

**Compendium of Judicial Decisions
on Matters Related to Environment**

NATIONAL DECISIONS

Volume II

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I N T R O D U C T I O N

This publication has been developed in pursuance of the aims of Agenda 21, particularly chapter 8 which recognizes, among other things, the need to facilitate information exchange, including the dissemination of information on effective legal and regulatory instruments in the field of environment and development. This will encourage their wider use and adoption.

Consequently, the *Compendium of Judicial Decisions* was devised with two objectives. First, it aims to create awareness and enthusiasm among lawyers and non-lawyers alike on the current trends in the jurisprudence related to environmental matters. Second, it aims to provide resource materials for reflecting on specific pieces of court decisions from the point of view of courts of different perspectives, grounded as they are in the unique legal traditions and circumstances of different countries and jurisdictions.

The promotion of sustainable development through legal means at national and international levels has led to recognition of judicial efforts to develop and consolidate environmental law. The intervention of the judiciary is necessary to the development of environmental law, particularly in implementation and enforcement of laws and regulatory provisions dealing with environmental conservation and management. Thus an understanding of the development of jurisprudence as an element of the development of laws and regulations at national and international levels is essential for the long term harmonization, development and consolidation of environmental law, as well as its enforcement. Ultimately this should promote greater respect for the legal order concerning environmental management. Indeed, when all else fail, the victims of environmental torts turn to the judiciary for redress. But today's environmental problems are challenging to legislators and judges alike by their novelty, urgency, dispersed effect and technical characteristics.

Over the last two decades many countries have witnessed a dramatic increase in the volume of judicial decisions on environmental issues as a result of global and local awareness of the link between damage to human health and to the ecosystem and a whole range of human activities. In many countries the judiciary has responded to this trend by refashioning legal, sometimes age-old, tools to meet the demands of the times, with varying degrees of success or, indeed, consistency. But such practice is still firmly to take root in Africa where not much by way of judicial intervention has been in evidence.

The complexity of environmental laws and regulations makes it necessary for today's legal practitioners, particularly from Africa, urgently to assimilate and

understand the concepts and principles rising from the developing jurisprudence. This is because the rate of growth of the corpus of modern statute law in the environmental field is singularly rapid in Africa. In most countries awareness of the potential of judicial intervention in the environmental field has grown largely because citizens have instituted proceedings in courts. But in other countries the effectiveness of the judicial mechanisms is still weak because of lack of information and a dearth of human and material resources. This is compounded by weaknesses in the institutions in charge of environmental law enforcement.

Needless to say, inconsistent or incoherent enforcement of such laws inevitably will undermine the legal order in the environmental field. This necessitates exposure of law enforcement officers in general and the judiciary in particular to comparative jurisprudence as a basis for interpreting local issues. This *Compendium* is produced in the belief that the provision of information, such as is contained in the *Compendium* can contribute to the repertoire of knowledge which judicial officers and law enforcers can call on in their efforts to give meaning to the enforcement issues facing them. Thus, it is intended to be a resource for training and awareness creation, and a source of inspiration as enforcement officers grapple with day to day issues of environmental management.

Given the novelty of environmental law, the *Compendium* is a unique opportunity for practitioners, particularly those from Africa, where case law is still scarce, to raise their level of awareness and sensitivity to ecological concerns and to share their experiences on possible approaches to resolving environmental disputes.

The *Compendium* is divided into *National Decisions* and *International Decisions*, volumes I of which were published in December 1998. At the time it was anticipated that subsequent volumes would be published as availability of materials and resources permitted, and if the response to the publication of Volume I indicated that a demand existed. This publication therefore constitutes Volume II of the *Compendium on National Decisions* for which sufficient material is available.

In this Volume the introductory discussion on "Background to Environmental Litigation" which was published in Volume I is reproduced because it forms a useful substantive background to the texts which follow. The reason is that Volume I may not easily be available to the reader. Consequently, it is desirable that, as far as is possible, each Volume should be a stand alone self-contained document.

As was done in Volume I this Volume too is divided into parts, reflecting emerging themes in environmental litigation. The themes provide only a loose grouping, and there are no strict dividing lines between them. Indeed, themes recur in various cases across the groupings. Finally, the cases in this Volume are drawn from the common law jurisdiction and the combined common law and Roman Dutch jurisdiction of South Africa while the cases in Volume III include a combination of cases from the common law jurisdiction as well as cases from the civil law jurisdictions. The decisions are of significance to lawyers from both jurisdictions even though the common law jurisdiction emphasizes the value of precedent while the civil law jurisdiction emphasizes the value of jurisprudence.

As is now established practice cases are drawn from a diverse range of countries and, where possible, are reproduced in the original language. Translations from the original language are in all cases unofficial translations, and the texts are reproduced in the form in which they were received, with minimal editorial changes.

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II BACKGROUND TO ENVIRONMENTAL LITIGATION IN COMMON LAW JURISDICTIONS

1. THE LEGAL BASIS OF CIVIL ACTION

Judicial intervention in environmental issues arises when persons resort to court action to seek redress for a grievance. Court action can be either civil action or criminal action. Civil action is resorted to typically by private parties while criminal action tends to be the preserve of public authorities. However, the boundaries are not at all seamless: there are many instances of public authorities bringing civil action, and of private individuals initiating criminal proceedings (i.e. private prosecutions). These tend, however, to be exceptional. Unlike the case with Volume I this Volume has also focused on criminal actions in addition to civil actions, especially on enforcement.

The traditional position has been that, whereas a public authority may take action explicitly to protect the environment, a private litigant can only take court action to seek redress for a private injury. Any environmentally protective effect resulting from the private action would be purely incidental. Where the private individual wishes to bring action to redress an injury to the public he has to seek the permission of the Attorney General to use his name in an action known as a “relator action.”

The traditional position found expression in the jurisprudence of the courts in common law and civil law jurisdictions alike. **Gouriet v Union of Post Office Workers** [1978] AC 435 is a leading English authority on the point. The House of Lords stated the position as follows:

... the jurisdiction of a civil court to grant remedies in private law is confined to the grant of remedies to litigants whose rights in private law have been infringed or are threatened with infringement. To extend that jurisdiction to the grant of remedies for unlawful conduct which does not infringe any rights of the plaintiff in private law is to move out of the field of private law into that of public law with which analogies may be deceptive and where different principles apply. (p. 500).

A private individual could however bring action in his name on the basis of an interference with a public right in two situations: where the interference with the public right also interferes with some private right of the person concerned or where, in the absence of any interference with a private right, the person concerned has suffered damage peculiar to himself, which is additional to that suffered by the rest of the public.

The basis of a civil law claim is a “cause of action.” This arises when an injury is caused to a person or property. If the injury is caused by a public body in the context of the exercise

of public powers or the performance of a public duty the cause of action is in public law, whereas if it is caused by a private person the cause of action is in private law. The causes of action in public law are *ultra vires*, natural justice and error of law. The remedies for their redress are *certiorari*, prohibition, *mandamus*, and declaration. The causes of action in private law are trespass, nuisance, the rule in **Rylands v Fletcher** (the strict liability rule) and negligence. The remedies for their redress are an award of damages, injunction and a declaratory judgement.

A civil law action in public law is designed for challenging the legal validity of the decisions and actions of public bodies. This is the common law process of “judicial review.” It is now largely provided for by statute. Judicial review is not to be confused with action taken in private law to redress private wrongs, and one may not seek judicial review instead of taking action in private law simply because the defendant happens to be a public authority. The remedy is specifically designed for challenging the exercise of public power or the performance or failure to perform a public duty. Where the dispute with the public body does not relate to the exercise of public power (or the performance of a public duty), redress cannot be sought through a judicial review application; the public body must be sued through an action in private law, like any other wrongdoer.

2. JUDICIAL REVIEW

Judicial review is a remedy that may be used to:

- (i) quash a decision (*certiorari*)
- (ii) stop unlawful action (prohibition)
- (iii) require the performance of a public duty (*mandamus*)
- (iv) declare the legal position of the litigants (declaration)
- (v) give monetary compensation
- (vi) maintain the *status quo* (injunction).

Judicial review may be awarded where a public body has committed the following wrongful acts or omissions:

- (i) where it has acted beyond its legal powers (i.e. *ultra vires*); a decision or an act of a public body may be *ultra vires* for reasons such as the failure to take into account relevant matters or taking into account irrelevant matters.
- (ii) where it has acted contrary to the principles of natural justice, which require an absence of bias and a fair hearing in decision making.
- (iii) where it has acted in error of law.

Judicial review is a remedy under both statute and the common law, and has been adopted by all the common law jurisdictions.

(a) Judicial review as a statutory remedy

Statutes typically provide that persons who are aggrieved with the decision of a public body may apply for a review to the courts. “Person aggrieved” was defined in a leading English authority **A.G (Gambia) v Njie** [1961] 2 All E.R. 540. Lord Denning said:

The words “person aggrieved” are of wide import and should not be subjected to a restricted interpretation. They do not include, of course, a mere busybody who is interfering in things that do not concern him, but they do include a person who has a genuine grievance because an order has been made which prejudicially affects his interests.

(b) Judicial review as a common law remedy

Quite apart from, and independently of, statutory provisions, judicial review is available as a common law remedy to which resort may always be had to challenge the decisions and actions of public bodies. In England, the Supreme Court Act 1981 and Order 53 of the Rules of the Supreme Court stipulate the procedure to be adopted in such cases. Similar procedures have been adopted by other common law jurisdictions.

Order 53 requires that the applicant seek leave of the court before filing the application. Leave is only granted if the court considers that the applicant has “sufficient interest” (or *locus standi*) in the matter in issue. Courts around the world have given varying interpretations to this concept, particularly in the context of environmental litigation. This has led to action in some countries, such as the Republic of South Africa, to introduce statutory provisions in the Constitution or elsewhere, widening the opportunities for access to the courts.

3. ACTION IN PRIVATE LAW

The private law causes of action are trespass, nuisance, the rule in **Rylands v Fletcher** (the strict liability rule) and negligence.

(a) Trespass

Trespass arises where a person causes physical matter to come into contact with another’s land. Trespass, therefore, protects an occupier’s right to enjoy his or her land without unjustified interference. It is limited, however, to direct, rather than indirect, interferences.

(b) Nuisance

There are two types of nuisance; public nuisance and private nuisance. Often the same act gives rise to both types of nuisance at the same time.

A public nuisance is an interference with the public’s reasonable comfort and convenience. It is an interference with a public right and constitutes a common law criminal offence, quite apart from providing a cause of action in private law. In the English case of **Attorney General v P.Y. A. Quarries Ltd** [1957] 2 Q.B. 169 Lord Denning said of public nuisance:

It is a nuisance which is so widespread in its range and so indiscriminate in its effect that it would not be reasonable to expect one person to take proceedings on his own responsibility to put a stop to it, but that it should be taken on the responsibility of the community at large.

A private nuisance is an interference with an occupier’s use and enjoyment of his land. Not all interferences, however, amount to a nuisance. Nuisances are those interferences which are unreasonable, causing material and substantial injury to property or unreasonable discomfort to those living on the property. The liability of the defendant arises from using land in such a manner as to injure a neighbouring occupier. Thus nuisance imposes the duty of reasonable use on neighbouring occupiers of land. It is the cause of action most suited to resolving environmentally related disputes between neighbouring landowners.

The reasonableness, or unreasonableness, of the use giving rise to the complaint is determined on the basis of the locality in which the activity in issue is carried out. The English case of **Sturges v Bridgeman** (1879) 11 Ch.D. 852 is illustrative of this point. A confectioner had for more than twenty years used a pestle and a mortar in his back premises which abutted on the garden of a physician. The noise and vibration were not felt as a nuisance and were not complained of. But in 1973 the physician erected a consulting room at the end of his garden, and then the noise and vibration became a nuisance to him. His action for an injunction was granted, the court holding that “whether any-thing is a nuisance or not is a question to be determined, not merely by an abstract consideration of the thing itself, but by reference to its circumstances.”

(c) Strict Liability: the Rule in Rylands v Fletcher

This rule is based on the facts of the English case after which it is named. The defendant had constructed a reservoir to collect and hold water for his mill. Under his land were underground workings of an abandoned coal mine whose existence he was unaware of. After the

reservoir had been filled the water escaped down the underground workings through some old shafts, and flooded the plaintiff's colliery. The plaintiff filed suit and the court decided that:

the person who for his own purposes brings on his land and collects and keeps there anything likely to do mischief if it escapes must keep it in at his peril, and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of the escape.

The case was appealed to the English House of Lords which upheld the decision, one of the judges adding that the defendant was liable because he had been engaged in a "non-natural use of his land."

The rule makes an occupier strictly liable for the consequences of escapes from his land. However, this cause of action has not been relied a great deal partly because of difficulties in ascertaining the true meaning of "non-natural use." Some have argued that "non-natural use" refers to the conduct of ultra-hazardous activities on land, while others hold that it means no more than bringing on to land things "not naturally there."

(d) Negligence

Negligence arises from a failure to exercise the care demanded by the circumstances with the result that the plaintiff suffers an injury. In contrast to the three other causes of action, the basis for the action is not the occupation of property. A plaintiff needs to show that he is owed a "duty of care", and that the defendant has breached that duty of care, with consequent injury to the plaintiff.

The leading authority on negligence is the English case of **Donoghue v Stevenson** [1932] AC 562. Lord Atkinson said in that case that the duty of care is owed to "persons so closely and directly affected by the defendant's act that he ought reasonably to have them in contemplation as being so affected when directing his mind to the acts or omissions which are called into question." In other words, the duty of care is owed to those whom the defendant could *foresee* might suffer injury as a result of the defendant's act or omission.

4. THE REMEDIES

The three remedies in private law are damages, injunction, and declaratory judgement.

An award of *damages* is compensation given to a party who has suffered an injury. The sum awarded is based on the principle that the injured person should be placed in the position he or she would have been in if he had not been injured.

An *injunction* is an order from the court directing a party either to do or to refrain from doing something. It is granted to stop a continuing or recurring injury, or in circumstances

where damages would not be an adequate compensation. Typically, an injunction will not be granted unless the damage is serious. The Court will balance the inconvenience which declining to grant the injunction would cause the plaintiff against the inconvenience which granting it would cause the defendant.

A declaratory judgement is the court's declaration of the rights and duties of the parties before it. Its value lies in resolving a dispute by setting out clearly the legal position. Most litigants will act in accordance with the Court's declaration without the need for further orders. However, as the House of Lords in the English case of **Gouriet v Union of Post office Workers** "the jurisdiction of the Court is not to declare the law generally or to give advisory opinions; it is confined to declaring contested legal rights, subsisting or future, of the parties represented in the litigation before it and not those of anyone else." (p. 510)

5. THE PROTECTION OF THE RIPARIAN OWNER'S RIGHT TO WATER

There is one other entitlement under the common law which can form a basis of environmental litigation; the riparian owner's right to water.

Under the English common law a landowner is presumed to own everything on the land "up to the sky and down to the center of the earth. However, running water, air and light are considered to be "things the property of which belongs to no person but the use to all" [see **Liggins v Inge** (1831) 131 E.R. 263, 268]. Therefore, a landowner has no property in running water, air and light; all that his proprietorship entitles him to, as an incident of such proprietorship, is a "natural right" to use these elements.

Thus, a landowner whose land abuts running water, i.e. a *riparian* owner, has a natural right to water. The riparian owner is able to exercise, as of right, the right available to all members of the public to use running water since he has an access to the water which non-riparian owners do not have. The right of use is available equally to all riparian owners and therefore any one riparian owner must use it reasonably. No one riparian owner may use the water in such a way as to prejudice the right of other riparian owners [**Embrey v Owen** (1851) 155 E.R. 579]. Other riparian owners have a cause of action if there is unreasonable use by any one owner.

The scope of the riparian owner's rights extends to access, quantity and quality. Access enables the riparian owner to navigate, embark and disembark on his land. Quantity enables the riparian owner to abstract, divert, obstruct or impound the water to the extent of its natural quantity. He may use the water abstracted for ordinary (domestic) purposes such as drinking, cooking and washing, and for these purposes may abstract as much as he needs without restriction. Secondly, he may use it for "extraordinary" purposes such as irrigation, but in this case must restrict

the quantity he abstracts to that which does not prejudice the rights of other riparian owners. Thirdly, a riparian owner may attempt to abstract water for use outside of his land, but the common law disallows such “foreign” use of water. On quality the riparian owner is entitled to have the water in its natural state of purity.

If any of these rights are interfered with, the riparian owner has a cause of action. However, as the House of Lords held in the English case of **Cambridge Water Company v Eastern Counties Leather plc** ([1994] 1 All E.R. 910), the suit itself must be based on the traditional common law causes of action: trespass, nuisance, **Rylands v Fletcher** (strict liability) and negligence. It is the injury suffered which arises out of riparian ownership.

Since it is the tradition of the *Compendium* to carry examples of judicial decisions from civil law jurisdictions, it is important to consider briefly the civil law system. On the whole this is typified by the French legal system, from which most French speaking African countries have derived their legal systems.

French judicial decisions can only afford analogies, not precedents, for courts which are so differently constituted as those in the English-speaking common law world. However, some of these analogies point to principles of general application, even though there are distinct differences as regards their form and style.

Among these differences are, first, that the word *jurisprudence* is not generally used in the civil law legal system in the same sense as in the common law system. In the former, it refers to something like the 'Case Law', the English term "*jurisprudence*" being equivalent to the French "*Théorie générale du droit*".

The civil law system does not recognise the absolute authority of judicial precedents. It also attaches more weight to jurists writings than does the common law system. A key feature of the system is its grounding in a series of Codes and other statutes. Consequently, the fabric of the law is primarily statutory, the judiciary's task being limited mainly to applying the provisions of the existing legal texts.

In principle, in the civil law system, even decisions of the superior courts are not recognised as automatically binding. However, for a long time now, the decisions of the Courts (or la *jurisprudence*) have been acknowledged as playing a major role in the development of the law in the civil law system and the creative function of the judiciary is now widely accepted. But, even then, though it is now generally accepted that decisions of the *Court de Cassation*, for example, are to all intents and purposes, regarded as authoritative for the future, the lower Courts still resist innovations of the *Court de Cassation*. In this they are often encouraged by the writers of doctrine.

Another characteristic of the civil law system is that, although the decisions are reported in the Official Series on a scale probably comparable to that of common law jurisdictions, the legal judgements of the courts consist usually of a very short enunciations (embodied in a series of complex wordings (sentences), each prefaced by the words *considérant que* or *attendu que* (enumeration of facts and the reasons for the decision), without any citation or discussion of authorities.

1. AN EXAMPLE OF A CIVIL LAW JUDICIAL SYSTEM: THE FRENCH JUDICIAL SYSTEM

In France, the judicial system and the various jurisdictional allocations are set out in the constitution and various basic statutes. Its structure is summarised briefly below.

1. On **the general principles** that apply in the organisation of justice in France, the following stand out:

- The collegiality of jurisdiction (up to three judges can be found in one court);
- The fixity and permanence of jurisdictions;
- The professional status of judges (being a dominant feature);
- The total independence of judges (from the political influence, the influence of other judges as well as of the parties among others);
- The fact that justice is free of charge;
- Equality of access to justice and neutrality of the judges;
- The public nature of the administration of justice;
- The adversary nature of proceedings before the judge;
- The rule of a dual level of jurisdiction (trial and appellate levels);
- The responsibility of the State to ensure that justice is carried out swiftly and adequately.

2. **The institutions of justice**, commonly called "*jurisdictions*," are:

- The *tribunaux* at a first degree (e.g. Tribunal de Grande Instance) and;
- The *Cours d'appel* (Appellate courts) at the second level.

There are several appellate courts of co-ordinate jurisdiction in France. However, some jurisdictions at a superior level are also called "tribunal" such as the "Tribunal des Conflits" and others are called "Conseils" such as the "Conseil d'Etat" or the "Haute Cour de Justice". These terminologies have a bearing on the designation of judicial decisions. The decisions of tribunals are called "Judgements" while the decisions of the courts are called "arrêt"(or order). When the decision has been issued by only one judge, they are called "Ordonnance" or, in some cases, "Decisions".

Jurisdictions which have fewer cases to handle are said to be “Ordinary jurisdictions” and those whose work is voluminous and specialised are said to be the “juridictions spécialisées”.

As regards the powers of the appellate courts, though the French legal system considers an appeal as the continuation of the original suit, the powers, prestige and duties of the judges in courts of original jurisdiction and those of the ones in the appellate courts are different to a large extent. The appellate court has powers as regards the amendment and return of complaints and memorandum of appeal; the withdrawal of the suit where there is mistake, or where there is need for separation; trial of misjoined suits; and the like.

The **French judiciary system** consists typically of two categories of judicial orders:

- The *juridictions judiciaires*, which have jurisdiction on both criminal and civil matters and;
- The *juridictions administratives*, which are many and among which the most important is the *Conseil d’Etat*, (presided by the Prime Minister or his representative). These deal with administrative matters.

The *Conseil d’Etat* has got four specialised sections and has advisory administrative powers related to finance, interior affairs, public works and social affairs. It gives opinions on major administrative issues.

One other section of the *Conseil d’Etat* is judicial in nature. It is composed of one chairman, three (3) vice-chairmen and a number of counsellors, “*maître de requêtes*”, and “*auditeurs*”. The Chairman is the judge of single matters brought before that section.

Many subordinate courts act under the supervision of the *Conseil d’Etat* as they deal with various issues such as the national budget, the efficacy of the general administration of the State, public enterprises and so on.

Apart from the two categories set out above there are other specific types of jurisdictions which are totally different from the ones mentioned above. There is the so-called *Tribunal des conflits*, which in rank, is on top or above the two orders of jurisdictions. It deals with matters that involve the determination of competence amongst the two known orders of jurisdiction, particularly when a conflict of mandates arises. Its role is limited to determining the jurisdiction which is competent in the matter. There is also the *Conseil Constitutionnel* whose main role is to determine the ‘*constitutionality of laws*’. Its role has evolved into an indirectly political one as it deals with cases involving, for example, claims related to presidential or parliamentary elections.

In summary the civil order deals with matters related to civil liability proceedings, including criminal offences, while the administrative order deals with matters related to public authorities’ decisions affecting private persons. However, the boundary between the two orders of jurisdiction is not rigid.

One can also say that, in France, the courts have jurisdiction to try all suits of a civil nature except suits whose cognisance is expressly or impliedly barred by law.

As regards the nature or subject matter of the suits, certain courts in France are courts of special jurisdiction, inasmuch as some classes of cases involve disputes with which superior or specially experienced tribunals are particularly familiar, and which can more satisfactorily be disposed of by them, such as administrative decisions, revenue issues, and the like. Furthermore, cases of importance affecting considerable interests or involving questions of intricacy are left to be determined by the higher courts. Additionally, under the French Codes of Civil Procedure and Administrative Tribunals, it is provided that where the claim is in a particular field, that field is regarded as the subject-matter of the suit.

As regards the court in which such a suit should be brought, reference should be made to the administrative tribunals, particularly the “*Conseil d’Etat*” in the case of administrative jurisdictions. Under the French legal system, in matters relating to public matters, such as cases that involve public nuisances, suits may be may be instituted, though no special damage has been caused, for a declaration and injunction or for such other relief as may be appropriate to the circumstances of the case. In principle, as in common law systems, a private individual cannot sue in respect of a public nuisance unless he shows that he has suffered special damage thereby.

Another relevant fact is that, under the French legal system, national courts are empowered to pass judgement against a non-resident foreigner, provided that the cause of action arose within the jurisdiction of the Court pronouncing the judgement.

The term *cause of action* as used here applies to torts as well as contracts. The meaning of the term *cause of action* has been the subject of considerable controversy. It has however been settled in the numerous decisions in which the question has been discussed extensively in the context of environmental litigation. It has been held that the term means either every material fact which needs to be proved by the plaintiff to entitle him to success, or everything which if not proved, would give the defendant an immediate right to judgement. The term is composed of many components, including the requirement that there must have been an infraction of the right claimed.

2. JURISDICTION IN THE FRENCH CIVIL LAW SYSTEM

As in any other legal system, the competence of a court in the French legal system means the “court’s jurisdiction.” Jurisdiction depends upon the nature or subject matter of a suit and upon its location, but often not on the pecuniary limits to the jurisdiction of the tribunal or court. While theories may differ as to the sources of judicial authority, environmental law suits now being litigated in many civil law countries, including France typically are initiated by environment protection organisations against Government agencies and local authorities’ decisions. The standing of these organisations rests basically upon their claim as being the appropriate representatives of the public interest. The liability of government bodies to be sued often depends on the existing legislation. However, whether a suit will lie at the instance of the Government depends on the existing substantive law.

As a commentator said, “*according to the exact conception of it given by the Roman lawyers, “Jurisdiction” consists in taking cognisance of a case involving the determination of some juror relation, in ascertaining the essential points of it, and in pronouncing upon them.*” The word *jurisdiction* is commonly used to mean jurisdiction in the ordinary sense described above, that is, a reference to local or pecuniary jurisdiction or to the Parties. It can also refer to the subject matter of a suit or the legal authority of a court to do certain things. All these possible meanings are provided in the French Code of Civil Procedure, the Code of Administrative Tribunals and the other Statutes that create the specialised jurisdictions and make the distinction between the two categories of legal settings (or orders): the civil order and the administrative order.

The existence of jurisdictions is primarily determined with reference to the law of the country. However, it is a general principle in civil law systems that whenever jurisdiction is given to a court by an enactment, and such jurisdiction is only given on certain specified terms contained in the enactment itself, these terms must be complied with in order to sustain the claim to jurisdiction. If they are not complied with the claim to jurisdiction cannot be sustained. This principle is emphasised in the French Code of Civil Procedure and Code of Administrative Tribunals. However, to found jurisdiction, there must, in the first place, be authority to pass judgement, that is, the authority to entertain judicial proceedings.

3. FRENCH CASE LAW AND ENVIRONMENTAL LIABILITY

This part attempts to explain the framework within which, in France, those whose property or health is harmed by environmental hazards find compensation, and also to define some of the principal areas of practice and procedure that arise in bringing or defending environmental cases in France, and in civil law systems generally.

The principles relating to civil liability for environmental damage in France do not constitute a single body of law, even though the Code of Civil Procedure and the Code of Administrative Tribunals give an orientation as to the methodological aspects of litigation in general, which also concern environmental matters.

These principles constitute a patchwork of concepts related to rights and duties which have been developed by the Courts and Tribunals over many years in the general area of civil liability and compensation, and specifically, in the area of the tort of nuisance.

In France, it is not necessary for the claimant to show that ownership or occupation of land has been affected by a public nuisance, as public nuisance is a criminal offence as well as a civil tort. To be a public nuisance, the relevant activity and its effects do not have to be widespread.

Increasingly, it is no longer necessary that a class or group of citizens who come within the sphere or neighbourhood of the operation of the nuisance must be materially affected in terms of their reasonable comfort and convenience. The grounds for civil liability for environmental harm result either from a breach of statutory duty or are created by specific provisions in the domestic legislation such as those of the “*Code Rural*”.

