects of land uses and development on areas subject to natural hazards

throughout the City (Objective 62.4). Related policies are to control the subdivision, use and development of land to ensure that risks to the community are avoided, remedied, or mitigated (62.3.4) and to direct development away from areas known to be subject to natural hazards (62.4.1). Principal reasons include consideration of the effects land uses can have on the hazards themselves and any increased risk to the environment. Also the intention to avoid the risk to life and property where possible by directing development away from hazard areas.

[90] Within the coastal hazard area identified on the planning maps, *prohibited* activities are these land uses:

- Any new building and/or structure, other than network utility operations, fences and coastal protection works, and
- The relocation of a building or structure, other than network utility operations, fences and coastal protection works.

[91] The Proposed Plan defines *building* to mean any temporary or permanent moveable or immovable structure. A retaining wall below 1.5 metres in height, wall or fence below 2 metres, driveway or paving below 1 metre, pergola under 2 metres and awning or canopy under 3 metres does not qualify as a building. Also some tanks and pools are not buildings. *Structure* has the meaning given it in the RMA...*any building, equipment, device, or other facility made by people and which is fixed to land, and includes any raft*... This definition would catch most, if not all, items exempt from the definition of building.

[92] The Proposed Plan defines a *fence* as ...*any wall other than a retaining wall or structure below 2 metres in height. Coastal protection works* are:... *any structure used to reduce risks posed by coastal erosion and/or inundation to human life, property or the environment and may include, but not limited to, sea walls, groynes and gabions, but does not include beach renourishment.* A network utility operation is: ... *a service, operation or activity undertaken by a network utility operator.* It would therefore not include pipes, septic tanks and access roads put in place by the landowner and not part of the Council's network.

[93] Provided the provisions of s36(2) Building Act 1991 can be satisfied, the repair, maintenance and minor alterations of coastal protection works, buildings and structures and maintenance and repair of network utility operations, in existence at 11 November 2000, are *permitted* activities. *Controlled* activities include new network utility operations, with control

reserved to the effects on the erosion hazard and degree of protection works. Land development not otherwise *prohibited*, and new coastal protection works, are *discretionary* activities. *Land development* includes subdivision. Other activities are *restricted discretionary*, with the Council's discretion confined to assessing effects on the erosion hazard and degree of protection works.

[94] Section 36(2) Building Act 1991 gave the Council the ability to grant a building consent where it considers the building work itself will not accelerate, worsen, or result in coastal erosion of the land or any other property. The Council must be satisfied that there is adequate provision to either protect the land, building work or any other property or to restore any damage to the land or other property. A condition of the building consent is an entry on the Certificate of Title to that effect. The Building Act 2004 repealed this section, but contains a similar provision: - see s74.

[95] By itself then, the Proposed Plan, if made operative with its the current wording, would really only allow the landowner to use the land in its existing state, with planting or landscaping a possibility. Applying to subdivide the land is a possibility, but would be pointless unless it involved adjoining land that could accommodate both buildings and services. The Council as network utility operator could locate services in the CHZ area with consent, but the landowner could not.

[96] We do not understand Fore World to contest the appropriateness of the objectives, policies and rules for the CHZ in the Proposed Plan. Fore World sought that the CHZ line should extend no further than 18m inland from the barrier edge, but we have found a line inland of that point justified on the evidence.

Operative plan

[97] For completeness, we mention that the Operative Plan has a CHZ area overlay on the Gill and Franklin Road areas and taking precedence over the existing zoning. A policy is to impose a coastal hazard definition based on the rate of erosion applied to a 100 year period with a safety factor distance of 50m built into the calculation. Another policy is to limit new residential development to those areas within the boundaries of the existing residential area and where the hazard is not considered to be great over the expected life of the building, as 50 years defined under the Building Act. All subdivision is a *discretionary* activity. New

dwellings are *discretionary* activities subject to criteria stating the building should be capable of being removed and a s36(2) Building Act 1991 notation will be placed on the title warning of erosion risk.

Zoning of Gill Road, Rogers Road and Franklin Road land

[98] We now look at the zoning of the three areas of land and what they could be used for, given the extent of the CHZ overlay necessary to achieve sustainable management under the RMA. We understand that outside of the Coastal Hazard appeals, there are no live appeals against the Proposed Plan zoning for the Fore World land as *Rural Settlement* and *Main Rural.*

[99] We did not receive submissions or evidence that made the position clear in terms of which rules of the Proposed Plan are now beyond challenge as they relate to the *Rural Settlement* and *Main Rural* zones. There could be some general appeals on the *Main Rural* and *Rural Settlement* rules still to be decided, but our attention was only drawn to some rules that are now beyond challenge. We therefore consider both the Proposed Plan and, for completeness, the Operative Bay View Section of the City of Napier District Plan (operative December 1996).

Gill Road

[100] The 1.9 ha piece of land has a *Rural Settlement* zoning under the Proposed Plan. There are 12 residential lots on either side of Mer Place (titles issued June 1999), the existing cul-de-sac. Adjoining the railway line, four of the sections have an area of 800m^2, with the one at the end of the cul-de-sac 818m^2. The sections on the seaward side between Mer Place and the esplanade reserve range from 1342m^2 to 1741m^2 in area.

[101] Any *residential activity* (the use of land and buildings including accessory buildings such as garages, carports and storage sheds by a household) is a *permitted* activity provided it complies with the relevant conditions in the *Rural Settlement* zone activity and condition tables. A note advises consultation with HBRC for any building or activity requiring services on unserviced sites and that the Council may request evidence of compliance with the Regional Council's regional plan for water, stormwater and/or wastewater. Under the density condition in respect of unserviced sites the maximum density must not exceed one dwelling unit per site provided the net site area is not less than 1000m^2.

[102] As the land is not fully serviced, a house could not be erected on each of the inland lots, all less than 1000m^2 in area, without a *restricted discretionary* activity consent. The Council's discretion is restricted to effects on infrastructural services, stormwater run-off, sewage/effluent/waste disposal as well as a number of other matters. Given the Council has already given consent to what was clearly intended as a residential subdivision, we would not expect the other matters like amenity values to be an issue preventing the grant of consent to reasonable building proposals for the sections. In addition, the subdivision consent appears to contemplate on-site wastewater treatment.

[103] While the seaward lots are over 1000m^2 in area, part of each lot is subject to the CHZ overlay rules making building a *prohibited* activity within it. Outside the CHZ overlay, a house and its associated structures for servicing would be a *permitted* activity. There is sufficient land for the owners to build houses and associated services outside the CHZ and to use the land that cannot be built on for landscaping and garden.

[104] We also note that there are conditions on the subdivision consent carried through in a consent notice under s224 RMA as a covenant binding subsequent owners of the land. The consent prohibits construction of any structure within Lots 1 to 7 marked A2 to G2, a line extending back from the esplanade reserve to a greater extent than the CHZ line we have adopted. This area must also have appropriate landscaping and planting to mitigate the effects of erosion or inundation by the sea. On those parts of Lots 1 to 7 marked A1 to G1, extending back from the no building line a further distance, all building consents will be issued subject to s36 Building Act 1991. If the effluent disposal on Lots 1-12 is to be by way of on site waste water disposal, installation details and design must be presented for approval in conjunction with any building consent application.

[105] In terms of possibilities other than the existing subdivision, we note that new subdivision is a *controlled* activity for a site with a 1500m^2 minimum area, or 800m^2 if the land is fully serviced by a network utility operator. Full servicing involves water supply, waste water and stormwater to meet the Council's engineering standards in Chapter 66 of the Proposed Plan. If the density control is not met, the activity becomes a *restricted discretionary* activity, with the matters of discretion being related to those arising from the lack of servicing, among others. As earlier described, in the CHZ overlay new buildings or

structures, with limited exceptions, are *prohibited* activities. *Discretionary* activities are retirement complexes, residential consolidation development, residential care facilities, day care centres, travellers' accommodation and education facilities. Land uses not complying with conditions are *restricted discretionary* activities and others not mentioned are *discretionary.*

[106] For completeness, we mention that under the Operative Napier City District Plan; Bay View Subdistrict, the *Residential* zoning would allow the Gill Road land to be subdivided to lot sizes of 800m^2 as a *controlled* activity. The minimum lot size would be reduced to 600m^2 if the site were to be fully serviced with a water supply and satisfactory effluent disposal by means of an on-site or community system at the developer's expense. There is a shape factor of 18m by 18m, and other standards also apply.

[107] One dwelling could be located as a *permitted* activity on each site subject to the same minimum site area as for subdivision as well as compliance with a range of other performance standards. For a multi unit development, there needs to be an additional 350m^2 for each and every unit. The zone rules specify multi unit development will not be permitted until a fully serviced sewerage system is available. As mentioned earlier, as a CHZ overlay covers the land, all subdivision is a *discretionary* activity. In addition, all new dwellings are *discretionary* activities subject to criteria stating the building should be capable of being removed and a s36(2) Building Act 1991 notation placed on the title warning of erosion risk.

Rogers Road and Franklin Road – Proposed Plan

[108] Rogers Road and Franklin Road are both zoned *Main Rural* under the Proposed Plan. Further subdivision of both areas of land would require consent as a *restricted discretionary* activity, with both lots too small to be further subdivided as a *controlled* activity. One dwelling could be placed on each piece of land, along with a supplementary residential unit and a home occupation employing up to 3 non-residents. A wide range of agricultural, horticultural and viticultural activities are *permitted* activities, along with rural processing, forestry, home occupations, smaller scale residential care facilities, day care centres, education facilities and travellers' accommodation. Generally, other activities are either *restricted discretionary* or *discretionary* activities. The location of buildings would be limited by the rules covering the CHZ.

[109] Land development, but excluding multi unit development, and relocation of buildings are *controlled* activities. For subdivision as a *restricted discretionary* activity, discretion is restricted to matters contained in Chapter 66 (Volume II – Code of Practice for Subdivision and Land Development) and effects on amenity values, rural character and infrastructural servicing. Retirement complexes, camping grounds, roadside stalls, factory farming, commercial and industrial activities are *discretionary* activities and the catch-all for other activities is *restricted discretionary.*

Rogers Road and Franklin Road - Operative Plan

[110] Turning again to the Operative Plan, all the land is shown as *Deferred Residential.* The *Deferred Residential* Zone applies the rules of the *Bay View Rural* Zone *...until such time that the land has been fully serviced and the Council has resolved that Residential Development may proceed. This process will need to be accomplished by way of a formal change to the district plan.* The plan also states for Lots 1 and 2 DP 22640 –

> The Council will consider making this land fully residential when the following is completed:
>
> Full services are available at the owners (sic) expense.
>
> An environmental impact assessment be prepared.
>
> That the boundary for the residential area be set at 40 metres including from mean high water springs mark.
>
> That the 40 metres would be vested as Foreshore Reserve.

[111] So in the meantime the Bay View Rural Zone provisions apply. Ms Allan gave evidence that these provide for a range of rural uses, and one dwelling plus one family flat per property as a *permitted* activity. As a *controlled* activity, there is a minimum subdivision size of 1.5 hectares, with all sites required to provide an adequate water supply and also a satisfactory effluent disposal by means of an on-site system at the developer's expense. The CHZ provisions, as described earlier, overlay the *Rural* zoning on the Franklin Road land. These mean a landowner would need to seek *discretionary* activity consents to subdivide and also to place relocatable buildings on the new lots created in these areas.

[112] The thrust of Mr Vernon Warren's evidence, as planning witness for Fore World, was that there was no credible use of the land under the planning regime in the Proposed Plan. Ms Allan gave evidence that it is not unusual in Napier to live in rural environments on land parcels the size of the two lots and make no or little productive use of land. People have an

off-farm income and the large size of the lots retains the rural amenity and character and wide range of land uses. There is also the ability to seek consents for other activities, including subdivision and further residential use.

[113] Mr Warren sought to persuade us that there would be little chance of successfully applying to subdivide and use the land for residential purposes. He gave evidence about a subdivision scheme plan designed to comply with the *Main Residential* Zone as amended by the proposed *Bay View Overlay Area* Rules. This provided for 90 lots on the Franklin Road land ranging in size from 400m^2 to 912m^2, with larger lots within the CHZ based on the NIWA line. The scheme involves forming the already vested (but unformed) portion of Le Quesne Road from Franklin Road to the point where the land widens (approximately 435m) and extending further to a cul-de-sac head to provide the primary access.

[114] The subdivision scheme plan also shows the Rogers Road land subdivided into 12 lots, if and when its use for wastewater treatment is not required once the development is connected to a public reticulated sewage system. In the meantime the Rogers Road land would be used for a local sewage treatment facility to be operated by a local utility operator. Fore World proposes that the residential area could be serviced by an extended Council wastewater reticulation system eventually and the soakage fields decommissioned and remediated if necessary. Under the proposed scheduling of Rogers Road, a wastewater treatment system would be a *permitted* activity. However, resource consents would be required from the Regional Council for the use of the land for this purpose.

[115] Mr Warren maintained that an application for residential subdivision and development along those lines would fail in the context of the District Plan. His conclusions may be correct for the density, design and servicing arrangements for residential development proposed by Fore World. They would not necessarily be valid for a different subdivision and development proposal with a lower density.

[116] Ms Allan found it difficult to conceive of a situation where the need to apply for a *restricted discretionary* consent could be said to be contrary to the criteria in s85. She concluded that the objectives, policies, standards and assessment criteria would have to be *completely unreasonable*... and *...that's not the situation here.* Ms Allan considered the Plan Change sought in the s85 application, seeking an intensity of development greater than in

most other residential areas in the City, did not recognise the area's character and constraints; and did not accord with national, regional or district planning documents; or achieve sustainable management. However, she considered that it may be possible for an application within the *Rural* zoning to achieve some further subdivision and development, but at an *...appropriate...* low density, and effectively transitional to the mixed foreshore reserve, and neighbouring residential and rural land.