The relevant “environmental torts” found in most civil law systems are negligence, nuisance and trespass. In these systems most aspects of the law on nuisance can be described as having been developed specifically to address the consequences of pollution or other effects on the environment of hazardous activities and substances. The types of nuisance are based on the fundamental duty that each person has not to conduct himself in a manner that unreasonably interferes with the use by others of their land and property or with the enjoyment of others’ public rights. In determining liability in nuisance, the judge is required to strike a balance between the interests of the claimant and those of the defendant, having regard to the level of interference that a neighbour can be expected to tolerate.

Liability for injury caused to another is generally based upon fault in French law, as provided in Article 1382 and 1384 of the Civil Code. Article 1384 provides that: “*A person is liable not only for the damage he causes by his own act, but for that caused by the acts of persons for whom he is responsible or by things that he has under his guard*”.

Article 1384 of the Civil Code is considered by the French courts to have established a presumption of fault which cannot be rebutted by claims that there was no fault, and it is in fact similar to the system of absolute or strict liability, in that the liability of the person who under his guard has the inanimate object causing the damage is presumed liable, unless he can prove that the damage was the result of *Force*

Majeure, or the act of the plaintiff himself, or a *cause étrangère* which was normally unforeseeable so that the damage was unavoidable and could not be imputed to him.

The presumption of fault, which is applied to the automobile accidents for example, has been justified by the French courts on the basis of the equitable considerations on account of the large number of accidents caused by motor vehicles and the impossibility in many cases of proving fault on the part of the driver.

The application of Article 1384 in the area of environmental risks and industrial accidents is appropriate. Further guidance as to applying such a principle of liability can be found in the following quotation from a case of an industrial accident. An author pointed out that:

“As machines took the place of man ... the number of accidents not only increased but, and this is more important, changed their character. Accidents came to have very often an obscure origin, an uncertain cause that made it hard to place responsibility ... The victim had to deal with powerful companies whose rules and obligations they did not know and with whom they engaged in such an unequal battle that they were defeated in advance. The defendants took refuge behind Article 1382 which, though it appears at first to give a basis for recovery in many cases, actually serves as a defence.”

Besides, the right of private individuals to bring civil claims in respect of public and private nuisances is to be distinguished from the power of local authorities such as the so called *prefet*, in respect of statutory nuisances as defined under the Law on the Classified Installations or under the Rural Code. These laws impose administrative duties and sanctions to the owners or operators of such establishments as part of the prevention and inspection policy and procedures.

The tort of negligence also has wide application to a range of public activities, particularly in the building industry and in the field of regulatory control or nature protection (eg the control of wild fires). The key elements here are:

- A- The existence of a situation in which the law requires a person to exercise care towards other person(s) who is or are the claimant(s),
- B- Breach by the defendant of the objective standard of care,
- C- Establishment of a link between the carelessness and the damage or injury which has resulted, and,
- D- The reasonable foreseeability of the carelessness giving rise to the damage or injury which it has caused.

The continuing analysis and reappraisal by the tribunals of the basic principles underlying these rights and obligations in the environmental risk field is exemplified in the more recent decisions of the “*Conseil d’Etat*”, the highest jurisdiction dealing with administrative matters in France.

However, the cases dealt with by the *Conseil d’Etat* give the impression that it is not at ease with environmental matters, particularly on issues that involve transboundary aspects. The consequence of its attitude is illustrated in the questions that arise from its Sentence of 18 April 1986 related to “**Société Les Mines de Potasse d’Alsace versus Province de la Hollande Septentrionale et autres**”. In that particular case there were no stipulations in international law as at 22 December 1980, which would have prevented the administrative authorities mentioned in the case, from issuing pollution licences. To understand this negation of any of the then existing international rules by the French jurisdiction, it is worth reading the conclusions arrived at by the *Commissaire du Gouvernement* (equiv. Attorney General), which are remarkable from the point of view of the reasoning, but contestable from the point of view of its substantial foundations.

Meanwhile, in addition to making awards for compensation in case of damage, in many cases, the civil law courts also grant injunctions ordering persons causing environmental harm to cease the activities, which are responsible for damage. Injunctions may also be granted to restrain activities, which threaten to do harm. Occasionally, such injunctions may be mandatory, i.e. requiring the person not only to stop the polluting activity complained of, but also take a positive remedial action, such as to make safe a source of that pollution or remove it.

The ability of private individuals, or groups, to enforce the provisions of environmental protection legislation provides a person aggrieved by a polluting activity with a legal means of bringing pressure to bear on the person responsible for that activity to abate it or to prevent its repetition. In France, as in other countries, the threat of environmental litigation for industrial concerns has increased greatly in recent times, as the conceptual foundation of the principles of *locus standi* are increasingly under test and scrutiny. This is a result not only of wider powers of the environmental agencies to impose remedial liability but of changes in public administration and legal procedures that have increased the will and capability of private individuals to bring civil action claims against polluters. The claims concerning nuisances and damage to health arising from pollution frequently involve many claimants.

As far as procedure is concerned, the institution of legal suits is made by the presentation of a plaint to the court, in which a person sets forth his cause of action in writing. This can be in situations where either general legal

principles are involved, - (principles of common application in almost all countries), or where those in which the French jurisprudence notions prevail.

The particular elements of the environment-related jurisprudence found in the French legal system simply constitute the context in which the policy issues such as combating water pollution, the management of classified establishments (or installations), protection of fauna, flora and the like, are resolved through the judicial system. However, the common characteristic of any legal system is that before any environmental resource that is declared public can be used, some kind of authorization from the government authority is necessary.

Lack of such an authorization, or shortcomings in the procedures for obtaining such an authorisation are considered as an offence. In that area, two kinds of permits

are usually issued: - a permit or licence, which is less permanent and easily revoked, and - a concession, which sets up reciprocal rights and obligations between the grantor and the grantee. This is the main feature of major French environmental legislation and other resource-control based legislation in most countries that are attempting to modernise their environmental legislation.

In the French legal system, provisions to afford better administrative control over the management of environmental resources are often introduced by statutes that give the courts enough power to define or determine the rights of users so long as they observe the existing legal provisions and the balance of the interests involved, particularly with the respect due to private property and public interest. The licencing or administrative authorizations and the inspection systems are adopted in order to subject most natural resources to administrative control.

IV THEMATIC ARRANGEMENTS OF JUDICIAL DECISIONS

A OVERVIEW

This volume features three themes as follows: physical planning; use of police power in environmental management; and the place of culture in environmental management. As pointed out already the attempt at categorization should not mislead the reader into taking the view that the cases reproduced illustrate only one theme in each case; on the contrary, the majority of the cases deal with more than one issue. Therefore the categorization is based on that aspect of the case which provides the case's most unique contribution to the development of jurisprudence on environmental law. The reader is therefore urged to approach the task of reading the material presented here with an open mind in order not to preclude an appreciation of other, equally important, aspects of the various cases.

1 PLANNING CONTROL

Most countries have a system for controlling the activities and changes (developments) which an owner of land may carry out on the land. This system is referred to as "the planning system" or "zoning". Planning control involves two stages: preparing "development plans" and the process of "development control." Development plans are in effect policy documents setting out the relevant policy in accordance with which changes in land use will be permitted, while development control refers to the process of approving applications by persons to carry out proposed specific development activities. The approval is often based on the extent to which the proposed development conforms to the development plan which, therefore, is a necessary prerequisite for development control.

Planning control serves as a mechanism for environmental management. It enables relevant authorities to regulate the proliferation of environmentally undesirable activities and nip them in the bud, either by declining to grant permission or by imposing conditions to be complied with before, or in the course of, implementing the project. In this respect development control relies heavily on environmental impact assessment to provide the information needed for predicting the nature of potential environmental impacts of the proposed project. EIA therefore is an integral aspect of planning control.

The following cases illustrate the intervention of the judiciary in the process of development control, and the way in which reliance is placed by litigants and judges alike on the compliance or otherwise of the proposed development with the development plan as the yardstick for determining the acceptability of the proposed development. The cases are as follows:

- i. Summers v The Far North District Council, Decision A132/98, New Zealand
- ii. National Association of Professional Environmentalists v AES Nile Power Ltd, Misc. Civil cause No. 268/99, Uganda
- iii. Bulankulama v The Secretary, Ministry of Industrial Development, S.C Application No 884/99, Sri Lanka
- iv. Save the Vaal v The Director Mineral Development Gauteng Region, Case No 97/021011 South Africa
- v. Paykel v the Northland Regional Council, No. 8/99, New Zealand
- vi. Farooque and Sekandar Ali Mondol v Bangladesh Ravensdown Fertilizer Co-op Ltd & Smith v Otago Regional Council, Decision No. A86/99, New Zealand

(i) **Summers v The Far North District Council, 1998, (New Zealand)**

This case highlighted the fact that the role of development planning is to advance the public interest rather than the interests of one landowner. It arose out of a claim by an owner of a farm, Mr. Summers, that, as a result of over drainage and inadequate clearing of public drains the condition of his farm had deteriorated considerably. He sought orders stopping the over-drainage and the restoration of the condition of his farm. He further sought orders that the respondent be stopped from doing any work on drains and watercourses in the drainage district without first having consulted with him and obtained his consent to the works.

The District Council, on the other hand, maintained that it should not be required to obtain Mr Summers' consent in order to carry out drainage works which were for the benefit of the entire district. It stated that it intended to adopt a management plan for the drainage district and works would then be carried out in accordance with the management plan. The court held that the management plan proposed for the drainage district would be an appropriate way to proceed in specifying the standards of clearing and other maintenance work. And that even though evidence showed that the drains and the watercourses had not been kept clear of weeds and as free flowing as may be possible at all times, Mr Summers was not entitled to expect that standard at all times.

(ii) **National Association of Professional Environmentalists v AES Nile Power Ltd, 1999, (Uganda)**

This case raised the issue of the stage at which an EIA needs to be conducted in the development control process. It arose out of steps taken by the Government to sign an agreement for the development of a power project. The

applicant sought an injunction to stop the respondent concluding a power project agreement with the Government of Uganda until NEMA had approved an environmental impact assessment study of the project. The applicant argued that by signing the agreement the parties would circumvent the requirement for an EIA as following the agreement the Government would be bound by its terms to implement the project, rendering the EIA process a formality.

The court held that signing the agreement *per se* would not lead to an environmental disaster. Any action based on the agreement could be challenged and therefore the application was premature.

(iii) Bulankulama v The Secretary, Ministry of Industrial Development, 1999, (Sri Lanka)

This case also raised issues regarding the stage at which an EIA must be conducted. It resulted in a different ruling from the Uganda case above.

The Government of Sri Lanka sought to enter into an agreement with a foreign company for the manufacture of phosphate fertilizer using local deposits of apatite. The applicants petitioned the courts to stop the proposed agreement on the basis that their lands were in danger of being destroyed if the proposed mining project was implemented and that about 2,600 families (or 12,000 persons) were likely to be permanently displaced from their homes and lands.

The respondents countered that there was no need to feel any apprehension at the exploration and feasibility study stages, which is what the signing of the proposed agreement would lead to. They argued that it was only after the exploration and feasibility study had been done, the approval of all statutory authorities been obtained, and the Secretary had accepted the feasibility report, that the company would be permitted to proceed to the construction and mining phases of the project.

The court held that although mining may have the more devastating consequences, exploration was not so harmless as to cause the applicants no apprehension of imminent harm to their homes and lands. Further, that the agreement provided for all stages of the project and therefore the totality of the proposed agreement needed to be considered in deciding whether there was an imminent infringement of the applicant's rights. The court held that there was nothing in the proposed agreement to show that its signing would only result in exploration and a feasibility study. It was a comprehensive, all embracing document.

The court further heard that the proposed agreement ignored the Central Environmental Authority and substituted in its place the Secretary to the Minister to whom the subject of minerals and mines was assigned for the purpose of approving the environmental study contemplated by the proposed study. The court held that

the applicants were entitled to be apprehensive that even if there was an EIA submitted to the Central Environmental Authority, the authority would not be able to act impartially in view of the fact that the agreement bound the Government to assist the company in obtaining the necessary approvals. The court ordered the respondents to desist from entering into the proposed agreement pending a comprehensive EIA study.

(iv) Save the Vaal v The Director Mineral Development Gauteng Region, 1997, South Africa

In this case the applicant sought a review of the decision to grant a mining authorization for the establishment of an open case mine on the river bank of the Vaal River. The complaint was based on the failure of the 1st respondent to give the applicant an opportunity to be heard. The Court held that the applicant was entitled to be heard prior to the respondent taking a decision whether to grant or not to grant authorization or the right to mine.

(v) Paykel v the Northland Regional Council, 1999, New Zealand.

The appeals in this case related to a proposal to develop a fishing lodge and associated facilities. The Regional Council had granted coastal permits for a boat ramp, and a dingy pull mooring, discharge permits for waste water and storm water, and a water permit to take water from a deep bore.

The appellants alleged that the proposed lodge and fishing facilities would be inappropriate having regard to the location, proposed scale, intensity, function and design of the development. But the court held that the Resource Management Act did not mandate tranquility and solitude, or an absence of any change, neither did the planning instruments. The court held further that the activity generated by the fishing lodge would be an addition to the activity already carried out there, but that the increase in activity would not be so great as to qualify as degrading the amenity values of the bay to a significant extent.

(vi) Farooque and Sekandar Ali Mondol v Bangladesh, (Bangladesh)

In this case two petitions questioned the activities and implementation of a flood control programme (FAP-20) undertaken in the District of Tangail in Bangladesh. The petitioners pointed to an apprehension of environmental ill effects arising from the flood control plan which would affect the life, property, livelihood, vocation and environmental security of more than 1 million people.

The court held that the FAP-20 was a developmental project aimed at controlling floods which regularly brought miseries to the flood prone areas of the district of Tangail. Further, that any interference with the project would

deprive the country of the benefits to be derived from the implementation of the scheme and also from getting foreign assistance. The Court held that it would be impractical to stop the work. But in implementing the project, the court held that the respondents could not with impunity violate the provisions of the law. The court therefore ordered the respondents to comply with the law on drainage and resettlement of displaced persons.

The final two cases illustrate the use of conditions to protect the environment while granting permission in circumstances where the project proposed poses environmental problems.

(vii) Ravensdown Fertilizer Co-op Ltd & Smith v Otago Regional Council, 1999, (New Zealand)

Ravensdown Fertiliser Coop Ltd sought amendments to various conditions attached to coastal and discharge air permits. At the same time, the appellant, Mr. Smith, sought to overturn or vary the Council's decision in favour of Ravensdown allowing discharges to the atmosphere on the ground that the decision was inadequate to protect its property and the residential environment of Ravensdown generally. The court held that the conditions for discharges to the atmosphere as formulated represented the best practicable options for mitigating the various actual and potential effects upon the amenity values of the surrounding area and the quality of the environment, while at the same time efficiently utilizing the substantial plant and resources represented by the works.

**2 POLICE POWER AND COMPULSORY ACQUISITION
IN ENVIRONMENTAL MANAGEMENT**

In the absence of planning control a landowner may do as he pleases with his land, and is kept in check only by the prospect of complaints from neighbouring landowners. As long as neighbours do not complain, a landowner has no obligations to protect the environment or to refrain from damaging actions or omissions on his land.

Planning control limits the rights of a landowner over his land. The right of the state to control the uses to which a landowner may put his land is referred to as "police power." The law of most jurisdictions recognizes the right of the state to protect the public's interest. Such curtailment of a landowner's rights may however amount to a confiscation of the rights in question.

The distinction between the legitimate exercise of the police power and the confiscation of the rights is a matter of degree of damage. Where the restriction involved can be considered reasonable, the exercise of police power is valid and the damage suffered by the owner is simply an incidental consequence of an otherwise valid action. However where the restriction is so great the landowner ought not to bear such a burden for the public good, the restriction has been held to be confiscatory (or in the US,

a constructive taking) even though the actual use or the forbidden use has not been transferred to the government so as to amount to a confiscation in the traditional sense.

In the US where the jurisprudence on this issue has advanced particularly far, the courts have held that whether or not a confiscation has occurred depends upon whether the restriction practically or substantially renders the land useless for all reasonable purposes. If the land can be put to some beneficial use the restriction will not be considered unreasonable. Further, if the damage is such as to be suffered by many similarly situated and ought to be borne by the individual as a member of society for the good of public safety or health or the general welfare, it will be considered a reasonable exercise of police power; but if the damage is so great to the individual that he ought not to bear it under contemporary standards, then courts are inclined to treat it as a taking of the property or an unreasonable exercise of the police power.

The state takes property "by eminent domain" (the theory that the state is the owner of last resort of all property) because the property is needed for a purpose that is useful to the public, and restricts use of property under the police power where such use is harmful to the public. From this results the difference between the power of eminent domain and police power. Where property is taken under the power of eminent domain the owner is entitled to compensation but if use of property is restricted in exercise of police power there is no right of compensation. Thus the necessity for monetary compensation for loss suffered to an owner through the exercise of police power arises when restrictions are placed on property in order to create a public benefit rather than to prevent a public harm.

The cases that follow illustrate the use of police power for purposes of environmental protection. The cases arise out of challenges by landowners of the powers in question as being unreasonable and unjustified. The cases therefore illustrate the courts interpretation of restrictions which may be considered a valid exercise of police power.

- (viii) Just v Marinette County, 201 N.W. 2d 761 (USA)
- (ix) Hatton v The Far North District Council, Decision No A 25/98 New Zealand
- (x) Daroux v The Minister of Lands, Decision No A 88/99 New Zealand

(viii) Just v Marinette County (USA)

This was a case in which landowners sought declaratory judgment that a shore land zoning Ordinance was unconstitutional. The county had sought a mandatory injunction to restrain the landowners from placing fill material on their property without first obtaining a conditional use permit as required by the Ordinance.

In 1961 several years prior to the passage of the Ordinance the Justs purchased land along a navigable lake.

Subsequently the Ordinance in issue was passed and the land owned by the Justs was designated as a swamp. Following this, in order to place more than 500 sq. ft of fill on this property, the Justs were required to obtain a conditional use permit. In 1968 after the Ordinance became effective the Justs, without securing a conditional use permit, hauled sand onto the property in violation of the Ordinance.

The issue before the court was whether the wetland filling restrictions were unconstitutional because they amounted to a constructive taking of the Justs land without compensation. The County argued that the restrictions were a proper exercise of police power and did not so severely limit the use or depreciate the value of the land as to constitute a taking without compensation.

The court held that this was a restriction on the use of a citizen's property not to secure benefit to the public but to prevent harm from the change in the natural character of the citizen's property. It held that the public purpose sought to be obtained by the Ordinance was to protect navigable waters and the public rights therein from the degradation and deterioration which would result from uncontrolled use and development shorelands. The Ordinance provided for permitted uses and conditional uses, one of which was the conditional filling, drainage or dredging of wetlands under a conditional use permit.

Accordingly, the shore land zoning Ordinance was not unconstitutional as being confiscatory or unreasonable.

(ix) *Hatton v The Far North District Council, 1998, New Zealand*

This case illustrates the public purpose criterion which must be met before deciding whether private property may be compulsorily acquired.

In 1996 the Far North District Council gave notice to the Hattons of its intention to take part of their land at Taupo Bay for a road. The Hattons objected to the proposal, *inter alia*, for the reasons that the land was sought to be taken to further private interests rather than the public interest. The argument was that the District Council was seeking to acquire the land for the private benefit to the owners and residents of the properties of Taupo Bay, properties which over a period of many years had been sub-divided and developed without a legal road access. Secondly, the Council was seeking to take more land than the minimum amount necessary, for the collateral purpose of giving adjacent properties frontages to the road which they did not previously have.

The Council argued, and the Court accepted, that the road was intended to be used by the public generally, and was not confined to use by the owners of the land. Secondly, the Hattons wanted the area taken to be kept to a minimum and to retain strips to give them control over future

developments on the land acquired. The Court held that defining the area of land to be taken for the road as extending to the adjoining property boundaries was for the purpose of the road and was not for a collateral purpose of promoting private interests. The court held that for the District Council to have defined the land to be taken by leaving strips of land in the Hattons ownership to give them the power to control sub-division and development on neighboring properties would be to diminish the public purpose of the road for the private benefit of the Hattons. The court ruled that allowing adjacent properties frontages was a proper exercise of the Council's power.

(x) *Daroux v The Minister of Lands, 1999, (New Zealand)*

Daroux v The Minister of Lands was a case in which the applicants objected to a notice of intention to take an easement against the titles to their properties. The notices were issued following an application to the Minister by Counties Power Ltd for the purpose of allowing an electricity line.

The changes in the electricity sector had led to a situation whereby power companies could be sold to the private sector. Under the old law, electricity boards had powers to enter upon private land for the purposes of constructing, maintaining and repairing power lines. Those wide powers were not transferred to the new entities and, with regard to power lines, the statutory authorities were restricted to maintaining and operating those lines that were in place prior to the privatization. Counties Power now required registered easements and had to rely on consultation and negotiation with landowners. If negotiations failed they had to apply to the Minister of Lands to have the land acquired or taken as if the work was government work. The effect of any proclamation taking the land would be to vest the land in the utility operator instead of in the Crown. Accordingly, any easement would become an asset of the utility operator and could be assigned, sub-let or otherwise disposed of.

The court held that even in these circumstances compulsory acquisition still served a public purpose. It stated that while the lines and their easements were valuable assets, the commercial benefit of supply must not distract attention from the need to ensure continuity of supply to consumers.

3 THE PLACE OF CULTURE IN ENVIRONMENTAL MANAGEMENT

Increasingly, local communities assert a right to a role in the management of local environmental resources. At times these claims are made in the context of litigation. In a few jurisdictions statutory recognition has been given to the community's role in environmental management. The best example of such a jurisdiction in New Zealand, from which the bulk of the court cases reproduced in this section have been drawn. Therefore some explanation of the New

Zealand law on the role of the Maori peoples in environmental protection is given below.

The indigenous people of New Zealand are the Maori (known as **tangata whenua** the Maori term for people of the land). Maori interests in natural resources management are provided for in the Resource Management Act 1991. Section 5(2) defines sustainable management as “managing the use, development, and protection of natural and physical resources in a way or at a rate which enables people and communities to provide for their social, economic and cultural well being and for their health and safety while -

- (a) sustaining the potential of natural and physical resources to meet the reasonably foreseeable needs of future generations; and
- (b) avoiding, remedying or mitigating any adverse effects of activities on the environment.

This section provides a mechanism for protecting Maori interests in so far as it refers to “people and communities” which include Maoris, and by its reference to cultural well being (including Maori culture).

A Maori family is a “**hapu**” while a Maori tribal group is an “**iwi**”. The courts have held that an iwi are a people and a community within the meaning of section 5(2).

A second mechanism for protecting Maori interests arises out of the requirement to take into account the principles of the Treaty of Waitangi between the Maori and the British Government at the time of the occupation of New Zealand. Section 8 of the Resources Management Act states as follows:

“In achieving the purposes of the Act, 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**).” Treaty principles include consultation, partnership, active protection, and informed decision-making. The Treaty requires consultation with the Maori (**tangata whenua**) often through their representatives (**kaitiaki**). Kaitiaki are **iwi** (families) or **hapu** (tribal groups) with responsibilities to take care of their natural resources within their geographical territory (**kaitiakitanga**). However the right to be consulted does not give the Maori a veto over proposals.

Finally section 6 of the Resources Management Act defines matters of national importance. The section requires that matters of national importance be recognized and provided for. In the context of the protection of Maori interests, section 6(e) states as follows:

“In achieving the purposes of this Act, all persons exercising functions and powers under it, in

relation to managing the use, development and protection of natural resources, shall recognize and provide for the following matters of national importance: *the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu (meaning special and sacred places), and other taonga (meaning valued resources).*

Section 7(a) requires attention to a related matter: “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 **kaitiakitanga** (responsibility).

The cases that follow illustrate the application of the above statutory provisions in the context of specific applications for resource consents.

- (xi) Kotuku Parks Ltd v The Kapiti Coast District Council, (New Zealand)
- (xii) Robert Te Kotahi Mahuta v The Waikato Regional Council and Anchor Products Ltd, (New Zealand)
- (xiii) Contact Energy Ltd v Waikato Regional Council, (New Zealand)
- (xiv) H Te M Parata v The Northland Regional Council, (New Zealand)
- (xv) Yanner v Eaton [1999] HCA 53 (7 October 1999), (Australia)
- (xvi) Attorney General v Lahoy Akonaay, (Tanzania)

(xi) Kotuku Parks Ltd v The Kapiti Coast District Council (New Zealand)

This case related to appeals concerning the subdivision of land at the mouth of the Waikanae River for residential development. Kotuku Parks Ltd had bought land there in the 1970s and had already completed subdivision and development of considerable areas which were now occupied by houses. The current proposal was called Stage IV.

The Kapiti Coast District Council granted subdivision consents and consents for the required earthworks. Te Runanga O Atia Ki Whakarongatai (the Runanga) is the “iwi” authority for a number of hapu who hold mana whenua over lands on the Kapiti Coast. The Maori people represented by the Runanga claimed a relationship with that land as ancestral land containing waahi tapu, and a responsibility in respect of the area generally as kaitiaki.

It was the case for Kotuku Parks Ltd that the Goodman family are tangata whenua of the subject land, based on long and close association with the site and the Waikanae Estuary, and that they exercise kaitiakitanga over the area. The Goodman family supported the project. Kotuku Parks Ltd contended that the views of that whenua should be given primary weight. It maintained that kaitiakitanga was addressed by involvement of the Goodman whenua in the project. It was also the District Council’s case that the

Goodman whenua are tangata whenua and claim mana whenua over the land.

Te Runanga did not seek to contest the question as to who had mana whenua. It asserted that its hapu have lived in that place since 1818, and many tribes before them; and that the estuary area in general has special associations for the iwi and hapu of Te Ati Awa. Te Runanga also submitted that kaitiakitanga had been misinterpreted by Kotuku Parks Ltd and the District Council, and contended that it had to be exercised in accordance with tikanga Maori, by which substantial decisions are only made following hapu and iwi marae hui.

Testimony was given that the Waikanae River is a central feature in the tribal lands. Although they no longer owned the land, tangata whenua still have a demonstrable relationship with the area, in that it had profound landscape and cultural associations including sites of ancestral occupation and of battles and burials (which remain as waahi tapu). The witness claimed that their ability to be kaitiaki for the river and the coastal environment would be adversely affected. He explained that the scale and nature of the development would have a profound effect on the ecological integrity, natural character and intrinsic values of the area for which they are kaitiaki, to safeguard its wairua and **mauri** (life force) for future generations.

The court held that neither section 6(e) nor section 7(a) called for a consent authority (or the Court of appeal) to make any decision about ownership of land, about the extent of the role of any iwi or hapu, about who are tangata whenua, or who are kaitiaki, in respect of a particular area or site. The evidence was that Maori have cultural and traditional relationships with the subdivision site and its environs, that those are ancestral lands of theirs, and that the sites and their environs are places of past occupation by their ancestors. The evidence also established that the subdivision site is the subject of kaitiakitanga. If the proposed development occurred, it would limit the capacity for exercise of kaitiakitanga in respect of safeguarding the wairua and mauri of the sand dunes, and their association with past occupation by their ancestors.

The court next considered the applicability of the Treaty of Waitangi principles as provided for in section 8 of the Resource Management Act. This provides 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 take into account the principles of the Treaty of Waitangi.”

A principle of the Treaty requires consultation with Maori in respect of projects that may affect their cultural interests. A consent authority has to take those principles into account in reaching its decision.

It was Te Runanga’s case that the District Council had not consulted adequately with it over Kotuku Parks Ltd Stage IV project, and Te Runanga had been prejudicially affected. In particular it claimed that the District Council’s consultation with Te Runanga had been limited to matters contained in the archeological assessment, and had not extended to resource management issues. Te Runanga submitted that the consent authority, as an agency exercising powers and functions under the Act, has a duty to consult, and a duty to provide for active protection.

The Court held that the regional of district council, acting in its capacity as consent authority under the Resource Management Act to hear and decide a resource consent application, did not itself have a duty to consult with Maori. Its duty is to be on enquiry that there has been consultation where that is appropriate. In that respect, a report to the consent authority on the resource consent application by officials or consultants of the Council should address that issue. However, consultation was not an end in itself, but a way of taking relevant principles of the Treaty into account. In practice it was the applicant who would need to consult with the Maori, in cases where that was appropriate, to avoid the risk of the application being postponed or refused by the consent authority if it was not satisfied that grant of the resource consent would be consistent with its duty to take into account the principles of the Treaty. The Court held that the consultations with tangata whenua was not sufficient to enable the primary consent authority to be confident that it had the understanding necessary to take into account the relevant principles of the Treaty in deciding the resource consent applications. However the court acknowledged that it had had the benefit of Te Runanga’s case presented at the *de novo* hearing of the applications on these appeals, so that it was able to take their concerns into account.

(xii) Robert Te Kotahi Mahuta v The Waikato Regional Council and Anchor Products Ltd, (New Zealand)

In this case, Anchor Products Ltd wished to expand the capacity of its dairy factory at Te Rapa, and to install a new gas fired cogeneration plant (in place of an existing coal fired power plant) to supply energy to the expanded milk processing plant. The cogeneration plant was originally intended to generate up to 150 megawatts of electricity, but Anchor Products reduced the size of the proposed plant to 45 megawatts, with consequential reductions in the quantities of water to be taken from the Waikato River, and to wastewater to be discharged.

Applications were made to the Waikato Regional Council and to the Waikato District Council for resource consents needed for the project. An appeal to the Environment Court arose from a joint decision of the Waikato Regional Council and the District Council granting those resource consents.

The appellants were Robert Te Kotahi Mahuta, Waikato-Tainui, Tainui Maori Trust Board and Nga Marae Toopuk. Waikato-Tainui are the descendants of the Tainui Waka. Sir Robert Mahuta is principal negotiator on behalf of Waikato Tainui in respect of a claim by them under the Treaty of Waitangi Act 1975 for the Waikato River. Tainui Maori Trust Board is a statutory body incorporated under the Maori Trust Boards Act 1955, and is the iwi authority of the iwi of Waikato. Nga Marae Toopu is a body representing all marae in the wider group of Tinui, and which has mandated Sir Robert Mahuta to represent them on all matters concerning the Waikato River.

The appeal was directed to three matters: the special relationship of Waikato-Tainui with the Waikato River, the adverse effects on the river of taking water from the river and of discharging contaminants into it, and the inadequacy of consideration by Anchor Products and its advisors of alternative methods of wastewater disposal.

The Waikato Tainui have a special relationship with the Waikato River which is of fundamental importance to their social and cultural well being. The planning instruments also recognize the special relationship between the Waikato Tainui and the Waikato River. What was at issue was the significance to be given to that relationship in deciding the resource consent applications before the Court.

A central tenet of this relationship was the metaphysical aspect of the Waikato River, its mauri, and the associated metaphysical phenomena. Evidence illustrated the appellants' belief in profound spiritual powers connected with the overall identity of the Waikato River.

At an early stage in the assessment of environmental effects of the proposal Anchor Products advisors had consulted with Haukina Development Trust, which was the environmental arm of the Tainui Maori Trust Board, and which had the mandate to address all resource management issues for the Waikato iwi. The subject of the consultations had included disposal of wastewater from the treatment plant in a way that would meet the cultural requirements of the tangata whenua. The Haukina Development Trust advised that the existing discharge pipe into the river should not be used and recommended that instead two gully systems on the anchor products site should be used. As a result of the discussions with the Haukina Development Trust and with Nga Marae Toopu, a design was developed for discharge of treated wastes, storm water, and cooling water to an infiltration bed at the head of the gully, from which water would then pass into the gully, which was to be lined with concrete and a channel filled with rock and weirs, and would lead to a specially designed submerged rock-filled conduit discharge structure, discharging to the Waikato River. It was explained that the rocks would represent Papatuanuku, and that would meet the cultural requirements of the tangata whenua.

The court noted that the term "environment" is given extended meaning to include: (a) ecosystems and their constituent parts, including people and communities; and (b) all natural and physical resources; and (c) amenity values; and (d) the social, economic, aesthetic and cultural conditions which affect the matters stated in paras (a) to (c) or which are affected by those matters."

The court therefore had to have regard to effects of allowing the proposed activities on the cultural conditions which affect Maori community, and in particular how the effects of the proposal may have an impact on the present and future relationships and future relationship of Waikato Tainui with the river.

On the effects of the proposal on the relationship of the Maori with the river, even the perception of contaminants flowing from the site into the river would cause offence. In that regard a witness deposed that there was no need for discernible physical adverse effects, nor would it depend on any particular concentration of contaminants, but any amount of contamination would constitute a serious adverse effect to the relationship of Waikato-Tainui with the Waikato River.

The Court found that there would not be adverse effects on the river environment of allowing the proposal. It found that the Waikato River is an outstanding water body and that Waikato Tainui had a deep and special relationship with it of a cultural and spiritual kind; and that the relationship would be impaired by activities which result in deterioration of the quality of the water of the river. It also found that the proposal had been developed and designed in ways and recognized and provided for that relationship, and for the kaitiakitanga of Waikato-Tainui, in accordance with the objectives and policies of the regional policy statement. The extent of the wastewater treatment, the protection for the Mangaharake Pa, and the specially designed discharge facility, were all examples of efforts to give effect to Maori interests. Further that setting an appropriate limit on the content of phosphorus in the discharge, complementary with the limits on other contents of the discharge would also recognize and provide for that relationship and for the kaitiakitanga of Waikato-Tainui.

The most important provisions were those directing recognition and provision for the relationship of Maori and their culture and traditions with the ancestral water; directing particular regard to kaitiakitanga; and directing taking into account the principles of the Treaty of Waitangi. The contents of the Waikato district plan and the Waikato regional policy statement, and the evidence given in the case confirmed that those provisions were applicable to the relationship between the Waikato Tainui and the Waikato River.

Principles of the Treaty of Waitangi called for the Crown and Maori to act reasonably and in good

faith towards each other, and that was applied in resource management practice to expect proponents of development proposals which may affect Maori cultural or spiritual interest to consult with Maori about their proposals, and consent authorities to receive and have regard to advice about the effects of proposals on those Maori interests.

In this case the consultation with Waikato-Tainui on behalf of Anchor Products had tangible beneficial results. Both the intake structure for taking water from the river and the discharge structure for disposing of treated wastewater, were deliberately designed to respond to the cultural wishes of the Waikato Tainui. In particular the evidence showed that the design of the discharge structure would not have been justified by engineering or environmental considerations, but only by a willingness by Anchor Products to meet their cultural requirements. In addition the reduction in the capacity of the cogeneration plant responded to the wish of the Waikato-Tainui that the taking of water be limited to the minimum amount. The wastewater treatment plant was to be designed to limit the contaminants to be discharged to the river, consistent with the cultural requirements Waikato Tainui that it be fit for spiritual use, as well as the more pragmatic contents of the proposed regional policy statement. Moreover Anchor Products had acknowledged that it respects the cultural and spiritual significance of the Waikato River to Waikato Tainui; had undertaken to maintain a programme of continuous improvement of its environmental impact on the Waikato River and to enhance the quality of the river as agreed to participate with Waikato Tainui in a public education programme to promote environmental improvement of the Waikato River, and to encourage others to take part.

The adverse effect on the relationship of Waikato Tainui with the river and on kaitiakitanga would be recognized and provided for and mitigated in four separate ways. First, by minimizing the amount of water to be taken, and design of the intake structure to meet their cultural needs. The second was by treatment of the wastewater to be discharged to meet appropriate limits in the conditions, and design of the discharge structure to meet their cultural needs. The third was by provision for early review to the limits of contaminants in the discharge. The fourth way was by acknowledgments by Anchor Products of the deep cultural and spiritual significance of the Waikato River to Waikato Tainui, backed up by undertakings in support of enhancing the quality of water of the river, and about protection of Mangaharake Pa.

The ways in which the cultural needs of the Waikato Tainui would be recognized and provided for would not extend to avoiding all perception of contaminants flowing into the river, irrespective of physical effects. That could only be avoided by discharge of wastewater to land, an option which itself would have considerable practical difficulties. The court found that because the community value of the proposed expansion of the dairy factory and because the

cultural interests of the Waikato Tainui people would be provided for in so many other ways which would avoid tangible harm to the river, the perceptions which are not represented by tangible effects did not deserve such weight as to prevail over the proposal and defeat it.

(xiii) In Contact Energy Ltd v Waikato Regional Council, (New Zealand)

In this case Contact Energy Ltd has appealed against decisions by the Waikato Regional Council and Taupo District Council refusing resource consent for a proposed geothermal power station near Taupo. Opponents of the application included the Tauhara Middle Trusts (which hold over 1635 hectares of land over part of the Tauhara Geothermal Filed in trust for 2400 members of the Tauhara hapu).

It was the case for the Tauhara Middle Trusts that the Tauhara hapu have a special relationship with the Tauhara geothermal resource, which they regard as a highly valued taonga. They sought exclusive and undisturbed possession of the resource; they do not wish Contact to have access to any more of “the limited and non-renewable geothermal resource from the Wairakei/Tauhara geothermal system.” They submitted that, in determining what was sustainable for a resource which is taonga of Maori, consideration is required of whether it is sustainable from a Maori perspective, and that only Maori can answer that question.

It was the case of the Tauhara Middle Trusts those members of the Tauhara hapu act as kaitiaki of Mt Tauhara and of the Tauhara Geothermal Field, and that this includes customary authority over the resource. The Trusts sought that recognition of their kaitikitanga be expressed in their having a future involvement in the management of the resource in consultation with those who exploit it, so that there may be active protection of the taonga, and to ensure that the time frame of the exploitation was culturally acceptable.

A witness testified that kaitiaki are decision makers over taonga within their areas of mana whenua, and that kaitiakitanga includes the right to make decisions over all levels of development of the taonga in accordance with their tikanga. Section 7(a) of the Act directs functionaries to have particular regard to kaitiakitanga. The court held that that had to be read in context of an Act which entrusts decisions on sustainable management of natural and physical resources to particular classes of consent authorities. The Court held that it could not meet a claim by kaitiaki to make decisions that were inconsistent with the scheme of the Act which provides for decisions to be made by regional councils and district councils.

The court held that if resource consents were granted particular regard may appropriately be given to the kaitiakitanga responsibilities of the Tauhara iwi in respect of the Tauhara geothermal field. That could be done by conditions requiring that they are provided with

information, and allowing for them to offer advise about Maori cultural and spiritual matters relevant to the exercise of the resource consents.

Counsel for Tauhara Middle Trusts submitted that consultation by Contact with Maori had been insufficient. However Contact had endeavored to open lines of communication with the Tauhara hapu but it had been frustrated in its efforts to identify a group who not only claim, but actually have, a mandate to represent them.

(xiv) H Te M Parata v The Northland Regional Council, (New Zealand)

This was a case in which the Northland Port Corporation Ltd proposed to establish a new deep water port in the Whangarei Harbour at Marsden Port. Hori Te Maonaroa Parata appealed against the decision to grant consent on the ground of the relationship of Maori and their culture and traditions with their ancestral land, water, sites, waahi tapu and taonga, and to that the consent would impact on the ability of the tangata whenua to fulfil their role as kaitiaki. They appealed also on the ground that the principles of the Treaty of Waitangi requiring consultation had not been adhered to.

Mr. Parata is of Te Waiariki descent, associated with the Ngatikorora and Ngatitaka hapu of Ngatiwai iwi. He is also the vice chairman of Ngatiwai Trust Board. Ngatikorora have traditionally lived on the northern shores of the Whangarei Harbour. Mr Parata lodged the appeal in his own name but stated that he was also in court for his brothers, sisters and grandchildren, but did not claim to have brought the appeal on behalf of Ngatiwai iwi, or on behalf of the Ngatikorora of Ngatitiaka hapu.

The court found that the applicant identified and consulted fully with the all tangata whenua of the locality, including the hapu and iwi with whom Mr Parata is associated.

Another ground for appeal was that the decision to grant consent did not recognize and provide for the relationship of Maori and their culture and traditions with Whangarei Harbour. Mr Parata expressed concern that places of traditional occupation might be destroyed by construction of the port, and by increased shipping and traffic flow to and from the port but this would be taken care of through the environmental impact study

The next ground of appeal was that the consents would impact on the ability of that tangata whenua to fulfil their role as kaitiaki. The consent provided for the establishment of a community liaison group and allow for a kaitiaki group. It was contended that as the conditions required the former but not the latter the decision failed to recognize and provide for the kaitiakitanga, and took into account irrelevant considerations in particular the role of the persons and groups other than tangata whenua in setting up the community liaison group.

It was claimed that the role of the community liaison group was to act in a manner akin to that of kaitiaki in that its stated purpose of having discussions with the consent holder, reporting to local authorities about the development, and recommending studies designed to improve the health of the harbour were roles that have traditionally been fulfilled by kaitiaki. It was argued that priority has been given to resident and rate payer groups and citizens associations representing communities but there had not been an attempt to recognize and provide for Mr Parata and his hapu's kaitiakitanga. It was submitted that the community liaison group would in effect be usurping the role that has traditionally been carried out since time immemorial by Mr Parata, Te Waiariki, Ngatikorora and Ngatiwai.

The court held that Parliament had not directed that kaitiaki are to be recognized to the exclusion of other members of the community. The condition imposed provide for a community liaison group in which any member of the community, kaitiaki or not, Maori or not, would be able to take part. In addition they also provide for the possibility of a kaitiaki structure. The condition did not demean the kaitiaki by providing only for them to participate along with other members of the community. They allowed for them to take part in that way. They also gave them special status if they wanted it as kaitiaki as well, by providing in addition for a kaitiaki structure.

(xv) Yanner v Eaton [1999] HCA 53 (7 October 1999), (Australia)

This is an Australian case dealing with the applicability of environmental management regulations to Aboriginal peoples. In this instance the person concerned argued that the environmental legislation in question did not apply to the traditional activities carried out by him.

The appellant was a member of the Gunnamulla clan of the Gangalidda tribe of Aboriginal Australians. Between 31st October and 1st December 1994 he used a traditional form of harpoon to catch two juvenile estuarine crocodiles in Clifffdale Creek in the Gulf of Carpentaria area of Queensland. He and other members of his tribe ate some of the crocodile meat; he froze the rest of the meat and the skins of the crocodiles and kept them at his home.

In 1994 the Fauna Conservation Act 1974 provided that "a person shall not take, keep or attempt to take or keep fauna of any kind unless he is the holder of a licence, permit, certificate or other authority granted and issued under this Act." [s. 54(1)(a)]

The appellant was not the holder of any licence permit, certificate or other authority granted and issued under the Fauna Act. He was charged in the Magistrates Court of Queensland with one count of taking fauna contrary to the Fauna Act. The appellant contended and the Magistrate accepted that s. 211 of the Native Title Act 1993 applied.

This states as follows: “(1) Subsection (2) applies if: (a) the exercise or enjoyment of native title rights and interests in relation to land or waters consists of or includes carrying on a particular class of activity (defined in subs (3)); and (b) a law of the Commonwealth, a State or a Territory prohibits or restricts persons from carrying on the class of activity other than in accordance with the licence, permit or other instrument granted or issued to them under the law; and (c) the law is not one that confers rights or interests only on, or for the benefit of, Aboriginal peoples or Torres Strait Islanders.

- (2) If this subsection applies, the law does not prohibit or restrict the native title holders from carrying on the class of activity, or from gaining access to the land or waters for the purpose of carrying on the class of activity, where they do so:
- (a) for the purpose of satisfying their personal, domestic or non-commercial communal needs;
- (b) in exercise or enjoyment of their native title rights and interest.
- (3) Each of the following is a separate class of activity (a) hunting (b) fishing (c) gathering (d) a cultural or spiritual activity (e) any other kind of activity prescribed for the purpose of this paragraph.

The Magistrate found that the appellant’s clan “have connection with the area of land from which the crocodiles were taken” and that this connection had existed “before the common law came into being in the colony of Queensland in 1823 and ... thereafter continued.” He further found that it was a traditional custom of the clan to hunt juvenile crocodile for food and that the evidence suggested that the taking of juvenile rather than adult crocodiles had “tribal totemic significance and was based on spiritual belief.” The Magistrate found the appellant not guilty and dismissed the charge.

In effect then the Magistrate found that:

- (a) the exercise of enjoyment of native title rights and interests in relation to the land or waters where the crocodiles were taken included hunting or fishing;
- (b) the law of the State (the Fauna Act) prohibited or restricted persons from carrying on those classes of activity other than in accordance with a licence, permit or other instrument granted or issued to them under the Fauna Act 1986.
- (3) the Fauna Act was not one that conferred the rights or interests only on, or for the benefit of, Aboriginal peoples or Torres Strait Islanders; and accordingly
- (d) the Fauna Act did not prohibit or restrict the native title holders from carrying on those classes of activity of hunting and fishing) or

from gaining access to the land or waters for the purpose of satisfying their personal, domestic or non-commercial communal needs and in exercise or enjoyment of their native title rights and interests.

On appeal, the court set aside the order of the Magistrate’s Court. By special leave the appellant appealed to the High Court. He contended that the Magistrate was right in dismissing the charge because in taking the crocodiles the appellant was exercising or enjoying his native title rights and interests; these rights and interests were preserved by the Native Title Act. It followed that the Fauna Act, to the extent to which it prohibited or restricted the taking of crocodiles in the exercise of those rights and interests for the purpose of satisfying personal, domestic or non-commercial communal needs was invalidated by s. 109 of the Constitution.

The respondent contended that any native title, right or interest to hunt crocodiles in Queensland which the appellant may have enjoyed had been extinguished, prior to the commencement of the Native Title Act by the enactment of s. 7(1) of the Fauna Act which provided that “all fauna, save fauna taken or kept otherwise than in contravention of this Act during an open season with respect to that fauna is the property, is the property of the Crown and under the control of the fauna authority.” It followed, so that respondent submitted, that the Native Title Act provisions preserving native title rights and interests to hunt and fish had no relevant operation in this case, because the native title rights and interests upon which the appellant relied had been extinguished before the Native Title Act had been enacted.

Earlier forms of Queensland fauna legislation had provided expressly that those Acts did not apply to “any aboriginal killing any native animal for his own food.” Unlike these earlier Acts however the Fauna Act did not deal expressly with Aboriginals taking native animals or birds for food. That being so, much of the argument concerned what effect the Fauna Act’s vesting of “property” in some fauna in the Crown had on the native title rights and interests asserted by the appellant.

The court then considered the provisions of the Fauna Act. Section 7(1) did not make all fauna the property of the Crown and under the control of the Fauna Authority. “Fauna taken or kept otherwise than in contravention of this Act during An open season with respect to that fauna was excepted.” Estuarine crocodiles were declared by Order in Council made on 29th August 1974 to be fauna for the purposes of the Act. Did section 7(1) give rights to the Crown in respect of fauna that were inconsistent with the rights and interests upon which the appellant relied? What interest was vested in the Crown when the Fauna Act provided that some fauna was the property of the Crown and under the control of the fauna authority. The respondent’s submission was that s. 7(1) gave full

beneficial, or absolute, ownership of the fauna to the Crown. The respondent sought to equate the Crown's property in fauna with an individual's ownership of a domestic animal.

The property which the Fauna Act vested in the Crown was no more than the aggregate of the various rights of control by the Executive that the legislation created. These were rights to limit what fauna might be taken and how it might be taken, rights to possession of fauna that had been reduced to possession, and rights to receive royalty in respect of fauna that was taken (all coupled with or supported by a prohibition against taking or keeping fauna except in accordance with the Act). Those rights are less than the rights of full beneficial or absolute ownership. Taken as a whole the effect of the Fauna Act was to establish a regime forbidding the taking or keeping of fauna except pursuant to a licence granted by or under the Act. This would not be enough to extinguish the rights and interests relied on by the appellant.

Turning to the issue of native title rights and interests, the court stated that section 223 of the Native Title Act provides that "The expression native title or native title rights and interests means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters where:

- (i) the rights and interests are possessed under the traditional laws acknowledged and the traditional customs observed by the Aboriginal peoples or Torres Strait Islanders;
- (ii) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
- (iii) the rights and interests are recognized by the common law of Australia.

Rights and interests includes hunting, gathering, or fishing rights and interests.

The hunting and fishing rights and interests upon which the appellant relied were rights and interests "possessed under the traditional laws acknowledged, and the traditional customs observed" by the clan or tribe of which the appellant was a member. The magistrate found that by those laws and customs the appellants clan and tribe had a connection with the land and waters where the crocodiles were taken. At least until the passing of the Fauna Act those rights and interests were recognized by the common law of Australia.

The respondent's contention was that the Fauna Act extinguished these rights and interests. Native title was extinguished by the creation of rights that are inconsistent with the native title holders continuing to hold their rights and interests. The respondent contended that the Fauna Act created a legal regime that was inconsistent with native title holders continuing to hold one of the rights and interests (the

right and interest in hunting and fishing) that made up the native title. That inconsistency was said to lie in the creation of property rights in the Crown that were inconsistent with the continued existence of native rights and interests.

The Court held that regulating the way in which rights and interests may be exercised was not inconsistent with their continued existence. Indeed, it presupposed that the right exists. Regulating particular aspects of the usufructuary relation with traditional land does not sever the connection of the Aboriginal peoples concerned with the land. Saying to a group of Aboriginal peoples "You may not hunt or fish without a permit" does not sever their connection with the land concerned and does not deny the continued exercise of the rights and interests that the Aboriginal law and custom recognizes them as possession.

Section 211 of the Native Title Act provides that a law which "prohibits or restricts persons from hunting or fishing other than in accordance with a licence, permit or other instrument granted or issued to them under the law" did not prohibit or restrict the pursuit of that activity in certain circumstances where native title existed. The Fauna Act did not extinguish the rights and interests upon which the appellant relied. Accordingly, it did not prohibit the appellant, as native title holder from hunting or fishing for the crocodiles he took for the purpose of satisfying personal, domestic or non-commercial communal needs. The appeal was therefore allowed.

(xvi) Attorney General v Lahoy Akonaay, (Tanzania)

This Tanzanian case raised also the issue of customary land rights in the face of legislative changes.

The respondents, father and son, had acquired land rights under customary law recognized as deemed rights of occupancy under section 2 of the Land Ordinance over 20 acres in Mbulu District, Arusha Region, which they had cleared in 1943. They occupied and used the land until they were dispossessed during "Operation Vijiji" under the Villages and Ujama Villages Act, 1975. They successfully sued for the recovery of that land and regained possession of it in 1990. An appeal against that judgement was still pending when the Regulation of Land Tenure (Established Villages) Act 1992 was passed. The effect of this Act was to extinguish customary rights in land acquired before "Operation Vijiji" in an "established village", to prohibit the right to compensation for such extinction, to oust the jurisdiction of the courts, terminate relevant court proceedings and prohibit enforcement of any relevant court decision. Proceedings under the 1992 Act were to be instituted only in local land tribunals. The respondents then petitioned the High Court alleging breaches of their fundamental rights and obtained a declaration that the 1992 Act was invalid for inconsistency with the Constitution in that its provisions violated, inter alia, the petitioners rights of freedom from deprivation of property without fair compensation. The Court ordered the Act to be struck out

of the statute book. The Attorney General appealed on the grounds, *inter alia* that customary rights were not forms of property protected by the Constitution.

The Court of Appeal held that customary or deemed rights in land, though by their nature are nothing but rights to occupy and use the land, are nevertheless real property protected by the provisions of the Constitution and deprivation of a customary right without fair compensation

is prohibited by the Constitution. Further that sections 3 and 4 of the 1992 Act which provided for extinction of customary rights in land but prohibit payment of compensation are violate of the Constitution and are null and void. However the court held that the provisions of the 1992 Act relating to extinction of customary rights were not applicable to the respondents because their customary rights had been extinguished before the 1992 Act and before the basic human rights became enforceable in 1988.

B. TEXTS

1

Planning Control

DECISION A132/98

IN THE MATTER

of an application for enforcement order under section 316 of
the Resource Management Act 1991

BETWEEN

ALAN WILLIAM SUMMERS
(Application ENF 99/96)
Applicant

AND

THE FAR NORTH DISTRICT COUNCIL
First Respondent

AND

**RAY SEYMOUR, MILAN YERKOVICH, TREVOR
BLUCHER and NORM BRYAN**
Second Respondents

BEFORE THE ENVIRONMENT COURT

Environment Judge DFG Sheppard (presiding)
Environment Commissioner P A Catchpole
Environment Commissioner F Easdale

HEARING at **KAITAIA** on 3, 4, 5, 6, and 7 November 1997, and 2, 3, 4 and 5 June 1998.

COUNSEL

R M Bell for the Applicant
M A Ray for the First Respondent
C A Patterson for the Second Respondents

DECISION

INTRODUCTION

1. This case concerns flooding and drainage of farms in the Motutangi district near Houhora, some 35 kilometres north of Kaitiāia. An owner of one of the farms, Mr A W Summers, claims that as a result of overdrainage and inadequate clearing of public drains, the condition of his farm has deteriorated considerably. By this application for enforcement orders he seeks that the overdrainage cease, and also seeks restoration of the condition of his farm. The proceedings are not for damages, but for restraining and mandatory orders in terms of section 314 of the Resource Management Act 1991¹.

2. The First Respondent is the territorial authority for the district, the Far North District Council. The Second Respondents are other farmers at Motutangi who are members of the Motutangi Drainage Committee. That committee has no formal status, but exists to give the District Council advice in respect of the Motutangi Drainage District. The Motutangi Drainage District was established as long ago as 1928, but there has not at any time been a written specification of the extent of drainage works to be done in the district.

3. The First and Second Respondents denied responsibility for the condition of the Summers' farm, and opposed the making of any enforcement orders. The application was fully contested, and the hearing occupied nine hearing days, including an extensive site visit. Evidence was given by 15 witnesses, most of whom were cross-examined fully.