[117] In discussions prior to the hearing, the City Council suggested Fore World should make an application for subdivision of its land with lot sizes in excess of 1500m^2, which would enable building platforms to be established clear of the CHZ. In making this suggestion, the Council was mindful it had granted a similar application to Bay Homes Limited in July 2002 for land in the *Main Rural* zone immediately to the west of the Fore World land. Ultimately, this land was rezoned *Rural Settlement*. The result is that the Fore World land is surrounded on three sides by *Rural Settlement* zone with the remaining side being the coast. Subdivision with sites in excess of 1500m^2 would be consistent with the surrounding *Rural Settlement* zone. Houses would be outside of the identified CHZ with gardens and soft landscaping within it. Another alternative was to look at a variation for *Rural Settlement* zoning, with subdivision down to 1500m^2 with sites including land within the hazard area.

[118] Mr Warren did not provide any evidence on alternative subdivision designs, including their servicing and economics. Instead the Fore World case centred on what could be designed to meet the standards proposed in the s85 application. Mr Andrew Taylor, a surveyor experienced in subdivision work gave evidence for the City Council. He expressed the view that there were options to configure a large lot subdivision on the Franklin Road site.

[119] Mr Brian Nicholls, a Director and majority shareholder of Fore World, agreed he could still apply for a large lot subdivision with building sites outside of the hazard area and sections running down into the hazard area. He expressed his difficulty as that it is *...not what I had under the deferred residential zone originally.* Ms Allan did not accept that this was the case, pointing out that Fore World was never able to rely on *permitted* activity status to undertake development of the land under the Operative Plan. She said the deferred zoning was not a Council commitment, but an undertaking to re-look at the situation when land could be serviced, with Fore World paying for Council provided services. She reminded us that a Plan

Change would be required to uplift the deferral and the outcome of that process could not be guaranteed.

[120] Lest it be thought that we have overlooked the points, we record that the s85 process does not require that s32 be complied with: - see *Steven v Christchurch City Council* [1998] NZRMA 289. We also record that we heard nothing to suggest that s74, requiring the territorial authority to have regard to the regional planning statement, regional plan, and other relevant planning documents mentioned in the section, had not been complied with.

Conclusions about section 85

[121] We find that the CHZ and rules would not prevent the residential use of the lots in the Mer Place subdivision provided there is adequate servicing. Interestingly, the area prohibited for building and required for landscaping by the subdivision consent and subject to a covenant on the titles, covers a wider area than the CHZ. We add that there is also the opportunity to apply to use the land outside of the CHZ for other purposes, or indeed to re-subdivide the total area, if desired.

[122] It is not in dispute that both the Rogers Road and Franklin Road sites are shingly, with poor soil structure, and are of low productivity. They would not support economically viable pastoral or horticultural uses. From that start point Fore World argues that because the land is not capable of economic use as farmland, the zoning of *Main Rural* in the Proposed Plan renders it incapable of reasonable use. But, with respect to those who support the Fore World view, that does not follow. It is not the zoning of the land which makes it of low productivity, it is the inherent quality of the land itself. Nor does low productivity of itself mean that a rural zoning of some kind is inappropriate, and an urban zoning of some kind appropriate. There are parts of many farms which are of low productivity: - scree-covered hillsides and stony river beds are two examples which come to mind. But they would not, for that reason, be given a zoning different from the land surrounding them. The choice of an appropriate zoning is driven by a matrix of factors in which such things as location, servicing ability and the nature of the surrounding area may be as influential as the quality of the land itself. Nor does a landowner's wish to use the land in a way that maximises its value make that use alone reasonable, and others unreasonable.

[123] Put another way, although this land might not be capable of economically viable farming use, that does not mean that medium density residential becomes a reasonable use, still less the only reasonable use. Other factors might indicate against that outcome. One cannot lose sight of the fact that by their qualities of type, configuration, locality and, for some of two of Fore World's sites the existence of an acknowledged coastal hazard, some pieces of land might be difficult to use in any but the most passive ways. In those cases it is fallacious to blame the zoning for the problem.

[124] Fore World is able to use both the Rogers Road and Franklin Road land areas for a range of *permitted* activities under the Proposed Plan. In addition, Fore World could apply for a range of uses, including residential subdivision of the Franklin Road land not involving buildings and structures in the CHZ. Residential subdivision and development of the area outside the CHZ is feasible, with suitable servicing, although the section yield may not be what Fore World desires. As with Gill Road, the sections could take in some of the CHZ as outdoor space for the houses located outside the hazard line.

[125] The Proposed Plan provisions, with the CHZ prohibitions and restrictions in place (subject to what we have said earlier) do not render the land incapable of reasonable use. Reasonable use is not synonymous with optimum financial return, as we mention elsewhere. There is the ability to undertake a range of *permitted* activities or to apply for consents for all activities, except buildings and structures in the CHZ. We do not accept that the need to apply for consent for other activities as, at worst, a *discretionary* activity imposes an unreasonable restriction on the use of land, or imposes an unreasonable burden on an owner.

Conclusions on appeals

[126] For the reasons we set out, we are satisfied that the Plan provisions challenged in the appeals (ie Chapter 62 and Variation 3) do achieve the purpose of the Act – the sustainable management of natural and physical resources. They give effect to the CHZ, which in turn is a response to the requirements of the New Zealand Coastal Policy Statement. Equally, for the reasons discussed, we are entirely satisfied that the alternative provisions put forward by Fore World; eg private beach renourishement, requirements for relocatable housing, a shortened planning horizon, and the like, would not achieve that purpose.

Summary of conclusions – and Direction

[127] RMA 674/02. 1. The CHZ is not removed (and this was not, ultimately, sought by Fore World). The extent of the CHZ on the Fore World land is to be 24m from the toe of the existing barrier scarp, rather than the 18m sought by Fore World at the hearing. Within the CHZ building (with the exceptions already noted in the Proposed Plan) is to be a *prohibited* activity. There will not be graduated hazard zones. 2. Private beach renourishment will not be provided for in the Proposed Plan. 3. The planning horizon is appropriately set at 100 years. 4. There should be no further amendment to Chapter 62 of the Proposed Plan.

[128] RMA0860/03. The zoning of the pieces of land under the Proposed Plan does not, in terms of s85, render Fore World's interest in any of the pieces of land incapable of reasonable use, or place an unfair and unreasonable burden on any person having an interest in any of those pieces of land. There is, therefore, no case to rezone any of those pieces of land to some form of residential zoning.

[129] ENV0085/05. The extent of the CHZ under Variation 3 of the Proposed Plan is set at 24m from the toe of the existing barrier scarp.