The Summers' farm

4. Mr Summers moved to the Motutangi area in 1972 and he has farmed there ever since. The farm is in several blocks which were acquired between 1973 and 1984 namely: Certificates of Title 1175/93 containing 66.0497 hectares; 52B/1082, 50.9626 hectares; 33A/395, 9.7124 hectares and 55A/1347, 34.9428 hectares, the latter being an interest under a deferred payment licence. Of the total area of 161.6675 hectares some 25.37 hectares lies to the west of Main North Road and the balance, some 136.3 hectares, to the east towards the coast.

5. Mr Summers described his land as being 85 to 90% peat, as generally falling in level from west to east, and as being the lowest lying land in the drainage district.

6. Mr Summers first bought the 66-hectare block from Mr M I Matich and, as described by Mr Summers, it was

then in 15 paddocks with 13 water troughs, fences of two or four wires and poor boundary fences, a four double-up walk-through milking shed, and with a central race and a wooden bridge over the Aspin Drain. Mr Summers described the present state of his farm of 161 hectares as being almost fully developed with 68 paddocks, fences of two-wire electric and some fairly new eight-wire and batten electric fences. There are six miles of fenced races and a crossing under the main road, and a 20-a-side herringbone milking shed. Water supply is from a well, stored in two 5000-gallon tanks on the highest part of the farm, providing a gravity feed by way of 40-millimetre high-density piping to 30 water troughs located mostly on fence lines to serve two paddocks each. The remaining paddocks are watered from permanent drains.

7. Mr Summers explained that an earlier regular programme of lime and fertiliser application had been curtailed in 1982, when he came to realise that application to areas subject to flooding was wasted expenditure. He gave an example of a flood which began in September 1991 and which left the farm still under water in April 1992. In his fourth affidavit Mr Summers explained how pasture is lost to farming from overdraining and lowered groundwater, while flooding (which can affect 28.3 hectares in a small flood and up to 81 hectares in a large event) causes rotting of the grass cover.

8. In his third affidavit Mr Summers produced photographs taken in August and September 1996 of pasture consisting of clover, rye and kikuyu near the road and towards the Turner property, pasture which he considered as good as any in the district. He agreed that his farm is deficient in the trace elements of selenium, copper and cobalt. He deposed that this is typical of the Aupouri Peninsula, and he asserted that he counters those deficiencies by treating his stock with appropriate remedies.

9. In his sixth affidavit Mr Summers deposed that from 1973 until 1985 he had made regular applications of both fertiliser and lime as required, but there had been no significant applications since. A letter from the Northland Cooperative Dairy Company² set out Mr Summers' seasonal production figures for milkfat between 1981 and 1997. The total for the 1981/1982 season was 14,796 kilograms, 1987/1988 showed a high of 16,586 kilograms and for 1996/1997 the figure was 6406 kilograms. Mr Summers deposed that he also runs dry stock. He provided a comparison with the production from the Turner property immediately to the south³, which has an area of 80.3 hectares milking 110 cows and producing 27,000, 29,000 and 30,000 kilograms of milk solids for the seasons 1994/95, 1995/96 and 1996/97 as warranted by the owner. For

¹ The relief sought is set out in more detail in paragraphs 115 and 116 of this decision.

² Produced as Exhibit M of the sixth affidavit of A W Summers, sworn on 29 October 1997.

³ Exhibit AJ in the seventh affidavit of A W Summers, sworn on 14 May 1998.

the same seasons Mr Summers' production figures were 10,177, 9325 and 6406 kilograms respectively. Mr Summers deposed⁴ that some 15% of the Turner property is subject to flooding in major events.

10. In his first affidavit Mr Summers gave an example of the overdraining of peat affecting his pasture. He deposed that in the past an area of 3.24 hectares not subject to flooding would graze 200 cows for 24 hours, but since drain deepening in 1993 the same herd requires 19.4 hectares for 12 hours grazing. This equates to a 90% loss of grazing capacity. In the result Mr Summers maintained that there has been an effective loss of 60.7 hectares of his farm which is no longer good for grazing, resulting in the dairy production being much lower than might otherwise be expected.

11. Mr G R Ussher, a Kaitaia agricultural consultant who had been engaged on behalf of the District Council, had made an inspection of the eastern portion of the Summers' property on 22 August 1996 and prepared a report. This report focused on three areas representative of the middle to bottom area of the farm and noted soil fertility deficiencies which were related to restricted pasture production throughout the areas sampled. Pasture species varied from strong ryegrass, white clover and kikuyu nearest the road, to a reasonable presence of these species in the middle area, to very few plants in the bottom or most eastern areas where carpet grass was dominant, together with some Yorkshire fog and the legume lotus. Mr Ussher had estimated the quantity of pasture as 1200 to 1400 kilograms of dry matter per hectare, which he compared with 1800 to 2000 kilograms for a moderate to highly stocked dairy farm in this area. The witness judged the available pasture on the Summers' farm to be extremely low, and reported that the farm was extremely short of feed for that time of year. Because of the low soil fertility he considered that the feed supply would remain low through the next two months especially, but also through most of the year, meaning low milk production.

12. Mr Ussher reported that he had walked through a dry dairy-stock herd of 220 to 240 head, the body condition of which he judged to be low to very low. This herd appeared to be largely cows and rising 2-year-old heifers calved or close to calving, and as such should have had a body condition score of at least 5.0 to ensure good milk production, minimal animal health problems and good reproduction levels. He judged the animals to have a condition score of 3.0 to 3.5 and as being thin to very thin. The rising two-year-olds he judged were smaller in size as a result of low feed intakes throughout their lives.

13. Mr Summers responded to that report in his fourth affidavit, claiming that the herd referred to had numbered

173, made up of 118 heifers which included bigger yearlings and 16- to 18-month old animals not in calf, 11 held-over cows and 44 cows to calve. He deposed that they had been under stress because of flooding earlier in the year, and because of over-draining.

14. During our visit to the property on 6 November 1997 we observed marked contrasts in the lower area of the Summers' farm between his land and the neighbouring property immediately across the main outfall drain near to Bryans Drain. The Summers' land was at a markedly lower level and the pasture was very closely grazed by comparison. To the south and east, towards the scientific reserve, pasture in low-lying areas was in poor condition and generally far from plentiful.

15. In his affidavit Mr Matich stated that up to 1973 the 66-hectare property that he had sold in that year to Mr Summers had consistently produced 13,600 kilograms of butterfat from 100 cows, had carried all replacement stock, made 2000 to 5000 bales of hay per year, and also could provide some rental winter grazing to local farmers. He stated that there had been flooding problems with the bottom part of the farm two or three times a year, with floods taking three or four days to recede. He gave the opinion that the Summers property, farmed properly, was as good a block of land as one would find anywhere in Northland.

16. Mr Summers produced⁵ an aerial photograph of the general district with landform information overlaid. We were told that the photograph was a copy from an as-yet unpublished report by Ecological Research Associates of NZ Inc. commissioned by the Northland Conservancy of the Department of Conservation and titled *Options for Managing the Kaimaumu Wetlands*. The landforms shown are as interpreted by D Hicks from a 1996/1997 examination of soils and water levels and from his landform map prepared in 1975. That part of the Summers' farm east of the main road is classified on the photograph variously as: f2, inland foredunes dry sand ridges alternating with wet peat hollows; s2, shallow sandy peat swamps; s3, deep fibrous peat swamps; and the most easterly strip p1, younger parabolic dunes dry sand ridges alternating with moist sand flats or wet peat swamp.

17. Mr K Thompson is a botanist specialising in peat wetlands management. He described the hydrology and historical development of the Motutangi swamp in which the Summers' farm is located. He deposed that the catchment has a complex history involving several phases of dune advance followed by consolidation, podsolisation and peat disposition from vegetation ranging from scrub and rain forest on ridges, to kauri forest, raupo swamp and peat bog on the flats. He considered that the Motutangi/

4 In Exhibit N of his sixth affidavit.

5 Exhibit AP to his sixth affidavit.

Kaimaumau system is unique in New Zealand for its several different peat types, associated complex dune systems, and discontinuous hard pans. As well, the hydrology is very complex involving as it does rainwater inputs, high evaporation rates, tidal effects, groundwater flow in several distinct aquifers, and widely dispersed springs.

18. Mr Thompson identified the Summers' property as having three types of peat with two acid varieties being almost solely confined to his land. Each peat type has a different water level and management requirement.

19. From this and other evidence we accept that the nature of the ground in the Motutangi catchment is complex, and that a high level of information and understanding is necessary for its successful management. Mr Thompson noted that there is no water budget for the catchment which can relate regional rainfall and seasonal variations to the requirements of the catchment and the water levels necessary to maintain it in a sustainable manner, nor were the figures available to prepare such a budget, and as a result there had been much speculation. He stated—

I can only say it seems unwise to use 'standard' drainage principles and methodologies on a complex and grossly under-researched peatland system...

20. In a letter to the Regional Council dated 29 December 1995 Mr Thompson had concluded—

Drainage issues on Motutangi appear at best to have been ad hoc. There is an urgent need to get management onto a firm scientific footing, to the benefit of all land owners (including the Department of Conservation).

21. We agree with that, although we do not know whether the return to be expected would warrant the cost of the research.

The Motutangi drainage system

22. The natural drainage of the Motutangi district is the Motutangi Stream, which flows in a generally north-north-westerly direction to the Rangaunu Harbour at Houhora. The land in the drainage district lies generally to the south-west of the Motutangi Stream.

23. The course of the stream has been altered upstream of the Summers' farm. Its former course lay further to the west, through an area which is now a scientific reserve.

24. The first significant alteration to the natural drainage of the area was in the late 19th century when part of the area was occupied by gumdiggers. At about that period, a drain or canal was cut through sand dunes at what is now

the bottom of the Summers' farm, to flow through to the Motutangi Stream. That is known as "the Cut".

25. Since establishment of the drainage district, other drains have been made, most named after farmers whose properties were served by them. There is a main drain (known as the Main Outfall) through the lower part of the Summers' farm, leading to the Cut. Beazleys Drain and Bryans Drain, which serve areas lying generally to the north of the Summers' farm, join the Main Outfall. The Aspin Drain joins it from the south. Further south the Selwyn Outfall flows in a generally north-easterly direction to a locality known as Lands End, from where it turns to the north-north-west and flows to the Motutangi Stream. The Seymour Drain and Bacicas Drain are tributaries of the Selwyn Outfall.

26. It is relevant to one of the issues in this case that the Aspin Drain starts at a position very close to the Selwyn Outfall.

The main issues

27. There are three main issues: overdrainage, inadequate drain cleaning, and separation of the Selwyn Outfall from the Aspin Drain.

28. It was Mr Summers' case that once the Selwyn Outfall had been extended to Lands End, in the late 1970s the drains in the district were capable of providing effective drainage for farms within the district so long as the drains were properly maintained. However he contended that from the mid 1980s, the drains were not properly maintained, in two respects. The first respect was that when the Main Outfall through his land, and the Motutangi Stream below the Cut, were cleaned, more material was removed than is involved in cleaning, so that they were overdeepened. The result was a lowering of the water table, leading to drying of peat on his land and slumping. The second respect was that the drains, particularly the Motutangi Stream below the Cut, were not cleared of weeds regularly and adequately. The result was that in wet conditions, the drains did not function adequately, leaving water lying on his land longer, damaging the pasture, restricting his ability to provide feed for his livestock, and providing a longer-term disincentive to apply fertiliser which might be wasted by further flooding.

29. The third main issue related to the separation between the Selwyn Outfall and the Aspin Drain. Some farmers in the district considered that the system would function better if there was a connection between the two, so that in times of flood some of the water flowing in the Selwyn Outfall might be diverted into the Aspin Drain. There had been at least one unauthorised experiment by installation of a pipe between the two. Mr Summers contended that this had exacerbated flooding on his farm.

30. We address the evidence on those three main issues in that order.

Over-deepening and levels of drains

31. It was Mr Summers' case that the drains have been deepened, which has led to a depletion of the groundwater, and overdrainage of the peat, with resulting loss of peat structure and fertility. The loss of groundwater has been such that the land has subsided with slumping. In turn these have adversely affected the quality of the pasture on his farm and therefore his production. He alleged that the deepening has been as a result of improper cleaning.

32. At paragraph 29 of his first affidavit Mr Summers deposed —

The effect of the deepening work, both in the Motutangi stream and in the Aspin drain, was to remove ground water from a large area of my farm and neighbouring properties.

33. And at paragraph 51 he deposed —

It is my case that the work of the District Council as carried out through its contractors has had significant permanent effects on the environment at Motutangi. The loss of ground water from the peat has reduced the quality and fertility of the peat. The way the work is carried out has been contrary to normal drainage practices in peat areas. The effect has been quite catastrophic for me.

34. Mr Summers claimed that fixing this up would be difficult. That is because the loss of fertility in dried peat is considered irreversible. He considered that the solution lies in chisel ploughing. This is a form of ploughing by which peat lying well below the surface, which is still wet, is brought to the surface, and other dry peat, lying at the surface, is buried. There would be associated grass sowing, application of fertiliser, lime, etc. However for this to work, it would also be necessary to raise groundwater levels to ensure that the peat remains moist. That would require engineering works within the district drains and streams.

35. Mr Summers produced a substantial number of photographs of drainage works taken over many years to support his allegations of deepening work and of overdeepening of drains. However we are not able to tell from that evidence the extent to which material removed from a drain has come from the invert of a drain, from the side of a drain, or is loose material which has fallen into the drain, or has been deposited there since the last cleaning and would be removed by the next cleaning.

36. The District Council official who until late 1995 had been responsible for the maintenance of public drains in the district, Mr G K England, produced⁶ a letter dated 8 September 1993 from Mr HR Green, Works Manager for the Far North District Council, where Mr Green stated —

It is generally understood by all working in the drainage field, that excessive drainage of peat can result in drying and shrinkage of the peat with consequent settling of the land surface.

37. The consensus seems to be that a peat farmer should aim to keep the water table within 45 centimetres of the surface.

38. It was Mr England's evidence that, apart from particular identified capital works, the only work undertaken by the District Council had been maintenance of the system to the existing profile. This work involves clearing silt and weeds from the drainage channels. The work is performed under an annual contract. The standard specification for the contract details the extent of the works to be undertaken. The specification includes the words —

All weeds and silt shall be removed to 500 mm above low water level to restore the channel to its original shape. All excavated material shall be deposited so as to leave a clear berm wide enough for future machine clearing.

39. Supervision of the contract had been undertaken by Mr England himself, typically by two or three visits over the course of each year's contract. He deposed that since 1982, when he had started supervising contracts in the drainage district, he had never seen any deepening of the drains. He acknowledged that the work involved the removal of silt and sand deposited in the drains, and stated that removal of accumulated sediment does not constitute deepening the drain.

40. Mr England denied that there had been attempts to disguise the fact that peat had been removed from the drains. He affirmed that all that had been removed was swamp material naturally moving into the drains by the build-up of hydrostatic water pressure on the banks.

41. There was no evidence of the District Council having contracted for, or having paid for, drain deepening. Mr M J Reed was the drainage contractor who was the most recent to undertake work in the area. It was his evidence that he had no instructions to do other than clear drains, and that he had not undertaken any deepening works. In answer to questions put to him in cross-examination, Mr Reed made it clear that he had never received any instructions to deepen the drains, only to clean them. He stated that his equipment was not capable of carrying out deepening, as it consisted of a weed-bucket with some extra bars, and that he would not have been paid for any deepening work. He also gave the opinion, based on his observations of the deposits along the banks, that previous contractors had not taken out much apart from the weed.

⁶ As Exhibit L of his first affidavit, sworn on 21 October 1996.

42. Various witnesses were called to provide evidence of the levels and cross-sections of the various drains.

43. Mr P J Cook is a qualified engineer and also has a diploma in agriculture. In April 1997 he had carried out survey work to try and identify if any deepening work had been carried out on the drains which relate to the Summers' land.

44. A survey was undertaken by a registered surveyor, Mr G R Webster, using a global positioning system total station, which commenced at Houhora Heads at a recorded level bench mark, and proceeded up the estuary of the Motutangi Stream and along its length to the intersection with the main outfall drain at the Cut, to Lands End, along the Selwyn outfall, the Aspin drain and the main outfall drain back to the Cut, with bank and invert levels being recorded at approximately 400-metre intervals. This information was overlaid by computer plotting on the District Council record map⁷. An overall plot of this work, together with long sections of the various drains, was produced in evidence by Mr Cook⁸.

45. In 1961 the former Mangonui County Council had made a survey of some 4800 metres of the Motutangi Stream between the mouth of the estuary and the Cut. The plans describing the result of that earlier survey were produced, but the field notes were no longer available. Those plans indicate a profile of the existing bottom or invert of the stream and a proposed bottom level or design grade which is based on an even grade line between the existing inverts at the Cut and the estuary. We note that this design grade follows generally the existing bottom for the first 800 metres from the Cut, but the existing bottom then drops abruptly to lie 1.0 to 2.0 metres below the design grade. We infer that the intention in 1961 was that the stream would gradually infill by deposition of sand and silt to achieve the design grade. That proposition was confirmed by Mr G K Cobb, the District Council's roading and drainage engineer, in response to a question from the Court.

46. Mr Cook gave evidence that relative to this section of the Motutangi Stream a comparison, as best as it can be achieved, between the current survey work and that of 1961 showed that the grade today is the same as the earlier design grade, and that no intentional deepening had been carried out. Mr Webster deposed that he had compared the two surveys and, although he had used a method different to that used by Mr Cook, he had arrived at a very similar result.

47. Mr Webster had been able to make a correlation between old and new survey work. From work done under his supervision a plan and long-section had been prepared

at the same scale as plans produced in 1961 by the then Mangonui County Council for the realignment of the Motutangi Stream and construction of the original drainage system. Production of the plans at the same scale had enabled the plans to be overlaid both for horizontal position and, by a comparison of common points, for vertical correlation. While not being an absolute comparison, because the original design had not been related to established survey monuments, Mr Webster concluded in his evidence

The long sections showing drain invert levels indicate that there has been no significant change from the design position shown on the 1961 survey other than that which may occur from normal maintenance over a period of 36 years.

48. The 1997 survey showed that the invert closely followed the design grade for the first 1400 metres back from the Cut and then gradually dropped to between 0.5 and 1.0 metres below the design grade. That suggests that infilling has indeed occurred. Although both Messrs Cook and Webster considered some minor over-deepening has occurred, the levels may also indicate that the infilling process is still taking place. Mr Cook gave the opinion that because the outlet is subject to natural tidal control, if some over-excavation had occurred it would not have had an adverse effect on flooding

49. Evidence was also given by another registered surveyor, Mr R D Williams, of a survey which he had undertaken for Mr Summers in November 1997 which had resulted in four cross-sections of the Motutangi Stream, the first at Bryans Bridge, and the other three 400 to 500 metres upstream from the bridge. Those cross-sections indicate a shelf in the western side of the bed of the stream, some 2 to 3.5 metres wide and 1 to 1.75 metres high, where the strongly growing water weeds would be beyond the reach of a clearing machine working on the east bank.

50. Mr Summers claimed that Mr Williams's survey was evidence of deepening work on the stream bed. Mr Williams's survey work was not related to that produced by Mr Cook, and comparison of the two was not possible because there are no other surveys or drainage design levels to which that survey can be related.

51. Mr Webster stated that he had not been able to draw any conclusions from the cross-sections provided by Mr Williams without further explanation as to how they relate to any other surveys. Mr Williams had made the same claim about survey work produced by Mr Cook. However Mr Webster had been able to make a limited comparison of his own survey with the plans of the 1961 survey because the common scale had enabled some correlation.

⁷ A minor positional discrepancy became evident, but it is of no consequence to this case.

⁸ Exhibits E to I of the third affidavit of P J Cook, sworn on 9 September 1997.

52. Mr Cook had also considered the long-sections developed from the 1997 survey for the other drains in the system, and indicated high spots on the Aspin Drain and a sandstone ridge in the Selwyn Outfall which protrude above the overall grade lines. He gave the opinion that those features would increase flooding upstream.

53. In his reply, counsel for Mr Summers submitted that the applicant had proved deepening within the means at his disposal; and referred us to a dictum of Lord Mansfield in *Blatch v Archer*⁹ —

It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to produce, and in the power of the other to have contradicted.

54. Counsel submitted —

... there are very real constraints on the evidence that the applicant can adduce. As a farmer within the Drainage District, (but not himself a member of the local drainage committee), he does not survey the drains and waterways within the Drainage District, and cannot be expected to carry out such surveys, or to keep running records of the length, breadth, and depths of drains and watercourses in the district and of groundwater levels within the Drainage District. Nor is he expected to supervise the work of contractors, carry out surveys of drains and watercourses before and after contractors have done their work. The amassing of such data is not reasonably expected of an individual farmer within a drainage district. If anyone is to be expected to compile and retain such information, it is the District Council.

So what the applicant has done is make observations of what has happened and kept a record of his observations by taking photographs. And these do show deepening.

55. Be that as it may, the function of the Court is to make findings on the evidence that is before the Court. We gave Mr Summers full opportunity to call evidence and to contradict evidence given by the respondents. His counsel ably cross-examined witnesses called on behalf of them. We take all that evidence into account. However it is our understanding that the Court is not to make findings that are not warranted by the evidence.

56. Having reviewed the totality of the evidence, we have not been persuaded that the Main Outfall, the Cut, or the Motutangi Stream have been overdeepened as alleged by Mr Summers. The scenes portrayed in the photographs produced by him do not point unequivocally to deepening, but are capable of other explanations, including widening. In particular, we accept that removal of silt and sand which

has accumulated in a drain or stream is within the proper scope of cleaning, and does not amount to deepening. The evidence of the presence of unoxidised peat and of shell in drain cleanings from the Main Outfall does not persuade us that deepening was carried out.

57. The cross-sections from Mr Williams's survey are not in themselves evidence of deepening. They show the existence at that time of a shelf at the side of the stream which was later partly removed. The cross-sections are not related to the 1961 survey or other evidence of the previous levels of the invert of the stream. The evidence of Mr England and Mr Reed did not support the allegations, and the evidence of Mr Cook and Mr Webster was not consistent with them. Counsel for Mr Summers reminded us that the surveyor who had carried out the survey under Mr Webster's supervision had not been called to give evidence, and submitted that Mr Webster could not vouch for the accuracy of the surveyor's work. However as a senior professional surveyor in public practice, Mr Webster was taking responsibility for work done by an employee in the course of that practice and carried out under his supervision. Unlike that of Mr Williams, Mr Webster's survey proved capable of correlation with the historic survey made in 1961. In our judgment that survey is worthy of consideration for the purpose of providing support for the respondents' cases.

58. Counsel for Mr Summers also submitted that the latter's plans show an averaging out without regard to particular rises and falls in the depth of the stream along its length, and do not show that at particular points the stream has not been deepened: that they are not evidence negating deepening. That may be, but they certainly do not support the claim of deepening; and they are consistent with the respondents' denial of deepening.

59. In short, although superficial deepening may have inadvertently resulted in local areas from drain cleaning, it was not systematic or significant; and we do not consider that the allegations of overdrainage and overdeepening have been established, and we do not accept them.

Drain cleaning

60. It was Mr Summers' case that since the 1980s, drains in the district had not been cleaned and cleared adequately, and that as a result his farm had suffered very serious flooding problems during the 1980s and 1990s. He referred in particular to the Selwyn Outfall, which can divert water away from passing through his property by way of the Aspin Drain and the Main Outfall. He alleged in particular that the Selwyn Outfall from Bacicas Drain down to Lands End, and the Motutangi Stream from Lands End to the Cut, had not been cleaned regularly and effectively.

⁹ (1774) 1 Cowp 53, 65, quoted in *Cross on Evidence* (4th NZ edition, 1989) paragraph 4.19.

61. We refer to the evidence in support of those allegations.

62. In his third affidavit¹⁰, Mr Summers deposed —

14. A matter that needs attention by the respondents is the cleaning of the Selwyn Drain downstream for approximately 1,200 metres from the place of the pipe.

15. Attached hereto and marked with the letter “I” are photographs showing light bull rush growing in the Selwyn Drain. There is approximately 2 feet of the weed growth. If the weed growth were removed, that would improve the capacity of the drain to take peak flows in the area downstream of the pipe.

16. The Selwyn Drain does not need deepening, but simple cleaning, as by a digger with a weed bucket.

17. There have been attempts to deal with weeds in this section by way of spraying, but spraying has been ineffective to deal with weed underwater.

63. The photographs exhibited to that affidavit marked “I” show weed growing in a waterway.

64. In his fourth affidavit¹¹, Mr Summers gave examples of what he claimed was lack of proper clearing of drains for some of the years in the 1980s —

Selwyn Drain

25. The area concerned is downstream from a point 300 metres below where the Bacica Drain joins the Selwyn Drain. In 1985 that stream was sprayed, but that was not effective to clear weeds. Otherwise from 1984 to 1988, there was no clearing work on that stretch of the drain.

Motutangi Stream

26. For the years 1986, 1988 and 1989 it was only partially cleared. In 1988-1989 only 1000 metres was cleared.

The Cut to Lands End

27. In 1985 there was an ineffective attempt to spray vegetation from a helicopter using a monsoon bucket. That aside, the stream was not cleared properly most years. Exhibit “C” is photographs of wattle trees growing on the west bank —evidence of lack of clearing for 4 years.

The Main Drain

28. In 1985 the Main Drain was sprayed but that was ineffective. For the last 22 chain, the drain was not sprayed. For the rest of the period 1981 to 1988 there was ad hoc clearing of the drain. Photograph “D” shows the uneven results of an attempt at spraying the drain from a helicopter. Paragraph [sic] “E” shows weed blocking the drain in 1989.

Aspin Drain

29. The Aspin Drain was cleared from 1982 to 1985 in an ad hoc way. In 1985 there was an attempt to spray the drain but the spraying was ineffective.

Beazley Drain

30. In 1986 the drain was sprayed but that was ineffective to clear the drain of vegetation. There were further attempts in 1987 and 1988, equally to no purpose.

31. In those days only weak sprays were used. Sprays generally attack only those parts of weeds exposed to the air and were ineffective on under-water parts of weeds. The committee recorded as much in its minutes of 19 January 1987: “Spraying of drains, killing weeds on surface, weed in bottom of drain still growing”(exhibit “F”)

32. The problem in the past was not insufficient internal drains on my farm, but the fact that with poor maintenance of the Motutangi and the Cut to Lands End, the canal and stream became clogged with weed. The canal then overflowed into my pasture.

33. The Cut to Lands End was also blocked, and that resulted in water flowing down the old Motutangi to my property...

35. Attached hereto and marked with the letter “H” are photographs of the Motutangi Stream taken in the years (mostly 1980s) before the Council began its overdraining work. These photographs were taken to show the problems with the drain when there had not been adequate clearing of weeds. Photographs “H1” and “H2” were taken at points where the County had cleaned for limited distance (1000 metres) showed the contrast between clearing operations and the rest of the stream, still choked with weeds. This was contract 11/89 (photographs taken in 1989). Photographs “H3” shows the stream, with weeds in it during the 1980s. “H4” looks south, with the west bank on the right side

10 Sworn on 8 October 1996.

11 Sworn on 30 January 1997.

and the east bank on the left side. This photograph shows the east bank lower than the west bank, with no signs of sand entering the stream.

...

82. Attached hereto and marked with the letter "EE" is a copy of contract number 11/89 with machine clearing, showing that only 1,000 metres of the Motutangi Stream was to be cleaned out of a total distance of 4,225 metres. In 1988 only 197 yards had been cleaned downstream from The Cut of the Motutangi. Contract number 5/91/14, exhibit D of Mr England's affidavit, shows that the contractor was not required to clean the Motutangi Stream. However some clearing work was done in the Motutangi in 1991 but it was not more than 400 metres. (See exhibit "FF" variation Order No 1)

...

102. Attached hereto and marked "YY" is a photograph of bullrush growing on the Selwyn Drain between the Bacica and Lands End. It shows more growth since the photographs in exhibit "I" of my third affidavit. At the highest point of the drain, the depth of water is 500 millimetres.

My vulnerability to flooding

103. In the present state of affairs, The Cut to Lands End has not been machine cleaned. It has been subject to some spraying but that has been ineffective and the drain remains largely blocked and impeded the flow of water. Photographs "ZZ" taken in 1996 show this. So if water comes down the Selwyn to Lands End, it will not go down to The Cut, or at least its full flow will be impeded. Instead some of the water will be diverted back along the old Motutangi into my property.

65. The photographs exhibited to that affidavit marked "C" show what appear to be wattle trees. The photograph exhibited to that affidavit marked "D" shows a clear waterway. The photograph marked "E" is said to show the main drain not cleared and blocked by weed, and appears to show vegetation. The photographs marked H1 to H6 show weeds in a stream (said to be the Motutangi Stream in the 1980s). The dates on which the photographs were taken, and positions from which they were taken, are not given. Exhibit "EE" is a copy of a contract dated 12 April 1989 for machine cleaning in the Motutangi Drainage District. It indicates that 1,000 metres of the Motutangi Stream were to be cleaned. Exhibit "FF" is a copy of a contract variation order dated 30 April 1991, providing for the Motutangi Stream to be cleared for 400 metres from the main outfall to the bridge crossing. The photograph marked "YY" shows growth of rushes in what is said to

be the Selwyn Drain between the Bacica Drain and Lands End. The photographs marked "ZZ" show weeds. The dates on which those photographs were taken, and positions from which they were taken, are not given.

66. In his sixth affidavit¹² Mr Summers produced¹³ a copy of a contract for 1987 which provided for cleaning of 500 metres of the Motutangi Stream. In that affidavit the deponent stated —

21. Photographs AG and AH are two photographs taken in 1997 between The Cut and Lands End. That stretch continues to remain choked with weeds.

22. Weed continues to grow in the Selwyn Outfall between the Bacica and Lands End. There has been no machine cleaning done to clear weed in this stretch, although weed has been cleared from the Bacica back to the Aspin and the Selwyn area. The effect of having weed uncleared in the Selwyn is to raise the level of water at the Selwyn-Aspin connection, and give a misleading appearance — suggesting that those upstream on the Selwyn need more drainage.

67. The photographs "AG" and "AH" attached to that affidavit show weeds over a drain. The dates on which those photographs were taken, and positions from which they were taken, are not given.

68. Counsel for Mr Summers helpfully attached to his submissions in reply a schedule summarising the length of stretches of the various drains which, according to the evidence, had been cleaned by machine over each of the years from 1987 to 1996. In summary, the whole length of the Motutangi Stream (ie downstream from the Cut) was cleaned only in 1992 and 1993; and in 1987 to 1991 no more than 1000 metres was cleaned in any year, and in 1990 no cleaning was done at all. The section from Lands End to the Cut was only cleaned in full in 1989 and 1993; and short sections in each of 1994, 1995 and 1996. The Main Outfall was fully cleaned in every year.

69. Mr Summers also relied on a letter dated 23 December 1992 from the District Council's Development Engineer, Mr W Haigh, to the Ombudsman¹⁴ stating that Mr Summers' complaints about inadequate maintenance had "usually been with some justification" and that "the local drainage committee had sought to have a certain drain critical to Mr Summers maintained less often in favour of other drains."

70. Mr R W Cathcart, the Regional Council's Land Operations Manager, deposed that he had visited the

12 Sworn on 29 October 1997.

13 Exhibit B of Mr Summers' sixth affidavit.

14 Exhibit V of Mr Summers' fourth affidavit, sworn on 30 January 1997.

Summers' farm in April 1992 in company with Mr Haigh, that there had been dry conditions over the summer, but the Summers' farm had been flooded, and he gave the opinion that this had occurred because there had been lack of maintenance work in the drains below his property: "The drains had not been cleared, thereby causing flooding of his farm".

71. Mr Cathcart reported that Mr Haigh had acknowledged that work had not been done below the Summers' property. The witness agreed that on other visits, drain maintenance had been done, and it was adequate.

72. It was the District Council's case that the evidence does not establish that flooding of Mr Summers' farm was related to lack of drain maintenance; that all the major flooding events that Mr Summers referred to had coincided with major storm events; and that because of the location of the Summers' farm, flooding from time to time is inevitable.

73. Mr England gave evidence of the formation, in December 1984, of the advisory committee for the Motutangi Drainage District. His understanding of the scheme and the way it was meant to be maintained and operated is that the scheme, which he understood had been formed under the Swamp Drainage Act 1915, was to provide reasonable and adequate drainage to all participating properties. This was to be done by the Council, on behalf of the drainage district, carrying out maintenance on particular identified drains. These were the primary outfall drains: the Motutangi Stream, the Selwyn Outfall, and the Main Outfall (the Canal), which were to be kept clear and free-flowing. As well, secondary, contributory drains were maintained in a serviceable condition. These were the Aspin, Beazley, Bryan, Seymour, and Bacica drains. All other drains or watercourses within the drainage district were to be maintained as seen fit by the individual farmer or ratepayer.

74. In addition to physical cleaning of identified drains by machine, the District Council supplied weedy spray to individual farmers for the spraying of the secondary drains which were part of the drainage system.

75. Mr England deposed that the Selwyn Outfall had been put in to divert flow away from the natural route to the Motutangi Stream, so that it passes instead via Land's End and The Cut. Much of the natural course of the stream had been on the land which is now the Summers' farm. Mr England did not consider that any of the maintenance works done had been other than for the benefit of the drainage district as a whole. He refuted the suggestion made by Mr Summers that there had been no concern with avoiding or mitigating flooding on the lower-lying land. Neither did he agree with the suggestion made by Mr Summers that a weed bucket only be used for cleaning the drains. The witness gave the opinion that only using a weed bucket would not be appropriate, as the cleaning work included the removal of silt and sand deposited in the drains.

76. Mr England deposed that the primary drains are maintained on a one- or two-yearly basis, and sections of secondary drains are maintained on a cycle from two years upwards, and may be sprayed in intervening years when mechanical cleaning is not done. He also deposed that in 1982 when he had been given responsibility for administration of the drainage districts, the Motutangi drainage district had been in deficit and this had restricted its ability to fund works.

77. The subsidy from the Northland Catchment Commission was to cease in about 1987, and in 1986 he (Mr England) had arranged for the Commission's engineer, Mr P Palmer, to come to a site meeting to discuss proposed works on Motutangi Stream. It was a full meeting of the advisory committee, together with Mr Summers and Mr Lynton (another farmer in the district). The meeting had discussed proposals (including hydraulic digging) in detail and at length.

78. Prior to 1987, machinery to clear the Motutangi Stream had operated from the west bank. Following the meeting with Mr Palmer, funding was obtained from the Northland Catchment Commission to make the stream accessible by hydraulic excavator on the east side of the stream. The work was done towards the end of 1987.

79. Mr England testified that from 1987 a consistent and substantial programme of maintenance works was undertaken, the scheme had become self-funding in about 1989, and by the time of Mr Summers' complaint in 1992, Mr England considered that work was being done to maintain the drains in a satisfactory condition.

80. Mr England explained that machine cleaning of drains was carried out in late summer and autumn, to give the best drainage improvement for winter; and he gave the opinion that earlier drain clearance would have been inefficient as regrowth takes place rapidly in summer. The witness stated that it was not possible to always have the drains in optimum condition, but observed that if significant rain fell in summer or autumn, then adequately maintained internal drains should avoid significant problems with ponding water, and that "The scheme cannot, and does not claim to, guarantee freedom from surface ponding."

81. Mr England did not accept Mr Summers' allegation of maintenance being carried out on an ad hoc basis to Mr Summers' detriment, stating that the procedures, method of operation, and work programmes for the Motutangi Drainage District were clearly understood and implemented. He deposed that work was undertaken as and when needed, and that not all the drains need to be cleared every year, but over a period clearance work on all drains had been undertaken.

82. Asked whether, if the Motutangi is obstructed downstream of the Cut, water would back up, he agreed

that it would “to an extent”; but when he was asked if Mr Summers would get flooding on lower parts of his farm, Mr England replied that this was not quite correct, although water would back up. Asked whether, if water could not flow past Lands End, it would be diverted through the old bed of the Motutangi, the witness agreed that it would, and would flow into the scientific reserve and on to the Summers’ farm, depending on the size of the flood. He agreed that it was important to keep the drains maintained, and that clearing weeds is part of the maintenance, as weeds form part of an obstruction within a drain

83. Mr England was asked about a letter dated 20 June 1986 from Mr Summers to Mr Palmer¹⁵. The witness recalled the Engineer having talked to him about it. Mr England had known that Mr Summers had concerns in 1986. He had known that the Selwyn had not been cleaned the year before, that there had been an attempt to spray by helicopter, and it had been unsuccessful. Mr England confirmed that the next year he had not arranged for the Motutangi to be cleaned in full, or for the Selwyn or Lands End to the Cut to be cleaned; he explained that 1500 metres of the Selwyn had been sprayed and that the Cut had been left for that year; and explained the system had been cleaned to what was agreed by the Council and the Engineer.

84. Mr England stated that in 1986/1987, work had been concentrated more on relieving the top end of Selwyn and main drain outfalls, but some work had been carried out on the stretch from Lands End to the Cut. He agreed that in 1988 the Motutangi had not been cleaned by machine or sprayed, and in 1989 only 1000 metres of it had been cleaned; then nothing had been done on it until 1991, and then only 500 metres had been cleaned; and that the only year when the Motutangi had been cleaned for its entirety had been 1992. Mr England explained that the stream had not been cleared in 1988 because in creating access for the hydraulic excavator in 1987, the stream had been cleared at that time; and that in 1994 and 1995 it had not been necessary to clean it.

85. Mr England testified that the Cut had been cleared in 1987 and 1989, that sections of the Selwyn Drain were sprayed in 1988 and machine cleared in 1989, and in 1992 the total length was cleared; that the Cut was cleared in its entirety in 1993, and sections of it in 1994 and 1995.

86. Shown photographs of weeds, Mr England deposed that some weeds float. Shown photos of water lying in Summers’ farm, the witness would not agree that this is what happened when a stream is not cleared of weed, nor did he agree that water lying on the Summers’ farm was totally contributed to by weeds in the drain. He was unable to say that flooding on the Summers’ farm had been caused by weed growth in the Motutangi Stream, although he

agreed that weed growth may have contributed to backing-up of water.

87. Mr Cook gave the opinion that the present management practice of cleaning drains in late autumn provided a level of natural water-table control, with spring growth and silt aggradation in the drains raising the water table over the summer months, but has the disadvantage that properties were potentially subject to increased flooding over that period. His study had shown that the drainage system had been designed for an average annual peak flow, so that flooding could be expected to occur on average more frequently than every two years.

88. Mr T Blucher, a member of the drainage committee from 1984 to 1996, chairman from 1984 to 1992, and one of the Second Respondents in these proceedings, deposed that the committee had recommended to the District Council which drains should be cleaned or sprayed. He remarked that it had been the Council’s final responsibility and that the Council would sometimes add or delete drains or areas of drains which the committee had recommended, and that the committee never gave instruction to contractors on how to do their job. Mr Blucher deposed that in 1992 he had walked the main cut, the stream main outfall, and the Bryan and Beazley Drains, and reported that the cleaning had left a lot to be desired. He stated that the committee —

... certainly do not take the view that the rest of the land should be drained to the detriment of the land being farmed by Mr Summers.

89. Mr N Bryan, another of the second respondents, had been a member of the drainage committee from its formation in 1984. He agreed that the purpose of clearing weeds had been to improve the flow of water, that if weeds were not cleared, there were problems with draining water from the district, and that regular cleaning promoted efficient drainage. Mr Bryan agreed that for 1996 the committee had recommended cleaning by machine between Lands End and the Cut of only a stretch of 100 or 200 metres at the bottom end, immediately above the Cut. In 1987 only 500 metres of the Motutangi had had maintenance work. That had been a recommendation he had made, because major capital works had been done in the Motutangi at about that time, they had cleared the stream for a considerable period, and cleaning the 500 metres was all that was required on it. Mr Bryan deposed that in one year, the committee had tried spraying rather than machine cleaning, but it had not worked, because there had been too much water in the creek at the time.

90. Asked in cross-examination whether before 1992 there had been any year in which the committee had recommended that the entire length of the Motutangi be cleared of weeds by machine, he agreed that there had not,

¹⁵ Exhibit C to Mr England’s first affidavit.

and explained that it had only been in recent years that there had been a build-up of paraquatic weed in the Motutangi Creek, remarking that earlier they had not had that problem. He believed that paraquatic had come from the Main Outfall and was creeping down the Motutangi Creek. He confirmed that the committee had always tried to keep a reasonable level of drainage in the Motutangi Creek, and that if the Motutangi was not kept cleared, it would impede the flow of water out of the district.

91. Mr R A Seymour, another of the Second Respondents, had also been a member of the advisory committee since 1984. He deposed that before 1987 the water had not been able to get away quickly enough, until the Cut was lowered and trees taken out of the Motutangi Stream. In that year virtually the whole area had been done by capital works, and maintenance work had not been necessary for a couple of years.

92. Asked about the absence of recommendations for cleaning from Lands End to the Cut in 1990 and 1991, Mr Seymour explained that that stretch has quite a fall, and the problem with the Selwyn Drain was higher up where sandstone was not removed when the drain was formed. He also stated that if the drain was not cleaned by machine, it would have been sprayed.

93. The other of the second respondents, Mr M Yerkovich, confirmed that in 1987 the Motutangi from the Cut down had been cleaned out thoroughly. Asked about clearing the stretch from Lands End to the Cut, he deposed that members of the committee had to decide “what could be spent where out of a limited amount of money”, but if it was not cleaned by machine, he would spray the whole 7 kilometres himself.

94. In making our findings on this issue, we start by noting that there is no evidence of any obligation by the District Council or the local committee that all the district drains, or even the primary drains, were to be cleaned every year. Rather, we find that decisions were to be made annually by the District Council, after receiving advice from the local committee, on what cleaning was to be done, and by what method. Inevitably cost would have been a factor. Although the Council had power to strike a rate on the district to meet the cost of works for any year, it would (particularly after the end of subsidies) have been influenced by the opinion of the ratepayers, especially as expressed by the local committee, in deciding an appropriate amount to be raised and spent, as well as how the funds were to be spent.

95. We have focused on the four stretches of drain of particular importance to the Summers’ farm: the Selwyn Outfall down to Lands End, Lands End to the Cut, the Main Drain through the canal to the Cut; and the Motutangi Stream from the Cut down. We accept that the evidence may not be complete.

96. The evidence is that the Selwyn Outfall down to Lands End was sprayed in 1985, sections were sprayed in 1986, 1500 metres were sprayed in 1988 and cleared by machine in 1989; in 1992 the total length was cleaned; and it was cleaned down to the Bacica Drain in 1997. It was sprayed in at least some of the intervening years.

97. The evidence shows that the stretch from Lands End to the Cut was sprayed in 1985, some work was done in 1986/87; it was cleaned in full in 1989 and in 1993; and short sections were cleaned in 1994, 1995 and 1996. That stretch was sprayed in some of the intervening years.

98. The Main Outfall (save the last 22 chains) was sprayed in 1985; in other years up to 1987 there was ad hoc cleaning; since then it was cleaned in every year.

99. The Motutangi Stream was partly cleaned in 1986; 500 metres was cleaned in 1987, later that year it was thoroughly cleaned in creating access on the east bank for use by hydraulic excavator; 197 metres was cleaned in 1988; 1000 metres was cleaned in 1989; 400-500 metres was cleaned in 1991; the whole length was cleaned in 1992 (although not to Mr Blucher’s satisfaction) and again in 1993 and (all but 100 metres) in 1994, 1995 and 1996.

100. We find that at times between cleanings and sprayings when those drains may have contained considerable quantities of weeds, the weeds would have impeded flow of water through them. We also find that when ponding or flooding occurred on the lower part of the Summers’ farm at times when flow of water through those drains was impeded by weeds, the fact that those weeds had not been cleared at those times is likely to have contributed to the ponding or flooding. However we do not accept that the existence of the weeds in the drains would have been the only cause of the ponding or flooding, nor the only reason why the water did not drain away from the Summers’ farm more quickly. In our understanding of the evidence the causes of that were more complex, and included the levels of the Selwyn Outfall, particularly below Bacicas Drain, the possibility of water passing down the old course of the Motutangi Stream through the scientific reserve, and the configuration and possibly the capacity of private drains on the Summers’ farm.

Separation of the Selwyn Outfall and the Aspin Drain

101. The Aspin Drain, which crosses and drains a large part of the Summers property, starts some distance to the south at a position which is close to the Selwyn Outfall. At the point where the drains are closest, the Selwyn Outfall flows in a generally north-easterly direction, and the Aspin (with an invert about 0.4 metres lower than the Selwyn) flows generally towards the north-west. The Selwyn Outfall carries water from higher up the catchment, including the Seymour and Vuksich properties.

102. In May 1995 the Northland Regional Council was advised that a pipe had been installed between the Selwyn Outfall and the Aspin Drain. The pipe had been installed without the Regional Council's consent, in contravention of the Northland Catchment Commission Bylaw 1967¹⁶, clause 9 —

No owner or occupier of land shall cause or suffer any constructed watercourse to be connected or continued to be connected directly or indirectly with any other constructed watercourse within the Commission's area without the prior consent of the Commission and then only upon such conditions and in such manner as the Commission shall impose and direct. Such consent may provide for the payments of annual or other charges of such amount as the Commission may determine.

103. Mr Cathcart deposed that although the pipe would not have carried much water, it would have created a weak spot. In a flood there would have been a danger that the fill around the pipe would be washed away, and water which was meant to be contained in the Selwyn drain would flood the area generally. The pipe also "went against" all planning for the drainage of water from the area. The water had been meant to be contained in the Selwyn Outfall to be channelled down to the Motutangi Stream, not to go into the Aspin Drain. The pipe exposed the Turner and Summers' farms to risk of flooding.

104. The Regional Council issued an abatement notice dated 25 May 1995 to the District Council. The action required by the abatement notice was:

The 300mm culvert which diverts flow into the Aspin drain must be removed and the trench backfilled with suitable non-permeable material, not local sand or peat, for the whole 20 metre width of the reserve and the head of the parallel drain in the Yerkovich property must also be backfilled within the reserve.

105. There had been no appeal against the issue of the abatement notice, but the Motutangi Drainage Committee had responded by a letter to the Regional Council stating that it was imperative that all personnel have on-site discussions, followed by written reports and directives from the appropriate council officers. This had been agreed to, and the parties had attended a meeting on Mr Yerkovich's property on 30 June 1995. Mr Yerkovich owned the property where the offending pipe had been installed.

106. At that meeting Mr Cathcart urged the Far North District Council and the drainage committee to prepare a proper management plan for the Motutangi Drainage

District, and both agreed to work on preparing such a management plan.

107. The outcome of the meeting had been that the Regional Council agreed to have the abatement notice withdrawn, on terms that the drainage committee was to block the culvert until such time as resource consent was granted.

108. On 6 October 1995 the District Council applied to the Regional Council for a resource consent for the pipe between the Selwyn and Aspin Drains. The application was returned to the District Council, noting that there had been no consultation with interested parties, a management plan had not been prepared, there was no assessment of effects on the Aspin Drain and adjoining properties, and no fee had been paid. The District Council did not make any further application, and no resource consent has been issued.

109. During the winter of 1996 Mr Cathcart received complaints from Mr Summers that the illegal pipe had been unblocked, and that floodwater was also flowing over the bank of the drain.

110. In response to the complaints Mr Cathcart contacted the District Council's Kaitiā drainage engineer who arranged to block the pipe and have it removed. Within a short time afterwards the pipe was removed and the embankment between the two drains was built up again.

111. Mr Summers contended that even with the pipe removed there was still a need for further heightening of the bank of the Selwyn Outfall, in addition to further cleaning further down the Selwyn, to protect his farm from flooding. Mr Cook stated that the purpose of the Selwyn Outfall had been to divert water away from the Summers property, and reduce the impacts of flooding. A second effect had been to reduce the flow in the Aspin. The result had been reduced flows in the Aspin Drain and a reduction in the water level which could lead to an increase in the potential for overdrying and shrinkage of the peat. In Mr Cook's opinion, discharging water into the Aspin in periods of low flow would be a benefit to maintaining more consistent flows in the Aspin drain. He suggested a flood-gate as a possible means of control, but he was also firm in his belief that a holistic approach to the whole Motutangi drainage district needs to be taken, because works carried out on one property or one part of the drainage district will affect another property or another part of the drainage system. The witness gave the opinion that any work requires careful planning for flood management and summer droughts, and that the first step is to carry out a survey of the drainage district.

16 The bylaw is incorporated in the transitional regional plan for the Northland Region under sections 368 and 369 of the Resource Management Act 1991.

112. Mr Summers' concern was to protect the lower part of his farm from flooding. The removal of the pipe had alleviated that concern to some extent, but he still had concern as the District Council was proposing such a scheme, and that Mr Cook also saw some merit in it.

113. The District Council did not consider it appropriate to raise the wall of the Selwyn Drain without detailed investigation of possible effects. It maintained that the desirability or otherwise of a pipe connecting the Selwyn Outfall and the Aspin Drain was also a matter that deserves fuller investigation. All these matters could be considered in the context of finalisation of the management plan, with input from all affected parties.

114. It was the District Council's case that the unauthorised installation of the connecting pipe had been a 'red herring' in respect of Mr Summers' application for enforcement orders, as the pipe had not contributed to flooding which would not otherwise have occurred. Mr Yerkovich's evidence was uncontradicted that prior to the installation of the pipe regularly, after rain, water had flowed from the Selwyn Outfall over the stopbank and into the Aspin Drain. He also deposed that the August 1996 storm had been of such magnitude that it was unavoidable the Selwyn stopbank would be over-topped and water released in the direction of the Aspin. Even if that over-topping had not occurred then flooding would have occurred on the Summers' property in the vicinity of the old Motutangi stream bed because the amount of water exceeded the drainage system's design capacity.

The relief sought

115. Having reviewed the evidence on the three main issues, we now address the relief sought by Mr Summers. By an amended application¹⁷ he sought—

- (i) An order requiring the respondents to cease carrying out activities that contravene the Act (Sections 13(1)(b), 14(1)(a), 15(1)(a) and Section 17(1)), rules in the transitional regional plan of the Northland Region (breaches of Bylaws 8, 9 and 15 of the Bylaw for the protection of watercourses and defences against water 1967, being deemed rules of the transitional plan); or are likely to be noxious, dangerous, offensive or objectionable to such an extent that they have adverse effects on the environment (Section 314(1)(a)(i) and (ii) of the Resource Management Act)
- (ii) An order requiring the respondents to do work necessary to avoid, remedy or mitigate actual and likely adverse effects on the environment caused by or on behalf of the respondents (Section 314(1)(b)(ii) and (c) Resource Management Act).

- (iii) An order requiring the respondents to pay the applicant his actual and reasonable costs which the applicant will incur in avoiding, remedying and mitigating adverse effects on the environment where the respondents have failed to comply with rules in the transitional regional plan and their obligations under the Act (as set out under (i) above). Section 314(1)(d)(iii) and (iv) Resource Management Act.

116. More specifically, by his amended application¹⁸ Mr Summers sought the following terms and conditions in respect of the orders—

1. An order requiring the first and second respondents not to carry out any work deepening any of the natural or man-made watercourses within the Motutangi Drainage District.
2. An order requiring the respondents not to do any other work on the drains and watercourses within the Motutangi Drainage District:
 - i) Except cleaning and clearing of weeds that does not involve any deepening of drains and watercourses; or
 - ii) Without having first consulted the applicant and obtained his consent to the works; and
 - iii) Without having first provided the applicant and the Northland Regional Council with full details of the work to be carried out and an assessment of the effects; or
 - iv) Except in accordance with a management plan for the Motutangi Drainage District approved by the Northland Regional Council; or in accordance with a resource consent for that work granted by the Northland Regional Council.
3. Clearing of drains
 - i) An order requiring the respondents to clear the Selwyn Drain (between the Bacica Drain and Land's End) of weeds [effectively], but without deepening;
 - ii) An order to clear the watercourse between The Cut and Land's End [effectively], including clearing of banks (again without deepening);
 - iii) An order fixing the time for that clearing and cleaning to be carried out and giving other directions for the carrying out of that work.
4. In respect of the Selwyn and Aspin Drains:
Orders requiring the respondents:
 - ...
 - ii) To fill in the Aspin Drain for a distance of 20 metres from the Selwyn Drain;
 - iii) To raise the wall of the Selwyn Drain by a height of at least 1.5 metres and strengthen the wall of the Selwyn Drain by widening it to a breadth of 10 metres (so as to prevent

¹⁷ Dated 18 March 1997.

¹⁸ As further amended by his counsel in his opening address on 3 November 1997.

- any flow of water out of the Selwyn Drain and into the Aspin Drain) for the distance running from the ridge east of where the Selwyn Drain and the Aspin Drain meet upstream to the point by the ridge south of the rails at the end of the pines on the Yerkovich property;
- iv) To remove the cattlegate from the side of the Selwyn Drain to a distance of at least 20 metres away and fence from the gateway to the Selwyn Drain;
 - v) To prevent stock drinking from the Selwyn Drain near the Aspin Drain, by erecting a fence or other similar restraint.