[130] The City Council is to prepare the changes to the Proposed Plan necessary to give effect to the conclusions we have come to, and we ask that it submit those changes to the Court for confirmation by 31 May 2006.

Costs

[131] Any application for costs should be lodged within 20 working days from the date of issue of this Decision, and any responses within a further 15 working days.

Dated at Wellington this 13th day of April 2006

For the Court

C J Thompson

Environment Judge

Issued:

Appendix 1 Coastal Geomorphology and Engineering witnesses.

For Fore World Developments Ltd and Bayside Villas Ltd

Dr Shaw Trevor Mead. PhD in Earth Sciences. Environmental Scientist and Director of ASR Ltd.

Mr John Warwick Oldman. B.Sc in Physics and Maths. Scientist in the Coastal and Estuarine Group of the National Institute of Water and Atmospheric Research Ltd. (NIWA)

Mr Ronald Keith Smith. MA(Hons) in Geography. Scientist in the Coastal and Estuarine Group of the National Institute of Water and Atmospheric Research Ltd. (NIWA)

Dr Robert Steven Young. PhD in Coastal Geology. Associate Professor of Geology at Western Carolina University.

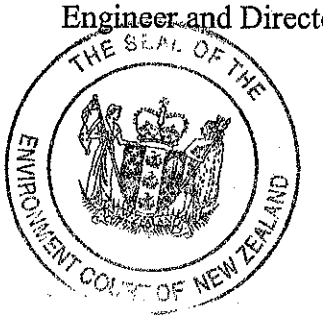
For the Napier City Council

Dr Peter John Cowell. PhD in Coastal Morphodynamics. Senior Lecturer at the University of Sydney, Institute of Marine Science.

Dr Jeremy Galwey Gibb. PhD in Geology. Director of Coastal Management Consultancy Ltd.

For the Hawkes Bay Regional Council

Mr Richard Anthony Reinen-Hamill. Master of Civil Engineering (Coastal). Senior Coastal Engineer and Director of Tonkin & Taylor Ltd.



ORIGINAL

Decision No. A 060/2004

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of two references pursuant to clause 14 of the First Schedule to the Act

BETWEEN **J V and C A KERR TRUSTS**

(RMA 713/01)

Referrer

AND **W M G YOVICH**

(RMA 715/01)

Referrer

AND **WHANGAREI DISTRICT COUNCIL**

Respondent

BEFORE THE ENVIRONMENT COURT

Environment Judge L J Newhook (presiding)
Environment Commissioner R M Dunlop

HEARING at Whangarei on 20 and 21 November 2003

APPEARANCES

K R Thomas for the referrers
S T Gordon for the respondent

DECISION

Introduction

[1] In its proposed district plan the Whangarei District Council put forward rules requiring that there be buildings setbacks of 23 metres from Mean High Water Springs ("MHWS") and from the bank of any river identified in the plan as an

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

Esplanade Priority Area ("EPA). On any land subject to such control, construction or alteration of buildings would be permitted activities to the extent that any building complied with the setback but would otherwise have restricted discretionary status. Setbacks required to meet the EPA controls are mapped in the district plan and also identified in a Table in Appendix 5.

[2] The Kerr Trusts own a property on the lower reaches of the Hatea River, a body of water within the coastal marine area, triggering the rule relating to setback from MHWS.

[3] Two out of three properties owned by Mr Yovich adjoin a bank on the lower reaches of the Waiarohia Stream, the bank being defined on the planning maps and in Appendix 5 as an EPA.

[4] The references challenged only the extent of setback required in the rules, and there was no challenge to any relevant supporting objectives or policies. The Kerr Trusts sought a reduction in setback from 23 metres to 9 metres. Mr Yovich originally sought a reduction from 23 metres to 6 metres (believing that a setback control in the transitional plan had been 6 metres) but now seeks a limitation in the setback requirement to the position of the outer walls of existing buildings. These walls vary in their distance from the stream, but are generally less than 23 metres, but greater than 6 metres, from the stream bank.

The issues

[5] The parties having helpfully filed a statement of facts and issues, described the issues in dispute as being:

(a) whether the references relate just to the Yovich and Kerr properties, or also to other properties located in the Business 2 Environment on Map 37 of the proposed plan;

(zones in the Whangarei proposed plan are called "Environments")

(b) concerning the Yovich properties the appropriateness or otherwise of identifying the entire length of the Waiarohia Stream as an EPA;

(c) the appropriateness or otherwise of providing for a blanket 23-metre setback from MHWS and for those areas identified as EPA's, as opposed to providing for different building setbacks;

(d) whether, and the extent to which, the respondent should be required to identify specific areas or localities – in terms of the building setbacks to be adopted in such areas – in meeting its duties under s.32 RMA (a site-by-site analysis), as opposed to adopting Environment-wide rules with an assessment of site specific considerations left to the process of any subsequent resource consent applications;

(e) whether, and the extent to which, the proposed plan's esplanade requirements should reflect the existing use of sites adjacent to rivers and streams, as opposed to the potential future uses of the sites;

(f) whether, and the extent to which, the proposed plan esplanade requirements should reflect the state of streams which have become degraded over time, as opposed to providing for improvements in the values of the streams in the future;

(g) whether, and the extent to which, a setback of 9 metres on the Kerr property would be sufficient to provide for future esplanade reserve requirements and for the ecological, public access and recreational values identified in s.229 RMA;

(h) whether, and the extent to which, a setback based on the existing footprint of the buildings on the Yovich properties would be sufficient to provide for future esplanade reserve requirements and for the ecological, public access and recreational values identified in s.229 RMA;

(i) in considering the above questions, the extent to which the respondent should (and had):

(i) considered alternatives and assessed benefits and costs under s.32 RMA; and

(ii) considered the need to provide for future esplanade reserves under s.229 RMA.

[6] In her opening submissions, Ms Gordon on behalf of the respondent summarised the issues in practical terms as follows:

(a) With respect to the Kerr interests, is the appropriate setback:

- 23 metres; or
- 9 metres; or
- something in between?

(b) With respect to the Yovich properties, is the appropriate setback:

- 23 metres; or
- the façade of the existing buildings; or
- something in between?

[7] She said, putting it in another way, with reference to ***Suburban Estates Limited v Christchurch City Council***[1]: *"which provision is better?"*

The rule the subject of the references

[8] The controls are found in Rule 30.20 of the PDP, the relevant parts of which provide:

30.20 Building Setbacks

Construction of alteration of a building is a **permitted activity** if the building is setback at least:

(a) ...

(b) ...

(c) 23.0m from mean high water springs;

(d) ...

(e) 23.0m from the bank of the river identified in Appendix 5 as an Esplanade Priority Area

Construction or alteration of a building that does not comply with a condition for a permitted activity is a **restricted discretionary**

[1] Decision C217/01 at para [276].

activity. [detailed provisions follow recording the matters to which discretion is restricted]

[9] Clause 30 provides reasons for the rule as follows:

> **30.35 Principal Reasons for Rules/Explanations**
>
> **Building Setbacks**
>
> Building setbacks play an important role in the overall amenity of a neighbourhood...setbacks from water bodies and the coast will preserve future availability of esplanade reserves, providing access space for water body maintenance and some flood protection.

Background Statutory Provisions

[10] Given the emphasis in Clause 30.25 on preserving future availability of esplanade reserves, it is appropriate briefly to consider the statutory provision for such reserves in the Act.

[11] Section 229 provides as follows:

> **229. Purposes of Esplanade Reserves and Esplanade Strips-**
>
> An esplanade reserve or an esplanade strip has one or more of the following purposes:
>
> (a) To contribute to the protection of conservation values by, in particular, -
>
> (i) Maintaining or enhancing the natural function of the adjacent sea, river, or lakes; or
>
> (ii) Maintaining or enhancing water qualities; or
>
> (iii) Maintaining or enhancing aquatic habitats; or
>
> (iv) Protecting the natural values associated with the esplanade reserve or esplanade strip; or
>
> (v) Mitigating natural hazards; or
>
> (b) To enable public access to or along the sea, river, or lake; or
>
> (c) To enable public recreational use of the esplanade reserve or esplanade strip and adjacent sea, river, or lake where the use is compatible with conservation values.

It is noted that the explanation for rule 30.20 in clause 30.25 is not as broad as the provisions of s.229, but objectives and policies of the PDP lie somewhere in between, and we will examine relevant aspects of them later in this decision.

[12] This case being essentially about the appropriate dimensions of building setbacks, the stated purpose of which is largely to preserve future availability of esplanade reserves, it is appropriate to note the relevant provisions of s.230 RMA as well:

> **230. Requirement for Esplanade Reserves or Esplanade Strips-**
>
> (1) ...
>
> (2) ...
>
> (3) Except as provided by any rule in a district plan made under s.77(1), or a resource consent which waives, or reduces the width of, the esplanade reserve, where any allotment of less than 4 hectares is created and land is subdivided, an esplanade reserve 20 metres in width shall be set aside from that allotment along the mark of mean high water springs of the sea, and along the bank of any river or along the margin of any lake, as the case may be, and shall vest in accordance with s.231.
>
> (4) ...
>
> (5) If any rule made under section 77(2) so requires, but subject to any resource consent which waives, or reduces the width of, the esplanade reserve or esplanade strip, where any allotment of 4 hectares or more is created when land is subdivided, an esplanade reserve or esplanade strip shall be set aside or created from that allotment along the mark of mean high water springs of the sea and along the bank of any river and along the margin of any lake, and shall vest in accordance with section 231 or be created in accordance with section 232, as the case may be.

[13] The relevant portions of s.77 provide:

> **77. Rules about esplanade reserves on subdivision and road stopping-**
>
> (1) Subject to Part II and having regard to section229 (purposes of esplanade reserves), a territorial authority may include a rule in its district plan which provides, in respect of any allotment of less than 4 hectares created when land is subdividied,-
>
> (a) That an esplanade reserve which is required to be set aside shall be of a width greater or less than 20 metres:

(b) That section 230 shall not apply:

(c) That instead of an esplanade reserve, an esplanade strip of the width specified in the rule may be created under section 232.

(2) A territorial authority may include a rule in its district plan which provides that in respect of any allotment of 4 hectares or more created when land is subdivided, esplanade reserves or esplanade strips, of the width specified in the rule, shall be set aside or created, as the case may be, under section 230(5).

Principles to be followed

[14] We consider, following the principles to be found in the decision of this Court in ***Nugent Consultants Limited v Auckland City Council***[2], that in the course of our decision we should consider Part II of the Act, in particular the purpose of the Act (s.5); local authority functions (s.31); the purpose of plans (s.72); the content of plans (s.75); the purpose of rules (to carry out functions under the Act and to achieve objectives and policies) (s.76(1); environmental effects to be taken into consideration when making rules (s.76(2)), and that rules are necessary in achieving the purpose of the Act and must be the most appropriate means of achieving the function (s.32). In the course of preparing our decision we have borne all of these matters in mind. Concerning s.32, we add (as we held in ***Kamo Veterinary Holdings Limited and anor v Whangarei District Council***[3] that s.32 may be a relevant consideration even if not pleaded by the referrer.

[15] Further, we remind ourselves that there is no onus of justification or burden of proof on a referrer to establish that a provision is correct or otherwise; instead the proceedings are in the nature of an enquiry to ascertain the extent to which land use controls are necessary, whether the controls are the most appropriate approach, and to ensure that the controls achieve the objectives and policies of the plan.[4]

[2] [1996] NZRMA 481.
[3] Decision No. A161/2003 at para 38.
[4] *Leith v Auckland City Council* [1995] 400; *Hibbit v Auckland City Council* [1996] NZRMA 529; *Kamo Veterinary Clinic* (supra).

Description of the sites and surroundings

Kerr Trusts land

[16] The land owned by the Kerr Trusts forms about a third of an area of land that exists between the Hatea River (just downstream of the Whangarei town basin) and Riverside Drive, a major road servicing suburbs and the coast to the east of Whangarei. Its location is illustrated on the plan attached to this decision.

[17] The block contains businesses that are generally long established, servicing the maritime industry and the construction industry. Included are boat sales, boat building, marine electronics, sail makers, and joinery workshops. It is the latter that are established on the Kerr property. Buildings on some of the properties in the block are established very close to the waters edge. Some (but not the subject property) have boat ramps into the river.

The Yovich properties

[18] Mr Yovich owns three of five small industrial lots on a triangle of land bounded by Albert Street, Lower Cameron Street, and the Waiarohia Stream. These are also identified on the plan attached to this decision. Buildings are erected on each of them. Given that the rear walls of each of the buildings on the triangle run parallel to the frontage on Cameron Street, they present in zigzag fashion along the stream boundary, rather than running parallel to it. A 23-metre building setback area would consume the greater part of two of Mr Yovich's three lots, as was conceded by Ms G J Bostwick, the Council's Park Manager, in cross-examination.

Statutory framework

[19] Part II of the Act has primacy, in particular s.5 which records the purpose of the Act as being the sustainable management of natural and physical resources, where sustainable management is defined as:

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

(a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and

(b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and

(c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.

[20] Relevant portions of s.6, ("matters of national importance"), are:

(a) The preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use, and development;

(d) The maintenance and enhancement of public access to and along the coastal marine area, lakes and rivers.

[21] The relevant portion of s.7, ("others matters"), are in our view:

(b) The efficient use and development of natural and physical resources;

(c) The maintenance and enhancement of amenity values;

(d) Intrinsic values of ecosystems;

(e) Maintenance and enhancement of the quality of the environment.