5. Reinstatement

Orders:

- i) Requiring the respondents to carry out work reinstating those parts of the applicant's farm damaged by depletion of groundwater and flooding, such work to include:
 - a) Spreading lime;
 - b) Deep chisel ploughing;
 - c) Cultivation by rotary hoeing
 - d) Stump chipping
 - e) Application of fertiliser
 - f) Resowing in grass.
 - ii) Requiring the respondents to obtain the approval of the Court to the contractors to be engaged to carry out the work under (i) above.
 - iii) Fixing the time within which the respondents shall carry out the work;
 - iv) In the alternative, requiring the respondents to pay the applicant the costs the applicant will incur in carrying out the reinstatement work himself.
6. Raise water tables
- i) An order requiring the respondents to obtain resource consents for the works in (iii) and (iv) below;
 - ii) Requiring the respondents to appoint engineers approved by the Court to design and supervise works in (iii) and (iv) below;
 - iii) An order requiring the respondents to construct in the bed of the Motutangi Stream from north of the S-bend in the Roy Wagener property to the Cut a series of weirs to lift the watertable in the stream 20 centimetres above the level of silica sand;
 - iv) An order requiring the respondents to construct in the bed of the Beazley Drain a series of weirs to lift the watertable 50 centimetres from the present base of the drain;
 - v) An order requiring the respondents to carry

- out such other works as are proposed by the engineers appointed in (ii) above to lift the water table within the Motutangi Drainage District and to maintain water levels.
 - vi) An order requiring the respondents to engage contractors approved by the Court to carry out the works;
 - vii) Fixing times within which the respondents shall obtain resource consents and carry out the work.
7. An order for costs including solicitor/client costs.
8. An order that the applicant not be required to pay directly or indirectly for the respondents' costs in this application or for the respondents' costs of giving effect to any orders of the Court (other than by way of payment of general rates) and in particular an order indemnifying the applicant for any increase in rates levied in respect of the Motutangi Drainage District following any orders payable by the respondents.

The law

117. Section 13(1)(b) of the Resource Management Act 1991¹⁹ provides—

- 13. Restriction on certain uses of beds of lakes and rivers—** (1) No person may, in relation to the bed of any lake or river, —
- ...
- (b) Excavate, drill, tunnel, or otherwise disturb the bed;
- ... —
- unless expressly allowed by a rule in a regional plan and in any relevant proposed regional plan or a resource consent.

118. Material provisions of section 14²⁰ read—

- 14. Restrictions relating to water—** (1) No person may take, use, dam, or divert any —
- (a) Water (other than open coastal water)
- ... —
- unless the taking, use, damming, or diversion is allowed by subsection (3).
- ...
- (3) A person is not prohibited by subsection (1) from taking, using, damming, or diverting any water, heat, or energy if —
- (a) The taking, use, damming, or diversion is expressly allowed by a rule in a regional plan [and in any relevant proposed regional plan] or a resource consent;
- ...

19 As substituted by section 11 of the Resource Management Amendment Act 1993.

20 As amended by section 12 of the Resource Management Amendment Act 1993.

119. Section 15(1)(a)²¹ provides —

15. Discharge of contaminants into environment—(1) No person may discharge any —

- (a) Contaminant or water into water;
...
unless the discharge is expressly allowed by a rule [in a regional plan and in any relevant proposed regional plan], a resource consent, or regulations.

120. Section 17²² provides —

17. Duty to avoid, remedy, or mitigate adverse effects— (1) Every person has a duty to avoid, remedy, or mitigate any adverse effect on the environment arising from an activity carried on by or on behalf of that person, whether or not the activity is in accordance with a rule in a plan, a resource consent, [section 10, section 10A, or section 20].

- (2) The duty referred to in subsection (1) is not of itself enforceable against any person, and no person is liable to any other person for a breach of that duty.
(3) Notwithstanding subsection (2), an enforcement order or abatement notice may be made or served under Part XII to —
(a) Require a person to cease, or prohibit a person from commencing, anything that, in the opinion of the Environment Court or an enforcement officer, is or is likely to be noxious, dangerous, offensive, or objectionable to such an extent that it has or is likely to have an adverse effect on the environment; or
(b) Require a person to do something that, in the opinion of the Environment Court or an enforcement officer, is necessary in order to avoid, remedy, or mitigate any actual or likely adverse effect on the environment caused by, or on behalf of, that person.
...

121. The provisions of section 314(1)²³ relied on for making the orders sought read—

314. Scope of enforcement order— (1) An enforcement order is an order made under section 319 by the Environment Court that may do any one or more of the following:

- (a) Require a person to cease, or prohibit a person from commencing, anything done or to be done by or on behalf of that person, that, in the opinion of the Court, —
(i) Contravenes or is likely to contravene this Act, any regulations, a rule in a plan, [a rule

in a proposed plan,] a requirement for a designation or for a heritage order, or a resource consent, section 10 (certain existing uses protected), or section 20 (certain existing lawful activities allowed); or

- (ii) Is or is likely to be noxious, dangerous, offensive, or objectionable to such an extent that it has or is likely to have an adverse effect on the environment:
(b) Require a person to do something that, in the opinion of the Court, is necessary in order to —
...
(ii) Avoid, remedy, or mitigate any actual or likely adverse effect on the environment caused by or on behalf of that person:
(c) Require a person to remedy or mitigate any adverse effect on the environment caused by or on behalf of that person:
(d) Require a person to pay money to or reimburse any other person for any [actual and] reasonable costs and expenses which that other person has incurred or is likely to incur in avoiding, remedying, or mitigating any adverse effect [on the environment, where the person against whom the order is sought], fails to comply with —
...
(iii) A rule in a plan [or a proposed plan] or a resource consent; or
(iv) Any of that person's other obligations under this Act.

122. Reliance was also placed on subsection (4) of that section —

- (4) Without limiting the provisions of subsections (1) to (3), an order may require the restoration of any natural and physical resource to the state it was in before the adverse effect occurred (including the planting or replanting of any tree or other vegetation).

Consideration

123. Mr Summers' counsel submitted that this is a resource management case, for protection of resources which include peat, and the groundwater and springs that sustain the peat.

124. On the first main issue, overdrainage, it was Mr Summers' case that the springs are lost with overdrainage, so that the peat dries out and will not rewet; that the District Council is not entitled to avoid responsibility for drainage and flood protection for the Summers farm, which is class A land in the Motutangi Drainage District; that by the former Catchment Commission bylaw (which is now

²¹ As amended by section 13 of the Resource Management Amendment Act 1993.

²² As amended by section 15(1) of the Resource Management Amendment Act 1993.

²³ As amended by section 141 of the Resource Management Amendment Act 1993.

incorporated in the transitional regional plan), deepening the drains requires resource consent as a discretionary activity, and none has been obtained for deepening drains in the Motutangi Drainage District.

125. On the second main issue, inadequate drain cleaning, it was Mr Summers' case that there had been poor performance of drain clearing duties; that his farm had suffered very real problems, with much of it under water for extended periods; and the District Council and the drainage committee have been unresponsive to his problems; that the effect of pasture being under water for prolonged periods has been to kill it; that uncertainty about future flooding created uncertainty, discouraging investment, holding back production and leading to increased debt.

126. On the third main issue, separation of the Selwyn Outfall and the Aspin Drain, Mr Summers was concerned that "plans are underway to make the change [ie, to connect the Selwyn into the Aspin] de facto, without going through the proper processes" that is, without obtaining resource consent, as happened in 1995.

127. The basis for the orders sought was alleged breaches of the Resource Management Act, in repeated deepening of the Motutangi Stream and other drains without resource consent, and also in contravention of the duty imposed by section 17; in repeated failure to clean by machine the Selwyn Outfall between the Bacica and Lands End, and to keep clean between Lands End and the Cut; and diverting water without resource consent in installing the connection between the Selwyn and the Aspin.

128. In addition to restraining orders to prohibit further overdeepening of drains or future connection between the Selwyn and the Aspin without lawful authority, Mr Summers sought mandatory orders, on the basis that section 314(4) (and other provisions of the Act) contemplate reinstatement for protection of the environment. The orders sought were intended to reinstate the Summers' farm and raise the water tables.

129. Counsel for the District Council submitted that the Resource Management Act has no retroactive effect, and the proceedings should be confined to effects caused after the commencement of the Act on 1 October 1991. He also submitted that the restraining orders sought against the District Council are unnecessary as it has not and does not intend to carry out activities which contravene the legislation; that the mandatory orders sought against it are not justified as it had not done work which had caused adverse effects on the environment; and it denied liability for any costs which the applicant might incur in carrying out work on his farm.

130. In respect of the order sought that the respondents not do any work on drains and watercourses in the drainage district (except cleaning and clearing of weeds that does not involve deepening) without having first consulted with Mr Summers and obtained his consent to the works, the District Council maintained it should not be required to obtain Mr Summers' consent. It stated that following consultation with affected parties, it intends to adopt a management plan for the drainage district as contemplated by a variation to the Regional Council's proposed water and soil plan, and works in the drainage district would then be carried out in accordance with the management plan, and with resource consent where required. Works proposed by Mr Summers in respect of the Selwyn and Aspin Drains could be considered in the process of finalising the management plan, but it maintained that they should not be considered in isolation. It submitted that it is not realistic to expect that flooding would not occur on Summers' farm, and that the evidence does not establish that flooding related to lack of drain maintenance, and it denied responsibility for reinstating the Summers' farm.

131. Counsel for Second Respondents submitted that the application was misconceived, as the Act is directed to sustainable management of the environment, which extends beyond the Summers' farm, to the whole of the Motutangi Drainage District. He also submitted that the alleged failure to perform a duty under section 17 had not been made out on the evidence; and that as the Second Respondents were an advisory committee, performing a community service, nothing they were involved in was a failure to comply with obligations under the Act.

132. The Second Respondents acknowledged the experiment of installing a culvert between the Selwyn and the Aspin, maintained that it had been done without knowledge that resource consent was required, and confirmed that the pipe was blocked and ultimately removed after the abatement notice was given. They contended that Mr Summers' problems are of his own making, and that the restoration sought would cost more than the value of the farm itself.

133. It is our understanding that, as submitted by Mr Ray on behalf of the District Council, the Resource Management Act is not retrospective in substantive matters, and does not authorise the Court to make an enforcement order in respect of activities which occurred prior to the commencement of the Act. In that regard we respectfully follow the Court's decision in *Voullaire v Jones*²⁴.

134. To the extent that Mr Summers seeks orders restraining overdeepening, we have not found his allegations of overdeepening established, nor is there evidence that the District Council or the Second

24 (1997) 4 ELRNZ 75.

Respondents have any present intention of carrying out any deliberate deepening of any public drain or watercourse in the district without whatever authority may be needed under the Resource Management Act. We accept that the operation of machinery to clean drains may not in practice be able to be carried out with such precision as to avoid superficial deepening in local areas, but we find that such unavoidable lowering of stream or drain invert levels would not have significant effect on draining the Summers' farm. The application has failed in respect of the alleged overdeepening and overdrainage, and no order will be made in relation to it. It follows that the mandatory orders sought to reinstate the Summers' farm from the alleged effects of overdeepening and overdrainage have also to be declined.

135. The allegations of inadequate drain cleaning are the basis for the mandatory order sought for clearing of part of the Selwyn Outfall and the Motutangi Stream. In considering that proposal, we accept that keeping the drains and stream clear of weeds contributes to the draining of the Summers' farm; and that when their flow is impeded by weeds that contributes to water lying on the farm longer. We also accept Mr England's opinions that it is not possible to have the drains in optimum condition all the time, that not all drains need to be cleaned every year, and that the drainage scheme cannot guarantee that the Summers' farm will be free of surface ponding. Regrettably, occasions may arise where a contractor has been engaged to carry out cleaning work, and the result is found unsatisfactory (as reported by Mr Blucher of the work done in the Motutangi Stream in 1992).

136. Plainly, differences of opinion can arise about how much clearing should be done at a particular time, how often any particular drain or watercourse should be cleared, the methods to be used, and how much money should be raised from the district for drainage work in any year. The last is a political question, better decided by a democratically elected body, and one on which a court should refrain from expressing an opinion. It would of course be desirable for the standards of clearing and other maintenance work to be specified, to provide a context for making the other decisions. The management plan proposed for the drainage district would be an appropriate document to contain such a specification.

137. The evidence shows that the drains and watercourses of the Motutangi Drainage District have not been kept clear of weeds and as free-flowing as may be possible at all times throughout the last 12 years. However that does not justify making enforcement orders against the District Council or the members of the drainage committee. While that standard may have been a worthy aim, it was not established that the District Council or the drainage committee had a duty to achieve that result. Indeed we doubt that the productivity of the farms of the district would

support the cost of attaining that standard. We find that Mr Summers was not entitled to expect that standard at all times.

138. The evidence does show that in every year from 1985 to 1997 some maintenance work was done, and parts of the various drains and watercourses were cleared; and that over the period all of the stretches of drain and watercourse of importance to the Summers' farm and not under Mr Summers' control were cleaned more than once. The evidence did not establish the assertion made in Mr Haigh's letter to the Ombudsman that "the local drainage committee had sought to have a certain drain critical to Mr Summers maintained less often in favour of other drains." Rather it was consistent with the claims made by Mr England and the members of the drainage committee that they had made decisions according to current needs for the benefit of the drainage district as a whole.

139. In our judgment the evidence does not justify making any enforcement order against the District Council or the Second Respondents in respect of the allegations of inadequate drain maintenance.

140. The unauthorised installation of the culvert between the Selwyn Outfall and the Aspin Drain in 1995 was acknowledged by the Second Respondents. There was no evidence to show that the District Council had responsibility for what was done; there was no evidence linking the existence of the pipe with any harm to the Summers' farm which would not have occurred anyway in the flood conditions of the time, and the pipe has since been removed.

141. Mr Summers was concerned that the District Council was currently proposing such a link, and that its consultant engineer Mr Cook saw some merit in it. However there is no basis in the evidence for supposing that the District Council, whether with or without Mr Cook's advice, would consider installing a pipe or culvert between the Selwyn and the Aspin without obtaining whatever authorisation may be required under the Resource Management Act. We accept that no enforcement order needs to be made against the District Council to ensure that.

142. Similarly, we are confident that each of the Second Respondents is now fully aware that the installation of the pipe without resource consent was a breach of the law. Without condoning that, we find that no enforcement order is required against the Second Respondents to ensure that there will be no repetition of that offence.

143. In the absence of evidence linking the existence of the pipe with harm to the Summers' farm, there is no basis either for a reinstatement order in that respect.

144. Mr Summers also sought mandatory orders for filling the Aspin Drain for 20 metres, for alterations to the wall of the Selwyn Outfall in the vicinity of the Aspin Drain, and controls for livestock. We accept the District Council's position that any such works, like the option of linking the Selwyn and the Aspin, might properly be considered in the process of settling the drainage district management plan. We share its concern that they should not be considered in isolation from the whole drainage scheme. Accordingly we decline to make any of the mandatory orders sought by Mr Summers in respect of the separation of the Selwyn Outfall and the Aspin Drain, but without prejudice to consideration of those, and other options, in the management plan process.

Determinations

145. In the outcome, the Court declines to make any of the enforcement orders sought by Mr Summers, and the application is dismissed. The Court commends to the parties the value of the proposed management plan for the drainage district, and the opportunities for them to take part in the formulation of its content.

146. The question of the costs of the respondents is reserved.

DATED at **AUCKLAND** this 23rd day of November 1998.

DFG Sheppard
Environment Judge

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
MISC. CAUSE. NO. 268 OF 1999

NATIONAL ASSOCIATION OF
PROFESSIONAL ENVIRONMENTALISTS (NAPE) APPLICANT

BEFORE : THE HON. JUSTICE RICHARD O. OKUMU WENGI.

RULING:

This application by way of Notice of Motion was brought under Order 48 rules 1 and 2 of the Civil Procedure Rules, Section 101 of the Civil Procedure Act and Section 72 of the NEMA Statute which I take to refer to the National Environment Authority Statute 4 of 1995. It seeks a temporary injunction to stop the respondent concluding a power project agreement with the Government of Uganda until the “Natural Environment Management Authority (NEMA)” has approved an Environmental Impact Assessment Study (EIAS) on the project. The motion further seeks declarations that such approval of the EIAS is a legal prerequisite and that any endorsement of the project by Parliament without this EIAS approval would contravene the law. The end result is that the applicant is asking Court to stop signature of the agreement with the executive and declare that its endorsement by Parliament without NEMA approval of EIAS would contravene a law and would thus be illegal, null and void and of no effect. The motion was supported by one affidavit and two supplementary affidavits of Mr. Frank Muramuzi the President of the applicant, a Non-Governmental Organization active in the area of environment protection. When the application came for hearing the Respondents were not represented nor were they in court. There was no clue that the respondents were contesting the claim. An affidavit of service was filed indicating that process was served on the respondents Chief Administrator Mr. Henry Kikoyo who signed and stamped on a copy of the motion on 29th March 1999. On an application by Counsel for the applicant this matter proceeded ex-parte.

Mr. Kenneth Kakuru learned counsel for the applicants first tussled with the issue of procedure. He submitted that under the NEMA Law there was no prescribed procedure to be followed by an applicant who seeks a remedy under that law. Counsel submitted that under section 72 of the NEMA Statute any party who feels that the environment is being harmed or is under threat of being harmed may bring an action to prevent or stop such harm and obtain an order from Court if the environment has been harmed to restore it. He urged this court to hold that in the circumstances the main issue was that there was a danger of a law being violated and all that he needed was a declaration to this effect and an order to prohibit the infringement. Counsel submitted that there was no pecuniary claim against the respondent or any injury claim as such but that whereas an Environmental Impact Study (EIAS) has been submitted by the respondent for consideration and approval by NEMA the respondent was in high gear of having the Implementation Agreement and power purchase agreement approved and executed before the NEMA approval. Learned Counsel referred this court to Articles 2.8(a) of the Implementation Agreement that states:

“(a) The Company shall prior to Financial closing conduct or cause to be conducted an environmental impact study in accordance with the Laws of

Uganda. Such environmental impact study shall be subject to approval by Government of Uganda.”

Learned counsel further pointed out that under paragraph 3.2 of the same agreement the Government of Uganda would on signing the agreement proceed to compulsorily acquire the site, the staging area and the inundated land and the U.E.B. shall acquire rights to the route, way leaves and easements. Mr. Kakuru contended that sine signing these agreements would trigger all these activities, it would enable the respondents to circumvent the law in contravention of which the project would be endorsed. The NEMA approval which is progressing at its statutory pace would be rendered meaningless if not nugatory. The danger of acting in this way and getting Parliament to endorse the project and the Executive to sign the agreements prior to the approval by NEMA was that the NEMA law would have been contravened in the process. Mr. Kakuru argued that bypassing NEMA procedures which was possible so long as the Parliament and Executive actions above had been concluded was the bone of contention. He further contended that the NEMA procedure was a protective measure in which the public who are concerned with the project would invoke as part and parcel of public protection of the environment and accessing the constitutional guarantee of the right to a clean and healthy environment. He submitted that the NEMA procedure was a necessary ingredient of this right and that the short cut being adopted by the Respondent to avoid compliance was in effect directed at violating the NEMA Statute and ultimately the constitutional regime and Environmental rights in Uganda.

Mr. Kakuru then referred to Order 37 of the Civil Procedure Rules and argued that the requirement therein for there to be a pending suit when seeking injunctions was inapplicable. He stated that this was a case of public interest litigation to protect a public right while order 37 was restricted to property disputes, private law rights in contract and tort. Counsel argued that this was the reason why although he sought an order of a temporary injunction he did not proceed under Order 37 of the Civil Procedure Rules. He cited Nakito & Brothers Ltd. Vs. Katumba to support the view that under Section 2 of the Civil Procedure Act a Notice of Motion is a suit. He prayed that this court accepts the motion and entertains it as such and grant the reliefs sought. He contended that Environmental Law has opened up new horizons for litigation and adjudication having codified common law especially in respect of *locus standi* and procedure that is required to take an urgent track. This complied with the new Constitutional mandate on a clean and healthy environment which required that such matter be dealt with expeditiously by Notice of Motion rather than by way of a plaint. Counsel contended that this action was about a breach of law whereby the respondent navigates his project around NEMA procedure and presses for Parliament to endorse it and the executive to sign the deal.

I must confess that I found it difficult diagnosing the claim and the remedy in this case. In the first place the proposed

implementation agreement which has been initialed stipulates, in article 2.8 cited earlier, that EIAS shall be subject to approval by the Government of Uganda. The respondent only undertook to conduct the study which it did and left the approval process to the government. In other words the respondent does not have to or want to subject himself to the process of getting the approval which the other party to government has the responsibility to do. If therefore the government executes the agreement as it is these terms would be binding and this court cannot speculate that indeed the agreements would or would not be signed before the approval of the impact study by NEMA. It would however not be difficult to expect that such approval would be obtained after which the project can be considered environmentally viable and can be implemented. But the suspicions and concerns raised by the applicant that unfortunately have not been dispelled by hearing the respondents or reading any counter pleadings raised many other issues. The level of suspicious regard towards the respondent was clearly brought out by the argument that the moment the agreements are signed major actions by the government and UEB are set in motion rendering NEMA procedures superfluous. It was further brought out by counsel for applicants' reference to the brittle low capital base of the Respondent whose share capital was Shs. 1,000,000/= only yet it was headed for a US\$ 500 million project with massive civil works. This he argued could not promise much for the "Polluter pays" principle of environmental law. Counsel contended that the EIAS approval by NEMA would be unlikely granted taking this principle into account. Counsel contended that this unlikelihood of the respondent company passing through the eye of the needle placed in its way by NEMA process and criteria, made the alternative of the shortcut attractive to the respondents. In clause 3.2 of the implementation agreement the respondent is specifically protected against environmental liabilities that may not encumber any land acquired by the government and UEB besides NEMA approval being the responsibility of government in the first place. Finally counsel for the applicants while praying for the orders and declarations sought in motion, stated that no orders for costs were being sought in this matter which was brought as a public interest issue.

As correctly sensed by counsel for the applicant the issues raised by this application relate to whether there is a cause of action, what the procedures should be and if the remedies sought are available to the applicant. I would rather approach it this way and as a result be able to determine if the matter is not frivolous. In his submission counsel contended that the application was not frivolous as it was brought to address legal concerns. Violation of the law he said, was not a frivolous matter. Counsel argued that the applicant being an NGO has come to court seeking the enforcement of the law which was in danger of being violated in the process of which the public right to environmental protection was being infringed. He submitted that the alteration of the environment being planned by the Respondents could or could not be harmful. The impairment of the environment

could only be determined by the process of approval of the EIAS by NEMA.

As can be seen this application is canvassing wide environmental concerns. It is only in looking at the legal basis of these concerns that the issues can be determined. According to the National Objectives and Directive Principles in the Constitution of Uganda the state is empowered to promote sustainable development and to prevent or minimize damage and destruction to land, air and water resources resulting from pollution or other causes. The state and local governments are further enjoined in the Environmental objectives (Objective No. XVII) to create and develop parks, reserves and recreation areas and ensure the conservation of Natural Resources. It shall also promote the rational use of natural resources so as to safeguard and protect the bio diversity of Uganda. Article 245 of the Constitution mandated Parliament to provide by law, measures intended to protect and preserve the environment from abuse, pollution and degradation; to manage the environment for sustainable development and to promote environmental awareness. The NEMA statute No. 4 of 1995 is for the purpose of this provision such a law being then the existing law. Now under this statute environmental impact assessment studies are required before any development project such as the one pursued by the respondents is approved. The respondent has conducted the study having appointed W S Atkins International as the study Consultants. This is Annexure B to the second supplementary affidavit of Mr. Muramuzi. In this affidavit the deponent states that the study as presented did not address the issue of the loss of the Bujagali Falls and the appropriateness of acquiring alternative cheaper and environmentally more friendly sources of power. The deponent states further that whatever information was provided in respect of this and in particular in respect of Karuma Falls was incomplete and misleading. The deponent then states that this together with the ambiguity in the name of the Respondent was likely to lead to rejection of the study by NEMA and to reflect on the capacity of the Respondent to carry on the proposed project without resort to an environmental disaster. The study was conducted for "AES Nile Power, a joint venture between AES Electric Ltd a UK wholly owned subsidiary of the AES Corporation, a US Company and Madhavani International of Uganda – according to the W S Atkins Executive summary (Annexure B). According to the first supplementary affidavit, Mr. Muramuzi averred that contrary to this statement the Respondent is not a foreign company but a local company with only Shs. 20,000/= paid up capital. He doubted the capacity of such an entity to execute a project of the magnitude proposed, without causing great environmental destruction, massive flooding and elimination of the spectacular Bujagali Falls. He further deponed that a failed project would interfere with the natural flow of the River Nile and cause other environmental products without even producing Electric Power. He lastly deponed that the investment license held by the respondent had no capacity to demonstrate ability to mitigate environmental damage before signing any agreement as required by the law. In presenting its case the applicant relied on section 35 and 72 of the NEMA Statute and Regulations made under that

law and suggested that the legal regime for environmental protection was a novel area with imprecise justiciability issues.

Section 35 of the NEMA Statute prohibits certain works on rivers and lakes that affect the flow or the bed and or divert or block a river or drain a river or a lake. Section 72 of the Statute provides the parallel avenue for a person to apply to court notwithstanding any action by the NEMA authority, for an environmental restoration order against a person who has harmed, is harming or is reasonably likely to harm the environment. Sub section 2 of that section provides:

“(2) For the avoidance of doubt it shall not be necessary for the plaintiff under this section to show that he has a right of or interest in the property in the environment or land alleged to have been harmed or in the environment or land contiguous to such environment or land.”

The environmental impact assessment is a study that is required to be conducted as the guiding environmental regulation model for implementation of certain projects. Dams on rivers is one such project as stated in the Third schedule. Electrical Infrastructure is another. In Section 97 it is a criminal offence for any person to fail to prepare an EIAS contrary to Section 20 of the Act. And a person who fraudulently makes a false statement in an environmental impact statement commits an offence. I have however not been able to pin point the consequence of proceeding with a project once one has placed an impact study with NEMA or no green light has come from NEMA. Section 20(6) of the NEMA Statute requires that the environmental aspects of a project as spelt out in an Environment Evaluation be approved first.

The above describes briefly the general legal landscape where the applicants concerns are located. The first issue is whether the procedure adopted by him is proper and competent. There is no prescribed procedure to seek environmental reliefs under section 72 cited by counsel. The reading of sub section 2 of that section would however imply two things. Firstly it refers to a plaintiff. This would in my mind directly refer to proceeding by way of applicant. Secondly this section appears to be the enactment of class actions and public interest litigation in environmental law issues. This is because it abolishes the restrictive standing to sue and *locus standi* doctrines by stating that a plaintiff need not show a right or interest in the action. There is also an administrative remedy available in section 69 of the statute which empowers NEMA to issue environmental restoration orders. Section 71 empowers the NEMA to enforce its own orders. The recourse to court is however not subjected to exhaustion of this remedy as the section 72 proceeding brought before court is without prejudice to the powers of NEMA under section 69 of the Statute. But even then this application does not seek order under section 72 of the NEMA statute.