Background to the PDP provisions

[22] The witnesses called by the Council, Ms Bostwick and a planner Mr A B Talbot, described to us four studies prepared on behalf of the Council in recent years:

- Whangarei District Reserve Requirement Study: Part 2, Esplanade Reserves (Reyburn & Bryant, and Tonkin & Taylor Limited, 1995).
- Esplanade Areas Requirement Study (1997).
- "Open Spaces – Special Places (an Open Space Strategy)" (2001).
- Whangarei Coastal Walkway Scoping Study (1999).

[23] The 1995 and 1997 Studies were described to us as providing general policy direction, but not specifically addressing building setbacks. The former were said to

have concluded that values associated with the harbour and various rivers and streams in the district (including those mentioned in the references) warrant identification for prioritisation in the assessment of future protection and acquisition of esplanade reserves. The 1997 Study was said to assign particular values, including in the case of the Waiarohia Stream, recreational and natural/ecological values, and in the case of the Hatea River and Whangarei Harbour, recreational values. Recreational values were said to include potential use for kayaking etc. We are concerned, having examined the studies, that the claims concerning the Waiarohia are not borne out on ecological matters, as it seems to be scored highly on account of "high noted forest" which is totally inapt as a description of this commercial locality. The authors of the report seem to have seized upon a feature in the top of the catchment many kilometres away, and applied it to the length of the waterway, which we think is at best a lazy assessment or at worst a misrepresentation.

[24] The Open Space Strategy (2001) addressed the concepts of stream corridors, coastal links, and the special qualities deriving from the presence of water bodies. It addressed in very positive terms, the ideals of clean streams that support well developed ecosystems, ecological corridors, pedestrian and cycle ways, visual and physical links to the hills and the sea, and habitat qualities for indigenous flora and fauna. Concerning the issue of access along the edges of water bodies, the strategy identified two priority projects already underway in the City, being restoration and enhancement of the Waiarohia Stream, with walking and cycling tracks where possible; and the development of a multi-purpose public path along the coastal edge on the north side of the Hatea River and the harbour.

[25] The content of these various reports and studies as described by the Council witnesses, are clearly laudable in terms of their sentiments and aims in a general sense. They do not however provide any real lead as to appropriate dimensions for possible future reserves at particular points along the identified water bodies, let alone for building setbacks in district plan provisions. They therefore did not assist us greatly with tackling the core issue in the references, as to what the dimensions should be for the respective building setback controls on the referrers' properties.

[26] We had an additional concern, that while Mr Talbot commenced his evidence by advising that he did not intend to provide opinion on the position of any of the parties in the cases, he proceeded to make a number of general assertions, not backed up by adequate reasoning, that a 23-metre building setback would be "more

appropriate" than the small ones proposed by the referrers. Further, we were offered no engineering evidence concerning any flood control purpose of the proposed building setbacks, although we gained the impression from the evidence overall, that the dimension of building setback at the Yovich properties might be academic in flood protection terms, because the whole of that part of the CBD is prone to flooding at times of tide coinciding with heavy rainfall.

[27] As we will record later in this decision, we have our real concerns about the adequacy of the task undertaken by the Council under s.32 RMA. In particular the studies appeared to us to be more akin to statements of laudable general policy, rather than documents demonstrating that the Council had done its homework before imposing the controls under consideration in these references.

[28] Mr Talbot, and also Mr R J Mortimer, resource management consultant called by the referrers, drew our attention to aspects of the New Zealand Coastal Policy Statement, the Northland Regional Policy Statement, and the (then) Revised Proposed Regional Coastal Plan (now operative in part). Mr Talbot's reference to them was rather generalised and tended to stress those provisions that set out to ensure the preservation of the natural character of the coastal environment and public access (both of which he asserted would be best served by a 23-metre setback than a smaller one).

[29] Mr Mortimer offered what we thought was a more careful analysis. From the NZCPS he referred to, and discussed, the following:

> Policy 1.1.1
>
> It is a national policy to preserve the natural character of the coastal environment by:
>
> (a) Encouraging appropriate subdivision, use or development in areas where the natural character has already been compromised and avoiding sprawling or sporadic subdivision, use or development in the coastal environment;
>
> Policy 1.1.5
>
> It is a national priority to restore and rehabilitate the natural character of the coastal environment where appropriate.
>
> Policy 3.5.3
>
> In order to recognise and provide for the enhancement of public access to and along the coastal marine areas as a matter of national importance, policy statements and plans should make provision for the creation of esplanade reserves, esplanade strips or access strips where they do not

already exist, except where there is a specific reason making public access undesirable.

[30] The Regional Coastal Plan includes polices referred to by Mr Mortimer:

> Policy 10.4.1
>
> To promote and where appropriate, facilitate and improve public access to and along the coastal marine area where this does not compromise the protection of areas of significant indigenous vegetation, significant habitats of indigenous fauna, Maori cultural values, public health and safety or security of commercial operations.
>
> Policy 10.4.3
>
> Where appropriate, to provide for the restriction of public access to protect public health and safety, for defence purposes or for the security of commercial operations.

[31] Mr Mortimer described the significantly modified (and to a degree degraded) quality of the subject properties and those around them. We will return to a consideration of those matters shortly.

Objectives and policies of the PDP

[32] Witnesses referred us to, and discussed, objectives and policies found in Chapter 10 (Riparian on Coastal Margins), Chapter 9 (The Coast), Chapter 11 (Water Bodies), Chapter 7 (Subdivision and Development), and Chapter 5 (Amenity Values).

[33] Mr Talbot placed stress on policies 10.4.3 and 10.4.15. The former encourages the identification of EPA's where land will serve one or more of the purposes of esplanade reserves or strips in s.229 RMA. We acknowledge this, but note that the policy is silent on the rule making potential in sections 77 and 230 RMA for reductions in width of esplanade reserves to less than 20 metres. We consider that the same may be said for policy 10.4.15 which provides:

> Land uses should not compromise the future availability of land adjacent to the Coastal Marine Area and water bodies indicated in Appendix 5 of this Plan, for esplanade reserves or esplanade strips.

[34] The policy gives no guidance as to what the possible dimensions of such future reserves might be, and leaves open the question (which we will address subsequently) as to whether building setback dimensions should be set on a blanket basis or be the subject of different prescribed widths in different places. Wwe were

not minded to agree with Ms Bostwick's claim about impracticality of assessing whole catchments at this stage. We are concerned that she has ignored or overlooked the potential unfairness of the resulting uncertainties, and commercial ramifications, to say nothing of the planning job being too general and incomplete. The approach amounts to an unduly blunt instrument which is unfair to landowners.

[35] Once again we were concerned that Mr Talbot tended to emphasise preservation of the natural character of coastal environment in his discussion of the operation of these policies, whereas in comparison Mr Mortimer offered us a more careful and holistic analysis. The same problem arose in Mr Talbot's very brief discussion of objectives and policies in Chapters 5, 7, 9 and 11.

[36] As we said earlier in the decision, the objectives and policies of the PDP are not under challenge by the referrers. That does not seem to us to be fatal to the referrers' challenge to the rule, because the most that the objectives and policies do is to set a general framework without providing any real guidance as to the dimensions for building setbacks, esplanade reserves, and esplanade strips.

S.32 Requirements: Transitional Plan Provisions "rolled over"

[37] The PDP as promulgated in 1998 contains a summary of the process undertaken in its preparation[5], which amongst other things recorded:

> In the draft district plan, the planning maps were amended only to reflect the reorganisation of the existing zones into the new structure, and errors and omissions were identified through the consultation process...

An appendix to that version of the plan[6] illustrates how the transitional plan zones were transposed directly into particular Environments in the new plan, and of relevance to the present case we note that the Business 2 Environment in the PDP is an amalgamation of zones from the transitional plan including the Industrial Light zone (in which the Yovich properties were found), the Riverside Drive Special Development zone (in which the Kerr Trusts properties were found), amongst several others.

[38] Mr Mortimer complained about the general rollover of provisions, as he did when giving evidence on behalf of referrers in the case leading to our decision in

[5] At page 11.
[6] Appendix 1 at p. 18.

Kamo Veterinary Holdings Limited and anor v Whangarei District Council[7]. We repeat our concerns expressed in paras 35 to 38 of that decision that it is likely that the Council's attention to its duties under s.32 RMA have suffered in the process. A district plan promulgated under the Resource Management Act 1991 is unlikely to be adequately researched and prepared when substantial portions of a scheme prepared under the Town and Country Planning Act 1977 are simply imported and rolled into it.

[39] Mr Talbot offered us brief evidence concerning the Council's activities under s.32, but we were less than satisfied with his evidence on the point. Importantly, he did not describe what he considered any trail of s.32 materials to have been. He contented himself with suggesting that any s.32 analysis should be limited to the "costs and benefits of adopting a 23-metre building setback rather than a smaller one", and then asserting that the benefits of "the application of the building setback width that is consistent with most other zones in the district", "the preservation of the potential for an appropriate width esplanade areas being maintained...helping to ensure that coastal and riparian values, public access and recreational opportunities can be preserved" (begging the question of what are appropriate setbacks), and "determining, if necessary, a lesser site specific setback on a case by case basis...", would **outweigh** his identified disadvantage with a 23-metre setback ("minor" in his view"), of the onus being placed on individual landowners to demonstrate a reduced setback.

[40] We were not helped by Mr Talbot's lack of reasons for these assertions.

[41] The approach taken by Mr Thomas, counsel for the referrers, was that, having regard to the principles in the ***Nugent*** decision, it was not too late for the Council to undertake its s.32 duties - even as late as receiving input from submitters and referrers. We accept that as a statement of law, and we consider that the information available in its totality at this stage, including all relevant and properly reasoned expert opinion in evidence found by us to be of probative value, can be taken into account. We will analyse that evidence in order to decide which control will be the "better", a 23-metre control in the two locations, or the lesser ones sought by the referrers. We are required to bear in mind that the references are not an attack on the blanket 23-metre building setback control imposed around the margins of the harbour, the Hatea River, and four of the five streams passing through the City. Rather they involve an examination of the appropriateness of the control on the two

[7] Decision No. A161/2003.

subject blocks of land, with some comparison where relevant, with needs in other parts of the district.

Ecological protection purposes

[42] While witnesses for the Council strongly asserted that preservation of the natural character of riparian margins and the coastal environment was relevant, Mr Mortimer complained that none of the studies undertaken by or for the Council demonstrated that the lower reaches of the Waiarohia Stream are of ecological significance.

[43] A number of factual aspects arise. First, the subject properties have been heavily modified for industrial purposes. Little natural character is visible above the margins of the relevant water bodies. Next, it was agreed by the parties that the water bodies in the two localities were quite degraded, but we do not think it appropriate to focus just on current conditions, and accept the view of Ms Bostwick (albeit that she was not really qualified on the subject) that it is possible to effect improvements over time in water bodies that proceed from higher catchments to lower places. An example of international note in this regard in recent years has been the River Thames where it flows through London.

[44] It seemed to be the subject of agreement between the parties that the Council's studies did not identify the lower Waiarohia as an area of ecological significance, but the emphasis instead was on recreational use of the stream, and a potential for future public access along the riverbank. We do not doubt the relevance of these latter factors, but consider that a sensible approach has to be taken to analysing what future reserves might be created on these riverbanks, and their purpose, at the time of any future subdivision or development. The pieces of land are small, and as we have said a 20 or 23 metre reserve (or 23 metre building setback in the short term) would remove the ability to build new structures on the greater part of two of Mr Yovich's three lots.

[45] We have the impression from the evidence (albeit that no witnesses of relevant qualification and experience were called) that the more area of planting that can be arranged on a riverbank the greater potential to benefit the health of the waterway. Balanced against that however, we have to take account of the small size of the lots, and the likely retention, perhaps long-term, of existing use rights for the sealed vehicle accessway along the Waiarohia riverbank. We doubt that there will

be significant enhancement available at this location. It is also trite that the building setback will not of itself result in planting, because there is no restriction placed on the use of the land for parking, vehicle access, goods storage, and other commercial or industrial activities.

[46] Similar issues arise in the Riverside Drive block.

Flood control

[47] Although hazard mitigation including flood control potential, is of relevance in the legal sense, it is of no moment concerning these flat pieces of land, where it seems to us on the evidence unlikely that a 23-metre setback would assist to any greater degree than a smaller setback.

Public access issues

[48] Mr Yovich told us, and it was confirmed by our site inspection, that the sealed access lane between his factories and the Waiarohia riverbank, is presently readily open to the public, even though it is private land. For reasons already given concerning the small size of these lots, it is in our view unrealistic to expect that any or very much more land than the sealed area would in future be required for esplanade purposes. The area varies in width between 10 metres and something less than 23 metres and it is appears to us to have more than adequate potential to provide a public walkway and cycle way in the future should it become an esplanade reserve or strip.

[49] On the Kerr Trusts' land, Mr Mortimer and counsel stressed that existing buildings extend nearly to the water's edge, and that this means that realistically, future public access along the full length of the block at the water's edge will be frustrated. That is not a factor we are prepared to take into consideration (and in any event the referrers are not arguing for zero provision for setback or future reserve). We have read and agree with the findings on this topic of another division of this Court in ***Macdonald v Christchurch City Council***[8], where it was held that the purpose of the Act might be served by protecting land for future esplanade purposes even if adjoining properties might prevent public access in the short-term. The Court there considered that esplanade reserve requirements might necessitate a long-term

[8] Decision No. C121/2002 at paras 86-90.

view of gradual partial acquisition, even if there were difficulties of accessibility in the meantime, and even though there might be a management burden on the Council concerning management of isolated reserves.