Although the applicant cited the section and contended that the respondent is likely to harm the environment he has not

prayed for an order to restore the environment. What he has sought is an injunction to stop the signing of the agreements and declarations. An injunction of this nature cannot be given in my view since the agreements per se do not alter the environment though the execution thereof places the respondent in a position so as to be able to alter environment by commencing works. I would conclude here that if this is correct then the order sought relates to a matter that by itself is not proximate to environmental damage as such though the signed agreements could be evidence of a reasonable likelihood for possible harm about to be done to the environment. Without going into the realm of freedom of contract, I would find it hard to prevent the act of signing the agreement as such. Partly I am aware of executive discretion in this matter, which I hope would be exercised with full awareness that a procedure such as the conduct of an acceptable EIAS has to be complied with, and the government or its agency has to be satisfied that the works envisaged will not damage the environment. I think the executive is bound to follow the law and a remedy would be available if indeed a private party caused it to go into hazardous project. There are many procedures available. For instance writs of Certiorari prohibition and Mandamus are available. Also proceedings under Article 50 of the Constitution on breaches of an environmental right or freedom would probably be available. In all these proceedings a notice of motion would be the correct pleading in my view to commence these actions. However, since the applicant did not move this court for the above remedies I would have difficulty reaching a decision that injunctive and declaratory reliefs could be secured by proceeding the way the applicant did without invoking article 50 of the Constitution, and the fundamental Rights of freedoms (Enforcement) rules S1 26 of 1992. The latter rules made under the repealed Judicature Act 1967 are applicable in my view to proceedings under Article 50 of the Constitution as they were saved by the Judicature Act 1996.

Counsel for the applicant asked this court to entertain this application on the ground that the applicant had come to court for redress and could not be turned away. I have already stated that the applicant had a right to take action without having to show a standing to sue on account of the clear provisions of the NEMA statute. However, standing to sue is a procedural question and not a substantive one like the issue of cause of action. But it is also true that a declaratory action is open to an individual without having to demonstrate a cause of action.

In other cases a cause of action needs to be raised in the pleadings and where the cause of action is obviously and almost incontestably bad the court would not entertain the matter. Otherwise a party would not be driven from the judgement seat without having his right to be heard. In deciding whether there is a cause of action one looks ordinarily only at the plaint (or pleadings). The case of The Attorney General vrs Olwoch (1972) EA 392 is authority for this point, and has been followed in other cases after it. This is the position which obtains in other

jurisdictions on this question in respect of civil actions and even public interest law suits which the applicant claims his own to be. In the Canadian case of Operation Dismantle & Others vrs The Queen & Others (1983) ICF 429 the Motion sought to bar the testing of Cruise Missiles in Canada which the plaintiff contended violated the Canadian Charter of Rights. The court stated that beyond the statement of claim it could not admit any further evidence and the statement stands and falls upon the allegations of fact contained in it, so long as they were susceptible to constituting a scintilla of a cause of action. The test to be applied was whether the germ of a cause of action was alleged in the claim. The court further held that if the statement contained sufficient allegations to raise a justifiable issue then even the claim cannot be corrected by amendment and there was no compliance with rules of practice this does not render the proceedings void in which an irregularity occurs which can be corrected by an amendment. The Supreme Court of Nigeria in Thomas & Others vrs Olufusoye (1987) LRC (Const) 659 defined cause of action to:

“Comprise every fact (though not every piece of evidence) which it would be necessary for the plaintiff to prove if traversed to support his right to the judgement of the court .. every fact which is material to be proved to enable the plaintiff to succeed. The words, have been defined as meaning simply a factual situation the existence of which entitled one person to obtain from the court a remedy against another person and it is the subject matter or grievance founding the action, not merely the technical cause of action.”

The Nigerian Supreme Court in that case cited the dictum of Lord Pearson in Drummond – Jackson vrs British Medical Association (1970) IWL 688 (C.A.) where it was held:

Where the statement of claim discloses no cause of action and if the court is satisfied that no amendment however ingenious will cure the defect the statement of claim will be struck out and the action dismissed. Where no question as to the civil rights and obligations of the plaintiff is raised ion the statement of claim for determination the statement of claim will be struck out and the action dismissed.

I have discussed these issues because the argument raised by counsel for the applicants the applicant’s claim beyond just the ordinary private law rights litigation to the wider issues relating to public interest law and a situation where a party merely seeks declaratory orders relating to compliance with the law failure of which has potential danger for the environment.

I am satisfied that in the circumstances of this case the applicant has reason to seek the intervention of this court in so far as no approval of the environmental aspects of the study has been brought in evidence to satisfy the

requirements of section 20 (6) of the NEMA statute. To this extent he is entitled to bring this action. As a public spirited body the applicant is espousing the public interest although I must say he has done so rather too quickly, almost prematurely. To this extent I accept to entertain the application which though procedurally faulty could be cured by amendment. In any case there was no challenge put forward by the respondents and the applicant would be at liberty to pursue further his substantive claims by filing amended pleadings in place of the motion field in court. I am able to declare though not in terms of the declaration sought that the EIAs presented by the Respondents consultants in this project must be approved by the Lead Agency and the National Environment Authority. This is the distance I can go in this matter. It has already been stated earlier that it is the view of the Court and I restate it tat the signing of the protested agreements are subject of the law. It is however not for this court to stop the signing of agreements by injunction or otherwise since signing agreement per se do not cause environmental disasters. If an agreement is signed and it is in contravention of any law then it can be challenged. Any action based on it can also be challenged. Therefore it is in the interest of the parties to it to conform to the law.

The declarations sought by the applicant relating to the Parliamentary approval is unnecessary to consider since Parliament would equally be advised and is capable of knowing their power. Since no approval has been given by Parliament this court cannot inquire as to whether it will or will not grant the approval in contravention of the law. In the circumstances the declarations sought out in the Motion are not granted; save that this court declares that approval of the EIAs by NEMA is required under Section 20 of the NEMA Statute. The injunction is also refused. This matter proceeded exparte. I am surprised why this was the case. I must say that a party must come to the court to be heard. In court maters epistolary proceedings have not taken root in this country. No amount of media action, or reaction though effective can e a substitute to going to court to challenge ones adversary. To ignore a court summons is itself foolhardy and places the party so summoned in a desert. However, no costs were asked for this action and I order none.

.....
RICHARD O. OKUMU WENGI
Ag. JUDGE
19/04/99

23/04/99Kakuru for applicants
Henry Kikoyo representing the respondents

COURT: - Ruling delivered in presence of the above parties.

.....
GODFREY NAMUNDI
DEPUTY REGISTRAR, CIVIL

IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC
OF SRI LANKA

S.C. Application No 884/99 (F.R)

In the matter of an Application Under Article 17 read with Articles 126 of the Constitution

1. Tikiri Banda Bulankulama
No. 05, Kandakkulama,
Kiralogama.
2. Rarnayake Mudiyansele Ranmenike,
Palugaswewa,
Eppawela.
3. Palitha Nissanka Bandara,
Palugaswewa,
Eppawela.
4. Dissanayake Kiribandalage Ranbanda,
Palugaswewa,
Eppawela.
5. Paliawadana Arachchige Kiribanda,
Palugaswewa,
Eppawela.
6. Dissanayake Ukkubandage Seneviratne,
“Polwatta”,
Ihala Siyambalawewa,
Eppawela.
7. Ven Mahamankadawala Piyaratna Thero,
Galkanda Purana Viharaya,
Eppawela.

Petitioners

1. The Secretary,
Ministry of Industrial Development,
No. 73/1, Galle Road,
Colombo 03.
2. Board of Investment of Sri Lanka,
World Trade Centre,
West tower Echelon Square,
Colombo 01.
3. Geological Survey and Mines Bureau,
04, Senanayake Building,
Dehiwela.
4. Central Environmental Authority,
Parisara Mawatha,
Maligawatte New town,
Colombo 10.

5. Sarabumi Resources (Pvt.) Ltd
41, Janadipathi Mawatha,
Colombo 01.
6. Lanka Phosphate Limited,
No. 63, Elvitigala Mawatha,
Colombo 05.
7. Geo-Resources Lanka (Pvt.) Limited.
No. 09, Abdul Gaffoor Mawatha,
Colombo 03.
8. The Attorney-General,
Attorney-General’s Department,
Hulftsdorp,
Colombo 12.

Respondents

- | | |
|---------|---|
| BEFORE | Amarasinghe, J
Wadugodapitiya, J
Gunasekara, J |
| COUNSEL | R.K.W. Goonasekara with Ruana
Rajapakse and Asha Dhanasiri for the
Petitioners
K. Sripavan D.S.G. with B.J.
Tilakaratne, SSC and Anusha
Navaratne, S.C. for the 1 st to 3 rd , 6 th
and 8 th Respondents.

Chulani Panditharatne for the 4 th
Respondents |

Romesh de Silva, P.C., with Harsha
Amarasekara and Sarath Caldera for
the 5th and 7th Respondents.

ARGUED ON 15.03.2000
16.03.2000
28.03.2000 and
30.03.2000

FINAL WRITTEN SUBMISSIONS 7th April 2000
DECIDED ON 2nd June 2000

AMERASINGHE, J.,

THE BACKGROUND

After soil surveys conducted by a team of scientists at Kiruwalhena, which had been selected as a prototype site of dry zone, high elevation laterite, the team informed the Director of Geological Survey about some peculiar weathered rock they had found. Early, in 1971, during the Geological Survey of the Anuradhapura district, it was found that what had been supposed by the scientists during the soil surveys to be “high level fossil laterite” was really an igneous carbonate apatite. The Department of Geological Survey had thus come to “discover” a deposit of phosphate rock occurring in the form of the mineral apatite at Eppawela in the Anuradhapura district.

Having regard to the policies of the Government at that time, it was decided in 1974 that the use of the Eppawela deposit should be entrusted to a Divisional Development Council. (D.D.C)

Although a trial order for the supply of 500 tons was placed by the Ministry of Industries and Scientific Affairs and the order was fulfilled within about four months, no further orders for phosphate rock were placed. The D.D.C. project was later taken over by Lanka Phosphate Ltd., a company fully owned by Government, which was set up by the Ministry of Industries.

In December 1992, a notice calling for proposals to establish a Joint Venture for the manufacture of Phosphate fertilizer using the apatite deposit at Eppawela was published in local and foreign newspapers. Six proposals were received. A committee appointed by the Cabinet, after having considered an evaluation report decided with the approval of the Cabinet to undertake negotiations with Freeport MacMoran Resource Partners of USA. (hereinafter referred to as Freeport MacMoran) One of the factors that appeared to have been in favour of Freeport MacMoran was that it was “one of the leading phosphate fertilizer firms in the world”. (P4 page 2) Another was that “IMCO Agrico (Sic.) and affiliate of M.S. Freeport MacMoran, had done studies and worked on the utilization of this particular phosphate deposit several years ago and therefore, they had the benefit of that research.” (p4 page 2)

The negotiation committee was assisted by representatives from various Government Departments and Ministries and by a team of experts.

The first round of negotiations was held from 17-22 March, 1994. Thereafter, when the present government took office, the Minister of Industrial Development, in a Memorandum dated the 28th of January, 1995, reported to Cabinet the progress made and sought and obtained the approval of the Cabinet to continue with the negotiations. A second round of negotiations were held from 27-31 March, 1995. “Major issues” relating to the availability of land for a plant at Trincomalee, and “the resettlements and payment

of compensation to Mahaweli settlers presently living in the exploration area identified for the project”, were discussed with local institutions and authorities (p4)

On the 26th of September, 1996 the Minister of Industrial Development reported to Cabinet on the progress made and sought approval “for certain parameters in respect of some key issues which continued to remain unresolved.” No information was furnished to court on what these issues were and what had been decided. We were merely informed that Cabinet approval was received on the 02nd of October, 1996 and that the third round of negotiations were held from December 21st, 1996. Thereafter, Freeport MacMoran submitted drafts of the Mineral Investment Agreement and other subsidiary agreements. These were studied by the negotiating committee and lawyers from the Department of the Attorney-General “on the basis of the parameters laid down by the Cabinet and the applicable laws.” (p4) The Freeport MacMoran draft was returned to them with amendments. Freeport MacMoran then raised “several issues regarding the interpretation of the key parameters and also the language in the draft as amended by the Attorney-General’s Department”. (p4) Subsequently, Freeport MacMoran met Her Excellency the President who thereupon directed Mr B.C. Perera (Secretary, to the Treasury), Hon Sarath N Silva, (Attorney-General), Mr. K. Austin Perera (Secretary, Ministry of Industrial Development), Mr Thilan Wijesinghe (chairman/Director-General, Board of Investment of Sri Lanka), and Mr Vincent Panditha (Senior Advisor, Board of Investment of Sri Lanka and Consultant, Ministry of Industrial Development) (p4), “to conduct on final round of negotiations and clear any outstanding issues along with the texts of the Mineral Investment Agreement and subsidiary agreements”. (p.4) The final round of negotiations was held from the 28th of July, 1997 to the 04th August 1997 and the final drafts of the Mineral Investment Agreement and subsidiary documents were agreed upon and initiated by the Secretary, Ministry of Industrial Development and the representatives of Freeport MacMoran and IMC Agrico.

On the 17th of May 1998 the President of the National Academy of Sciences, Prof. V.K. Samaranyake wrote to the President of Sri Lanka (with copies to the Minister of Science Technology and Human Resource Development and the Minister of Industrial Development (p10) stating that the council of the Academy was of the view “that the proposed project in its present form as some of the vital data relating to the actual size and quality of the mineral deposit have not been adequately surveyed and established. This shortcoming had also been highlighted in the Report of May, 1996 of the Presidential Committee appointed by Your Excellency. The feasibility of the Project can be comprehensively appraised only when this vital data are available. Accordingly, we respectfully request Your Excellency to defer the grant of approval for the Project until a comprehensive appraisal is undertaken”.

In the same letter, the President of the national Academy of Sciences stated that the Council had also examined other related issues and that the recommendations, including options, were elaborated in the report of the National Academy of Sciences which was forwarded to the President of Sri Lanka.

In a newspaper article entitled “Exploitation of Eppawela rock phosphate deposit”, (p.10 (a) Prof. V.K.Samaranayake stated as follows

“the national Academy of Sciences is the highest multi-disciplinary scientific organisation in Sri Lanka. Its mandate includes, “to take cognizance and report on issues in which scientific and technological considerations are paramount to the national interest” and “to advise on the management and rational utilization of the natural resources of the island so as to ensure optimal productivity, consistent with continued use of the biosphere on a long term basis taking into account the repercussions of using a particular resource on other resources and the environment as a whole and to help in making use of resources of the country in national development”.

Prof. Samaranayake went on to say that,

“Accordingly, the Academy studied the proposal from all angles and submitted its report to Her Excellency the President in May 1998. The project proposal was examined in relation to (a) the deposit and proposed rate of exploitation; (b) proposal to manufacture fertilizer locally; (c) environmental considerations; and (d) economic and social considerations”.

On the 23rd of July, 1999 a committee of twelve scientists of the National Science Foundation submitted a report under the title “The Optimal use of Eppawela rock phosphate in Sri Lankan agriculture” (p12) Having observed that the proposal of the U.S. Mining company “in the view of many of the Professional Associations in the country. E.g. the Institution of Engineers, Institute of Chemistry, National Academy of Sciences and most individual scientists and engineers is highly disadvantageous to the country and with highly adverse environmental impacts”, the committee examined various proposals made and suggested options which in its view “are more advantageous to the country”. On the 8th of October, 1999 the seven Petitioners filed an application in this court under Article 17 read 126 of the constitution. The court (Fernando, Wadugodapitiya and Gunasekara, JJ.) on the 27th of October 1999 granted the seven petitioners leave to proceed with their application for declarations and relief arising from the alleged infringement of their fundamental rights guaranteed by Articles 12 (1), 14(1) (g), and 14 (1) (h) of the Constitution.

JURISDICTION

In the proposed agreement, it is acknowledged in the “Introduction” that “The mineral resources contained in

the territories of Sri Lanka constitute a part of the national wealth of Sri Lanka.

Learned counsel for the 5th and 7th respondents with whom, the Deputy Solicitor-General associated himself, submitted that the Government, and not this court, is the “trustee” of the natural resources of Sri Lanka. “thus, as long as the Government acts correctly the court will not put itself in the shoes of the Government. That is to say the court may or may not agree with the final outcome. However, if the Government has correctly acted as trustee the court will not interfere”. It was further submitted that the petitions should be dismissed *in limine*, since the petitions had invoked the fundamental rights jurisdiction of the court in a matter that was “either a public interest litigation or breach of trust litigation”.

I am unable to accept those submissions

The Constitution declares that sovereignty is in the people and is inalienable. (Article 3) Being a representative democracy, the powers of the people are exercised through persons who are for the time being entrusted with certain functions. The constitution states that the legislative power of the people shall be exercised by Parliament, the executive power of the People shall be exercised by the President of Sri Lanka and the judicial power of the people shall be exercised, *inter alia*, through the courts created and established by the constitution. Article 4) Although learned counsel for the petitioners., citing *M.C. Mehta v. Kamal Nath* (1977) ISCC 388 agreed with learned counsel for the 5th and 7th respondents that the natural resources of the people were held in “trust” for them by the Government, he did not subscribe to the view that the court had no role to play. In any event, he challenged the respondents claim that the government had in fact acted “properly” in discharging its role as “trustee”.

The organs of State are guardians to whom the people have committed the care and preservation of the resources of the people. This accords not only with the scheme of government set out in the constitution but also with the high and enlightened conceptions of the duties of our rulers, in the efficient management of resources in the process of development, which the *Mahavamsa*, 68.8-13 sets forth in the following words.

“Having thus reflected, the king thus addressed his officers.

In my Kingdom are many paddy fields cultivated by means of rain water, but few indeed are those which are cultivated by perennial streams and great tanks.

By rocks, and by many thick forests, by grate marshes is the land covered.

In such a country, let not even a small quantity of water obtained by rain, go to the sea, without benefitting man.

Paddy fields should be formed in every place, excluding those only that produce gems, gold, and other precious things.

It does not become persons in our situation to live enjoying our own ease, and unmindful of the people

Translation by Mudaliyar L. de Zoysa, Journal of the Royal Asiatic Society (C.B), vol. III No IX, (The emphasis is mine)

In the case concerning the Gabčíkovo-Nagymaros project (Hungary/Slovakia)- the Danube case – 1997 General List no 92, 25 September, 1997 before the International court of Justice, the Vice-president of the Court, Judge C.G. Weeramantry, referred at length to the ancient irrigation works of Sri Lanka which, he said “embodied the concept of development par excellence”. He said:

“Just as development was the aim of this system, it was accompanied by a systematic philosophy of conservation dating back to at least the third century B.C. The ancient chronicles record that when the King (Devanampiya Tissa) 247-207 B.C. was on a hunting trip (around 223 B.C.) the Arahata Mahinda, son of the Emperor Asoka of India, preached to him a sermon which converted the King. Here are excerpts from that sermon: “O great King, the birds of the air and the beasts have as equal a right to live and move about in any part of the land as thou. The land belongs to the people and all living beings; thou art only the guardian of it” The juxtaposition in this heritage of the concepts of development and environmental protection invites comment immediately from those familiar with it. Anyone interested in the human future would receive the connection between the two concepts and the manner of their reconciliation. Not merely from the legal perspective does this become apparent, but even from the approaches of other disciplines. This Arthur C. Clarke, the noted futurist, with the vision that has enabled him to bring high science to the service of humanity, put his finger on the precise legal problem we are considering when he observed: “the small Indian Ocean island Provides textbook examples of many modern dilemmas: development versus environment”, and proceeds immediately to recapitulate the famous sermon, already referred to, relating to the trusteeship of land, observing, “For as King Devanampiya Tissa was told three centuries before the birth of Christ, we are its guardians – not its owners. “The task of the law is to convert such wisdom into practical terms....”

I have not been able to find the sermon referred to. However, Tissa, who depended on the support of Emperor Asoka, and even added to his name the title of his patron, “Devanampiya”, would have had little or no hesitation in accepting the advice of Asoka’s emissary, Mahinda. The subject of land tenure in Sri Lanka, including the status, claims, and rights of the monarch with regard to the soil,

is an extremely complex one as, for instance, the debates on various matters between H.W. Codrington and Julius de Lanerolle showed. (see Journal of the Royal Asiatic Society (Ceylon Branch), Vol. XXXIV, p, 199 s.q.p. 226 sq.) For the present limited purpose, what I do wish to point out is that there is justification in looking at the concept of tenure, not as a thing in itself, but rather a way of thinking about rights and usages about land. H.W. Codrington, Ancient Land Tenure and Revenue on Ceylon, pp. 5-6 refers to the fact that the King was *bhuatpi* or *bhupala* “lord of the earth”, “protector of the earth” – “*Lordadhipathi* of the fields if all”. He quotes Moreland who wrote as follows. “Traditionally there were two parties, and only two, to be taken into account; these parties were the ruler and the subject, and if a subject occupied land, he was required to pay a share of its gross produce to the ruler in return for the protection he was entitled to receive. It will be observed that under this system the question of ownership of land does not arise; the system is in fact antecedent to that process of disentangling the conception of private right from political allegiance which has made so much progress during the last century, but is not even now fully accomplished” “Later, grantees, in general, it seems were given the enjoyment of lands for services rendered on to be rendered in consideration of their holdings, or lands were given for pious and public purposes unrelated to any return. For their part grantees were under an obligation to make proper use of the lands consistent with the grant or, in default, suffer their loss or incur penalties.

The public trust doctrine, relied upon by learned counsel on both sides, since the decision in *Illinois Central R. Co. V. Illinois*, 146 U.S. 387 at 452, 135 S.Ct. 110 at 118 (1892), commencing with a recognition of public rights in navigation and fishing in and commerce over certain waters, has been extended in the United States on a case by case basis. Nevertheless, in my view, it is comparatively restrictive in scope and I should prefer to continue to look at our resources and the environment as our ancestors did, and our contemporaries do, recognizing a shared responsibility.

The Constitution today recognizes duties both on the part of parliament and the President and the Cabinet of Ministers as well as duties on the part of “persons”, including juristic persons like the 5th and 7th respondents. Article 27(14) states that “The State shall protect, preserve and improve the environment for the benefit of the community”. Article 28(f) states that the exercise and enjoyment of rights and freedoms (such as the 5th and 7th respondents claimed in learned counsel’s submissions of their behalf to protection under Article 12 of the Constitution relating to equal protection of the law). Is inseparable from the performance of duties and obligations, and accordingly it is the duty every person in Sri Lanka to protect nature and conserve its riches”.

The loose use of legal terms like “trust” and “trustee” is apt. as this case has shown. To lead to fallacious

reasoning. Any question of the *legal ownership* of the natural resources of the State being vested in the Executive to be held or used for the benefit of the people in terms of the Constitution is at least arguable. The Executive does not have a significant role in resources has nor been placed exclusively in the hands of the Executive. The exercise of Executive power is subject to judicial review. Moreover, Parliament may, as it has done on many occasions, legislate on matters concerning natural resources, and the Courts have the task of interpreting such legislation in giving effect to the will of the people as expressed by Parliament.

In any event, the issue before me is not the question whether this court or the “Government” is a “trustee”, and whether there has been a breach of trust, but whether in the circumstances of the instant case the rights of the Petitioners guaranteed by Articles 12(1), 14(1) (g) and 14(1) (h) of the Constitution have been violated. And in that regard the jurisdiction of this Court is put beyond any doubt by Article 126(1) of the Constitution which states, among other things, that the Supreme Court has “sole and exclusive jurisdiction to hear and determine any question relating to the infringement or imminent infringement by executive or administrative action of any fundamental right” The court is neither assuming a role as “trustee” nor usurping the powers of any other organ of Government. It is discharging a duty which has in the clearest terms been entrusted to this court, and this court alone, by Article 126(1) of the constitution.

Learned counsel for the 5th and 7th respondents submitted that, being an alleged “public interest litigation” matter, it should not be entertained under provisions of the constitution and should be rejected. I must confess surprise, for the question of “public interest litigation” really involves questions of *Standing* and whether there is a certain kind of recognized *cause* of action. The court is concerned in the instant case with the complaints of individual petitioners. On the question of standing, in my view, the petitioners, as individual citizens, have a constitutional right given by Article 17 read with Article 12 and 14 and Article 126 to be before this court. They are not disqualified because it so happens that their rights are linked to the collective rights of the citizenry of Sri Lanka – rights they share with the people of Sri Lanka. Moreover, in the circumstances of the instant case, such collective rights provide the context in which the alleged infringement or imminent infringement of the petitioners’ fundamental rights ought to be considered. It is in that connection that the confident expectation (trust) that the Executive will act in accordance with the law and accountably, in the best interests of the people of Sri Lanka, including the petitioners, and future generations of Sri Lanka, becomes relevant.

MAY THE SEVEN PETITIONERS JOIN IN A SINGLE APPLICATION?

Learned counsel for the 5th and 7th respondents submitted that “several petitioners cannot join in one application in terms of Article 126 of the Constitution”. Admittedly, Article 126(2) refers to “any person”, “such person” and “he may himself”. However, the court has not construed these phrases so as to preclude the joining of several petitioners where their individual rights are based on the same alleged circumstances; in fact, the practice of the court points in the other directions. I therefore hold that the petitioners are not non-suited on the ground of misjoinder.

IS THE APPLICATION OUT OF TIME?

The respondents submitted that the application must be rejected, since it has been made out of time. However, no indication was given by the respondents of the date from which the period of one month specified by Article 126(2) is to be reckoned. The respondents at the same time maintain that there can be no complaint of an infringement or imminent infringement of rights :unless and until the Development Pant is in place”, for it is that document which would show what rights, if any, have been or are about to be infringed. If there has been no infringement or imminent infringement it seems to me that the respondents are entitled to call for the dismissal of the petition on the ground that the petitioners have failed to establish their case. It cannot, however, be maintained that the petition is too late, unless it is conceded that the case was ripe or mature for hearing. The petition cannot be premature and too late at the same time, for the latter position assumes that although the matter was ripe or mature for consideration, the petitioner failed to act within the prescribed time. A substantial part of the respondents’ case was based on the submission that the petitioners’ case was based on the submission that the petitioners’ case was premature and “conjectural”. I shall deal with the respondents’ submissions in that regard later on. But for the present, in dealing with the threshold question of whether the petition is out of time, what I have already stated and what I shall state in the next paragraph, should, I think, be sufficient to meet the submission of the respondents.

In addition to pointing out the inconsistent positions of the respondents on the question under consideration, namely, whether the petition was out of time, the petitioners explained that there was considerable uncertainty about the status of the project in question, with “inconsistent signals” being given by the Government from time to time on that matter, both in response to public protests, and

critical observations from scientists, including those of the National Science Foundation in their report to the Minister of Science and Technology in July 1999. The Minister had asked the National Science Foundation for advice, and having regard to the observations made by the Foundation, it was not unreasonably expected that the Government would not proceed with the project. There was such uncertainty about the matter, that it might have been premature for the petitioners to come into court earlier. However, when a newspaper report (Document p13) dated the 26th of September 1999, announced that the proposed agreement relating to the project, which had been initialed in 1997, following negotiations that had gone on since 1994, was expected to be signed within two months, the petitioners filed their petition on 08 October, 1999. The impending or threatening danger of the violation of the petitioners' rights reached a sufficient fullness on the 26th of September, 1994.