[50] The Kerr Trusts propose that a 9-metre building setback will adequately protect against the possibility of a future esplanade reserve on which a cycle way and pedestrian way could be provided. We agree with the proposition given the likely long-term ongoing occupation and use of these properties for industrial, particularly maritime industrial, enterprise. Council witnesses expressed a hope that the industries might at sometime in the future relocate, but in cross-examination of them, and questioning of Mr Mortimer, it became apparent that there was little prospective availability of land near the town basin water's edge where recreational craft could be continue, as they do now, to have their maintenance and refurbishment needs met by a thriving local industry.

Natural and general amenity

[51] We have already found that the business activities on both pieces of land currently set the tone, and that there is very little natural character in these locations. Ms Bostwick gave evidence about the Avon and Heathcote Rivers in Christchurch. She had made a particular study of the situation in which the old tow paths on the banks of the Heathcote had been replaced with attractive landscape recreational areas. We consider that that must be seen in some contrast to the two Whangarei locations, at least from the point of view that (as she conceded) the tow path areas on the banks of the Heathcote were already in public ownership.

[52] Our attention was also drawn to the decision of another division of the Environment Court, ***Thacker v Christchurch City Council***[9], where a referrer sought reduction of a building setback on the banks of the Avon River from 10 metres to 3 metres on a number of grounds, including that local amenity and alleged lack of visibility from public places, would favour the lesser control. Direct comparisons between the amenity in that case, and the two localities in this, are not possible, but we note that the 10-metre setback was upheld in that case. It was held to be reasonable in various terms, including for amenity reasons. Coincidentally, we consider that something of similar order would be reasonable in the two present cases.

[9] Decision No. C100/2003.

Decision

[53] We reiterate that the blanket approach taken by the Council to building setbacks on riparian margins in the City, is not under challenge City-wide in these references. Our task is confined to assessing the appropriateness of a 23-metre setback at the two subject locations. For the various reasons given in the course of this decision, it has been demonstrated to our satisfaction, that the 23-metre setback would be inappropriate at both locations. We find that on the land owned by the Kerr Trusts, and the other pieces of land in the surrounding block bounded by Riverside Drive and the Hatea River, a 9-metre setback from mean high water springs is the appropriate control. At the properties bounded by Albert Street, Lower Cameron Street and the Waiarohia Stream (including those owned by Mr Yovich) the appropriate control is along the walls of the structures on those properties as they existed at 1 June 2003.

[54] Accordingly we direct that subclause (c) of Rule 30.20 be amended by adding a proviso to incorporate our findings concerning the Kerr Trusts properties and those in the same block earlier described, in paragraph [53] above.

[55] We direct that subclause (e) of Rule 30.20 be amended by the addition of a proviso in relation to the Yovich properties and those in the same block earlier described, in paragraph [53] above.

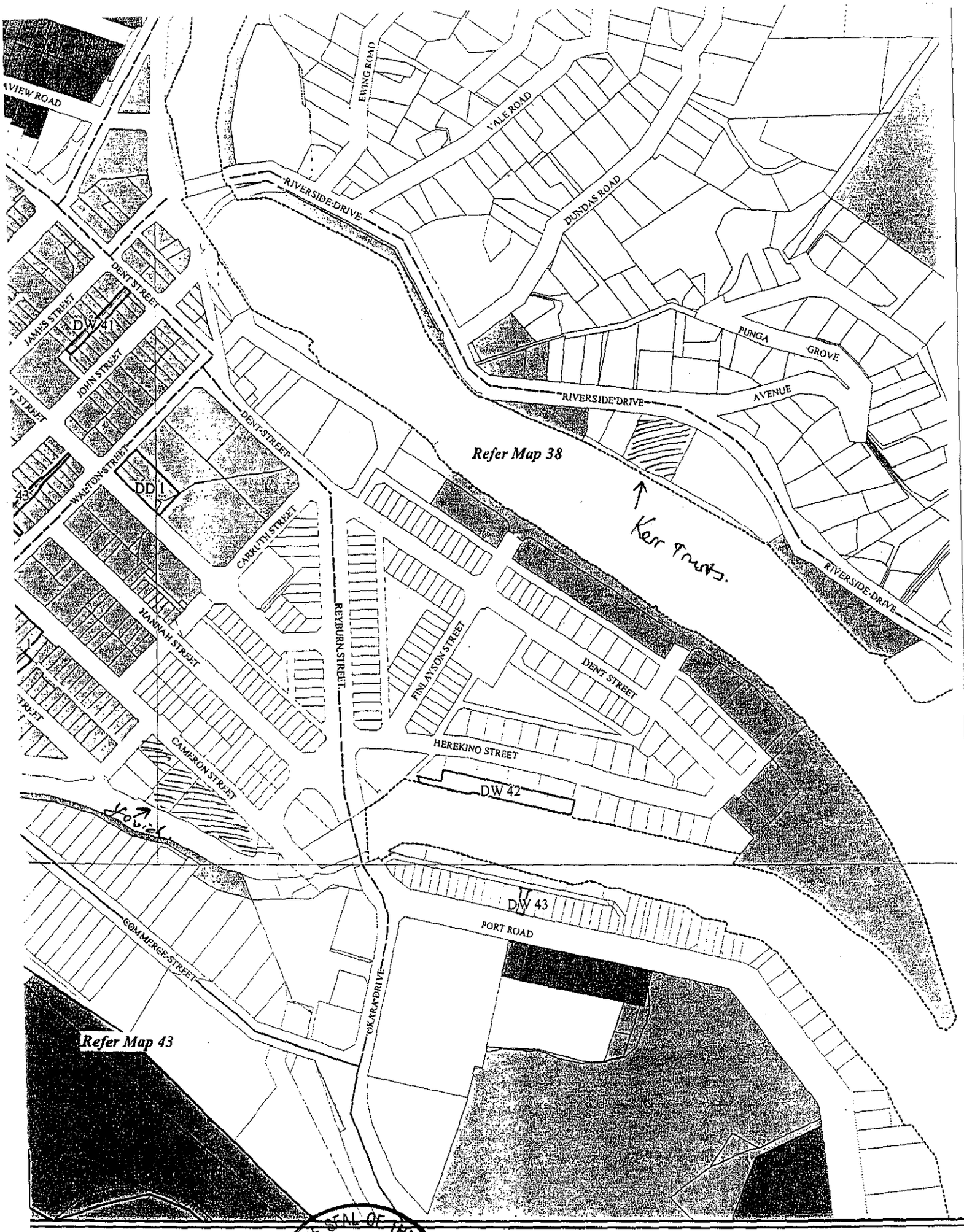
[56] If there are consequential amendments required to other provisions of the PDP that we have missed, leave is reserved to the parties to draw them to our attention and obtain our ruling if necessary.

[57] In accordance with the usual practice, costs are probably not appropriate against the territorial authority proposing the district plan provisions referred to us. If however there is any application, it should be made within 15 working days of the date of this decision, and a response filed by the Council within a further 15 working days.

DATED at **AUCKLAND** this 28th day of April 2004.

For the Court:

L J Newhook
Environment Judge



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