In the circumstances, I hold that the application was filed in time within the meaning of Article 126 (2) of the constitution.

LEAVE TO PROCEED WAS FOR INFRINGEMENT NOT FOR IMMINENT INFRINGEMENT

The petitioners were granted leave to proceed for the alleged *infringement* of Articles 12(1), 14(1)(g) and 14(1)(h) and not for the alleged imminent infringement of their rights. The fact that leave to proceed was granted for "infringement" does not preclude the court from considering whether there was an *imminent infringement* for *omne mejus continetur minus* – the greater contains the less. This court, having granted leave to proceed for the alleged infringement of a fundamental right, and thereby being empowered by the constitution to do the more important act of considering whether an infringement had taken place, cannot be debarred from doing the less important thing of considering whether there is an imminent infringement, for non *debet cui plus licet quod minus est non licere* or and it is sometimes expressed, *cui licet quod majus non debet . quod minus est non licere* – a doctrine founded on common sense, and of general application.

THE ALLEGED IMMINENT VIOLATION OF ARTICLES 14(1) (G) AND 14(1) (H) OF THE CONSTITUTION

Article 14(1)(g) of the constitution states that every citizen is entitled to the freedom to engage by himself or in association with others in any lawful occupation, profession, trade, business or enterprise. Article 14(1)(h) states that every citizen is entitled to the freedom of movement and of choosing his residence within Sri Lanka. The petitioners are citizens of Sri Lanka and residents of the area called Eppawela in the Anuradhapura District in the North Central Province. The first to fifth petitioners are land owners and/or paddy and dairy farmers

in the Eppawela area. The sixth petitioner is a teacher and the owner of an extent of coconutland in the Eppawela area. The first to sixth petitioners state that they are in danger of losing the whole or some portion of their lands and their means of livelihood if the proposed mining project is implemented. The seventh petitioner is the Viharadhipathi of the Galkanda Purana Viharaya where he has resided for over 35 years. He states that the Viharaya and the paddy lands that sustain it are in danger of being destroyed if the proposed mining project is implemented. The petitioners complain of an imminent infringement of their fundamental rights guaranteed by Articles 14(1)(g) and 14(1)(h).

THE AREA AFFECTED

The Petitioners' state that the initial exploration area will be 56 square kilometers with a ten kilometer buffer zone on each side, bringing to about 800 square kilometers the area potentially affected. They state that about 2,600 families or 12,000 persons, including themselves, are likely to be permanently displaced from their homes and lands.

There are only seven persons who have filed this application; but it must now become clearer why I said that their claims were linked to the collective rights of others and that the alleged infringement of the petitioners' individual rights need to be viewed in the context of the rights guaranteed to them not only as falling within the meaning of "all persons" as for instance within the meaning of Article 12(1) of the constitution, but in particular as member of the *citizenry* of Sri Lanka.

The negotiating Committee appointed by the President states in its report to the president (p4 at p.5) that "the exploration area will cover approximately 56 sq. miles (sic.) of land situated in Eppawela in the Anuradhapura District". And that the Buffer Zone Area "will comprise of a land area extending to 10 kilometers from the boundaries of the exploration area". That is a misleading statement, for in terms of the Agreement the "exploration area", is far in excess of 56 sq. miles. Indeed, as we shall see, the President's committee accepts the fact that the exploration area was not absolutely limited to 56 sq. miles: It was contractually elastic and extendable.

I agree with learned counsel for the respondents that there is as yet no "Agreement" *Stricto sensu* Article 2.1 of the proposed Mineral Investment Agreement, sometimes hereinafter referred to for the sake of convenience as the "Agreement" describing the "basic" rights of the company, states, *inter alia* as follows: "without limitation on the other rights conferred on the company by this Agreement, the Company shall have, and the Government hereby grants to the company, subject to the other terms and conditions specified in this Agreement, the sole and exclusive right (a) to search for and explore for phosphate and other minerals in the Exploration Area (b) to conduct pilot or test operations as appropriate at any location within the

contract Area (without limiting the company's option of conducting such pilot or test operations entirely or partially at other locations):(c) to develop and mine under Mining Licences any phosphate deposit (including phosphate minerals and Associated Minerals) found in the Exploration Area”

Article 1 of the Agreement defines “Exploration Area” as “that certain area of land which forms part of the contract Area and which initially covers approximately 56 sq. kms. Of land and is set forth and described as the Exploration Area on Annexes “B-1” and “C-1” hereto in respect of which Exploration Licences have been issued under the Act to Lanka Phosphate and/or Geo Resources Lanka (Pvt.) Ltd as such area may be reduced or extended as specifically provided for in this Agreement.” “Exploration” is defined in the Agreement as “the search for apatite and other phosphate minerals using geological, geophysical and geo-chemical methods and by bore holes, test pits, trenches, surface or underground headings, drifts or tunnels in order to locate the presence of economic apatite or other phosphate mineral deposits and to find out their nature, shape and grade., and this term includes “Advanced Exploration” in terms of the Mining (Licensing) Regulations. No. 1 of 1993. The verb “explore” has a corresponding meaning.

The various activities falling within the definition of “Exploration” is, in terms of the Agreement, not confined to an area of 56 sq. kms. That, in terms of the definition, is the area covered “initially”, but one that may be “extended as specifically provided for in this Agreement”. It is stated in Article 2.1 of the Agreement to be a “basic right” of the Company “to conduct pilot or test operations as appropriate at any location within the contract Area without limiting the company's option within the contract Area test operations entirely or partially at other locations”. So, Exploration may extend to the Contract Area. The Agreement defines “Contract Area” to mean “the lands included within the Exploration Area and the processing Area as included within the Exploration Area and the Processing Area as described in Annexes “B-1” and “B-2” hereto and depicted on the maps set forth as Annexes “C-1” and “C-2” hereto, within which the activities of the enterprises are to take place, as from time to time reduced or extended in accordance with this Agreement.” “Processing Area” is defined in the Agreement to mean “that certain area of land which forms part of the Contract Area and which is set forth and described as the Processing Area on annexes “B-2” and “C-2” hereto, as such area may be amended, revised or replaced on accordance with the provisions of this Agreement, which area may be used for Processing, shipping, docking, terminalling, storage, stockpiling and all other related activities and operations”. “Processing” is defined in the Agreement as “the crushing, beneficiation, concentration or other treatment of phosphate minerals and Associated Minerals by physical, chemical, or other process in

connection with the manufacture of products but does not include the smelting and refining of metals. The verb “process” has a corresponding meaning.”.

Thus, in terms of the Agreement, the activities falling within the definition of “Exploration”, may take place, not only within the 56 sq. kms., not only within the “Exploration Area”, but also within the “Processing Area” which even includes Trincomalee. In fact, the report of the President's Committee states at p.6 that the “Processing Area will be Trincomalee where the processing plant, warehouse, dock, terminal and shipping are located”.

It might be noted that in terms of Article 2.5, if the Processing Area identified at the time of the signing of the Agreement was found to be unsuitable after the feasibility study, the Government pledges to use “its best efforts” to locate other lands that are suitable.

Article 2.4 of the Mineral Investment Agreement states as following

“Notwithstanding the existence of this Agreement and the fact that the company will control a significant area of land for the exploration for and possible development of phosphate mineral deposits as a result of this Agreement, the company shall remain eligible to apply for and obtain Exploration and Mining Licences on lands outside the Exploration Area.... In the event the Company does obtain Exploration and /or Mining Licences ... covering lands within the Buffer Area such lands shall be added to the Exploration Area and treated in all respects as part of the Exploration Area and (and Mining Area, if a Development Plan is approved) and as licences which are subject to the provisions of this Agreement.

The report by the President's Committee states: “The company will have a right to extend their activities into the buffer zone as well, if found necessary.” There is no definition in the Agreement of “Buffer Zone”, however, the report of the President's Committee states at p6 that “Buffer Zone Area” will comprise a land area extending to 10 kilometers from the boundaries of the exploration area. The Company will have a right to extend their exploration activities into the buffer zone as well, if found necessary.” Indeed, (1) since the “Exploration Area” in terms of the Agreement, as we have seen, extends to the “Processing Area”, and (2) since in terms of Article 2.1 of the Agreement it is acknowledged that the Company shall have the “basic” right not only to conduct pilot or test operations at any location within the Contract Area but without limiting the Company's option of conducting such pilot or test operations entirely or partially at other locations”, the area of operation even at the “Exploration” stage is very vast indeed and extendable, in terms of the Agreement, in “the Company's option.” Reference is made to the reduction or extension of exploration or Processing Areas, however, reduction in terms of Article 6.3 is

amatterfor the *Company* to decide. The Government has no say in the matter. Regardless of maps demarcating the “Exploration” wide and practically unrestricted. No exploration may be contemplated in any area outside the areas demarcated in the maps, but the terms of the agreement made “Exploration Area” at least an arguable matter. If the proposed agreement is signed, it would leave the resolution of a dispute on that matter to be settled by arbitration in terms of Article xx of the Agreement.

SETTLERS AND THE AFFECTED AREA

In their final written submissions on behalf of the 1st-3rd, 6th and 8th respondents, made after the oral hearing, learned counsel submitted that “During the exploration period the inhabitants of the area will not be displaced nor their lands will be affected”. A map (Document X), prepared by the Director of the Geological Survey and Mines Bureau was annexed to the submissions under the caption. “The area reserved for mineral explorations up to (the) 31st July, 1999. “The map is a map of Sri Lanka showing three areas of demarcation:

- “1 the area of 56 sq. km reserved for the proposed phosphate project;
- 2 areas reserved present for mineral explorations (8514 sq.km)
- 3 The areas where detail explorations have been carried out during the past three years (1839 sq.km). Neither any complaints or damage to the environment have been received nor any person has been displaced due to exploration activities”. (The emphasis is mine)

That map was not produced until after the conclusion of the oral submissions. When and why was it prepared? On the basis of Document X, the Deputy Solicitor-General said: “One could see from ‘X’ that the whole of Chillaw town has been part of the exploration area (sic). Therefore, it is respectfully submitted that no harm will occur either to the inhabitants of the area or to the environment during the exploration period. In the circumstances, it is respectfully urged that the application of the petitioner at this moment is pre-mature”.

What is the fate of Chillaw and other areas referred to in document X? Was the agenda of the Geological Survey and Mines Bureau made known to the people of the affected areas? The Deputy Solicitor-General has not stated that the people of the areas demarcated in Document X have been made aware of the intentions of the Geological Survey and Mines Bureau, and, in the circumstances, his submissions that the people living within the proposed exploration areas in document X have made no protests, and that therefore the petitioners cannot object to exploration is unsound, for they are not comparable situations. Has it been publicly announced that exploration, as defined in the proposed agreement, will be carried out in Chillaw and other areas shown in Document X?

In his affidavit, the 1st respondent states, 4. (a) “The apatite deposits were discovered in 1971 and part of the deposit is to the North of the Jaya Ganga, which consist of Crown lands (sic). Only; (b) the area to the south of Jaya Ganga has been excluded from the Mahaweli settlement Scheme and reserved for the apatite/Phosphate Project in view of the said discovery in 1971. Accordingly there are no legal settlements in the area “This, as we shall see is flatly contradicted by Article 17.3 of the proposed agreement which I have quoted below. At the hearing, he produced a map through the Deputy Solicitor-General. With his affidavit he submitted a Plan of “the known deposit area” prepared by the Geological Survey Department and stated that the 7th petitioner’s temple was not within the known deposit area”.

According to the map, there do not appear to be inhabitants on what is marked as the “known Deposit Area” south of what is marked as the “Kalawewa R.B. Main Channel”, which the Deputy Solicitor General confirmed is the Jaya Ganga referred to by the 1st respondent. Learned counsel, for the 5th and 7th respondents and the Deputy Solicitor-General stated that no one was living on the reserve and that, therefore, on the known data, there will be no relocation.

However, the question as far as the 7th petitioner and the other petitioners are concerned is not whether their lands were on the “known deposit area”, but whether they were within the “Exploration Area”, including the area south of the Jaya Ganga. Having regard to the Grid map (p6 and 5 R2), the petitioners’ lands are in the following squares and fall within the exploration area: 157332 (1st petitioner); 157329 (2nd petitioner); 157327/156329 (4th petitioner); 157329 (5th petitioner); 157327/158327 (6th petitioner); 157328 (7th Petitioner).

The 1st respondent suggested that, in view of the impending phosphate project, no settlers were located under the Mahaweli project in the area earmarked for the phosphate project. However, in the map furnished to us, there are “Mahaweli Settlers” within the demarcated “Exploration Area” south of what is marked as the “Kalawewa Main R.B. Channel”. Indeed, the map it seems had been prepared for the very purpose of identifying Mahaweli Settlers, who are obviously not, as the 1st respondent suggested, illegal occupants of lands. The caption of the map is “Phosphate Project at Eppawela – Area falling within system ‘H’ of Mahaweli Project.” Another map produced by the Deputy Solicitor-General – the “Buffer Area map” – grid map – shows another “Known Deposit” north of what is marked as the “Kalawewa main R.B Channel.” When that map is read with the “Phosphate Project at Eppawela etc. Map”, Mahaweli Settlers’ appear to be living in that area as well.

Learned counsel for the 5th and 7th respondents submitted that “there are no persons living in the Exploration Area”, and that therefore there will be no need for relocation,

and that no *viharayas*, homes or villages will be damaged. He stated that “As at present in terms of the known given reserves and inferred reserves no one at all will be relocated. Until the feasibility report is done there will be no way at all in finding out whether in terms of this project anybody will be relocated.” The Deputy Solicitor-General stated that the application of the petitioners was “premature”, for the deposits had not been commenced. It was only after the feasibility study that the persons affected and extent of environmental damage could be assessed.

From the point of view of imminent infringement as distinguished from infringement their submissions are not supported by the evidence provided by the maps submitted to us especially when read with the definition and flexible description of “exploration area” in the Agreement referred to above.

Learned counsel’s submissions, as well as the assertions of the 1st respondent in his affidavit, are also at variance with the report of the President’s committee. At pp. 3-4 of that report, attention is drawn to the fact that during the first round of negotiations conducted by the negotiating committee previously appointed by the Cabinet, one of the “major issues” that had to be discussed with “local institutions and authorities” related to the resettlement and payment of compensation of Mahaweli settlers presently living in the exploration area identified for the project”. The President’s Committee notes that “Discussions have also been held with the Mahaweli Authority of Sri Lanka and will help to determine an exploration area which will least disturb the settlements. However, where re-settlement has to take place consequent to displacement, adequate compensation will be paid to the settlers and the costs will be met by the Joint Venture Company”.

Article 17.3 of the proposed agreement acknowledges both the fact that there are settlers south of the Jaya Ganga and the fact that they and other persons may be affected by mining operations. The Article shows not only that the petitioners and others may be affected but that if they are, the paramount consideration will be the interests of the company rather than those of the occupants of the affected areas.

17.3 “the Government and the Company acknowledge that if Mining is conducted within the portion of the Exploration Area, located south of the Mahaweli District Authority’s main canal which flows through the Exploration Area, the occupants of such land may be directly affected. Occupied areas are indicated on the map is attached hereto and made a part hereof as annex “K”. To the extent that this area is included within the Mining Area and constitutes part of the area to be mined under the Company’s Development Plan which is approved by the Government in accordance with the procedures set forth in Article VII, and the Company determines that it is necessary to relocate such occupants in order to accommodate Mining such area, then the company will

pay the costs of such relocations and the Government will use its best efforts to facilitate the relocation of any inhabitants of such land as requested by the Company in a manner which does not create an undue financial burden on the company or delay the Company’s development and operation of the Mining Area. The Government will also use its best efforts to co-ordinate with the Mahaweli Authority and any other Government authority having jurisdiction over such lands in order to implement such relocations in an orderly and efficient manner, to minimize or eliminate the settlement within this area, and to cause the removal at minimal cost to the Company of squatters having no legal or possessory rights. In connection with the foregoing, the Government shall use all reasonable efforts to minimize or eliminate the settlement within this area of new inhabitants during the term of this Agreement.

As to other parts of the Mining Area where the Company determines that “resettlement” is necessary, the Government and the Company acknowledge that only small numbers of persons inhabit such lands. As to these other lands where relocation is determined to be necessary by the Company, the same relocation provisions as set forth above will apply and the Government will utilize its best efforts to minimize or eliminate any settlement of persons or families on such other lands during the term of this Agreement.

In the event that the Company wishes to relocate persons in occupation or possession of private land and not within the scope of the relocation specifically provided for above in this section 17.3 such relocation shall be effected on terms to be agreed between the company and the owners of such private land”.

(The emphasis is mine)

Apart from the Mahaweli settlers in the more recent villages established as part of the Mahaweli Development System ‘H’ project, there are residents of numerous ancient villages (*purana gam*), both in the “Exploration Area” and the Buffer Zone. Admittedly, the scale of displacement will depend on the feasibility study. That does not mean that at the present time it can be confidently asserted, as learned counsel for the respondents did, that no relocation will take place, nor it can be denied that some displacement is likely, - c conclusion, as we have seen, that understandably troubled the negotiating committee appointed by the Cabinet, although they seem to have been preoccupied with the fate of the Mahaweli settlers.

PETITIONERS’ FEARS UNFOUNDED?

Learned counsel for the 5th and 7th respondents analysed the Agreement and said there were five stages in the project; (a) exploration; (b) feasibility study; (c) construction; (d) operating; (e) marketing. Mining, which could cause damage, he said, “is done only at the operating stage”. There was no need to feel any apprehension at the

Exploration and Feasibility Study stages, which is what the signing of the proposed Agreement should lead to. It is only when the exploration and feasibility study are done, the approval of all the statutory authorities are obtained, and the Secretary accepts the feasibility report, that the company will be permitted to proceed to the construction and mining phases of the project. Exploration, he said, “only means search and location of the presence of economic apatite and other phosphate mineral deposits and to find out their nature and grade.” The Deputy Solicitor-General expressed a similar view.

The exploration contemplated by the respondents may, perhaps, be of a non-intrusive nature. However, the definition of “exploration” in the proposed Agreement, as we have seen, includes the search for certain minerals, and their location, nature and grade, *inter alia* making “boreholes, test pits, trenches, surface or underground headings, drifts or tunnels.” Mining may have comparatively more devastating consequences, but exploration can scarcely be said to be so harmless as to cause the occupants of the exploration area no reasonable apprehension of imminent harm to their homes and lands. In the circumstances, the petitioners can hardly be blamed for not sharing the optimistic submission of learned counsel for the 5th and 7th respondents that exploration “can do no harm whatever to anyone”.

The petitioners express concern not only about the harm that may be caused at the stage of exploration, but also at all stages of the project and by the total effect of the project as described in the proposed agreement. Admittedly, there is as yet no formally executed agreement. Yet, the document may have caused reasonable apprehension leading to the application of the petitioners, for (a) it has been initialed after a “final” round of negotiations between the parties to a proposed agreement; and (b) provides for each and every one of the “five stages” of the project referred to by learned counsel for the fifth and seventh respondents in his analysis of the Agreement. The petitioners’ case is that, in the circumstances, the totality of the proposed agreement must be considered in deciding whether there is an imminent infringement of their constitutional rights.

There is nothing in the proposed agreement that supports the view that the signing of the proposed agreement will “only result in exploration and feasibility study”. It is a comprehensive, all embracing document.

THE PROPOSED ACTIVITIES UNDER THE AGREEMENT

Following the exploration stage during which the company will locate the presence of economic apatite or other phosphate mineral deposits and find out their nature, shape and grade, a study would be made “to determine the feasibility of commercially developing the phosphate deposit or deposits identified by the Company”. (Article 7.2) this is to be followed by the construction of “the mine, fertilizer processing plant and associated facilities”. (Article

8.1) Article 9.4 states that “The Enterprise facilities shall include, among other things, the mine and related processing facilities, the fertilizer processing plant and associated facilities and may include port facilities, rail, road and pipeline transportation facilities, storage facilities, communication facilities, power supply and distribution facilities, gypsum and other waste disposal facilities, repair and maintenance facilities temporary or desirable in connection with the operation of the Enterprise “The next stage is the “operating period” when mining takes place. Article 9.1 states; “As the construction of the enterprise facilities are progressively completed,” the company will “commence the operation of such facilities on the mining and processing areas and the conduct of all other activities contemplated by the Enterprise and shall achieve commercial production by no later than two years following the end of the construction period, and the company shall be authorized to continue such operations and activities for the duration of the operating period, as long as the company abides by its obligations under this Agreement and Applicable Law”. “Operating Period” is defined in the Agreement to mean “the period commencing on the day following the end of the construction period and continuing for so long as the Company shall continue to conduct operations with respect to any phosphate mineral reserve within the Exploration and/or Mining Area and, provided the Company has not permanently abandoned or terminated its operations and given notice thereof to the Secretary, for a period of not less than 25 years following the commencement of Commercial Production, or such longer period as the Secretary, on the written application of the Company may approve.” Finally, the product will be sold in the market. This is dealt with in Article X.

SUSTAINABLE DEVELOPMENT

In the introduction to the proposed Mineral Investment Agreement, it is stated, “The Government seeks to advance the economic development of the people of Sri Lanka and to that end desires to encourage and promote the rational exploration and development of the phosphate mineral resources of Sri Lanka.” (The emphasis is mine).

Undoubtedly, the state has the right to exploit its own resources pursuant, however, to its own environmental and development policies. (Cf. Principle 21 of the U.N Stockholm Declaration (1972) and Principle 2 of the U.N. Rio De Janeiro Declaration (1992) Rational Planning Constitutes an essential tool for recognizing any conflict between the needs of development and the need to protect and improve the environment. (Principle 14, Stockholm Declaration) Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature. (Principle 1, Rio De Janeiro Declaration). In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it. (Principle 4, Rio De Janeiro Declaration). In my view, the proposed agreement must be

considered in the light of the foregoing principles. Admittedly, the principles set out in the Stockholm and Rio De Janeiro Declarations are not legally binding in the way in which an Act of our Parliament would be. It may be regarded merely as 'soft law'. Nevertheless, as a Member of the United Nations, they could hardly be ignored by Sri Lanka. Moreover, they would, in my view, be binding if they have been either expressly enacted or become a part of the domestic law by adoption by the superior courts of record and by the supreme Court in particular, in their decisions.

During the hearing, learned counsel for the 5th and 7th respondents, submitted that the project must go ahead; because the people would otherwise "starve". In his written submissions he stated that as "trustee of the natural resources of the country ... the Government cannot sit back and do nothing. That would be a sin of omission and would be as such a breach of trust as if the Government did act wrongly ... It is common ground that the phosphate has to be developed. All the experts are agreed that the phosphate cannot be permitted to lie underground".

While, as I must on account of its extravagance reject learned counsel's claim that people would "starve" if the project is not proceeded with, it might be pointed that there seems to be no disagreement that the phosphate deposit should be utilized. Indeed, an hypothesis has been advanced that the Eppawela deposit was not "discovered" in 1971, but was known to our rulers and people for thousands of years and shared the thought that the deposit should be utilized. The difference between them and us is how this should be done. The ingenuity of the rulers and people of Sri Lanka in times gone by, it is suggested, had created a stable and sustainable agricultural development system harnessing the key natural resources available within their natural habitat, including the Eppawela deposit. The natural processes of weathering, microbial activity and precipitation might have released plant nutrients which were carried overland by flowing into the reservoirs, channels and rivers as well as permeating into the soil matrix and possibly reaching underground aquifers. (see Ivan Amarasinghe, *Eppawela; Contribution to Nutrient Flows in the Ancient Aquatic Ecosystems of Rajrata*)

In 1974, it was decided to use the Eppawela deposit through a District Development Council. The D.D.C. was an organisation aimed at harnessing resources at "grass roots" level, utilizing locally available resources with the minimum use of foreign or imported expertise, techniques and technology, and providing maximum employment opportunities and the most favourable benefits to the locality. The annual production of the Eppawela D.D.C. projects was to be 50,000 tons, and at that rate of extraction, it was estimated that the deposit would serve the country for a very long time, perhaps a thousand years. Moreover, the D.D.C. project was designed to quarry the phosphate and not to mine it, and such quarrying operations were to be far from the Jayanganga.

It has been the policy of successive governments during the past three decades that the Eppawela mineral deposit should be put to use. In fact, Lanka Phosphate Ltd., the 6th respondent, under a licence issued by the Geological Survey and Mines Bureau has been mining about 40,000 metric tons of rock per annum for crushing and marketing to enterprises making fertilizer. That modest operation, the petitioners explain, caused them no concern. However, in view of the escalation of the amount to be mined under the proposed agreement to 26.1 million metric tons within thirty years from the date of the signing of the agreement, the petitioners fear (a) that existing supplies will be exhausted too quickly, and (b) that the scale of operations within the stipulated time frame will cause serious environmental harm that would affect their health, safety, livelihood as well as their cultural heritage. The petitioners do not oppose the utilization of the deposit. However, they submit that the phosphate deposit is a "non-renewable natural resource that should be developed in a prudent and sustainable manner in order to strike an equitable balance between the needs of the present and future generations of Sri Lankans".

In my view, due regard should be had by the authorities concerned to the general principle encapsulated in the phrase 'sustainable development', namely that human development and the use of natural resources must take place in a sustainable manner.

There are many operational definitions of 'sustainable development', but they have mostly been variations on the benchmark definition of the United Nations Commission on Environment and Development chaired by Fro Harlem Bruntland, prime Minister of Norway, in its report in 1987....development that meets the needs of the present without compromising the ability of future generations to meet their own needs".

Some of the elements encompassed by the principle of sustainable that are of special significance to the matter before this court are, first, the conservation of natural resources for the benefit of future generations – the principle of inter-generational equity; second, the exploration of natural resources in a manner which is 'sustainable' or 'prudent' – the principle of sustainable use; the integration of environmental considerations into economic and other development plans, programmes and projects—the principle of integration of environment and development needs.

International standard setting instruments have clearly recognized the principle of inter-generational equity. It has been stated that humankind bears a solemn responsibility to protect and improve the environment for present and future generations. (Principle 1, Stockholm Declaration). The natural resources of the earth including the air, water, land flora and fauna must be safeguarded for the benefit of present and future generations. (Principle 2, Stockholm Declaration). The non-renewable resources of the earth

must be employed in such a way as to guard against their future exhaustion and to ensure that benefits from such employment are shared by all humankind (Principle 5, Stockholm Declaration). The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations. (Principle 3, Rio De Janeiro Declaration). The inter-generational principle in my view, should be regarded as axiomatic in the decision making process in relation to matters concerning the natural resources and the environment of Sri Lanka in general, and particularly in the case before us. It is not something new to us, although memories may need to be jogged.

Judge C.G. Weeramantry, in his separate opinion in the Danube case (*Hungary v. Slovakia*), (*supra*), referred to the “imperative of balancing the needs of the present generation with those of posterity”. Judge Weeramantry referred at length to the irrigation works of ancient Sri Lanka, the Philosophy of not permitting even a drop of water to flow into the sea without benefiting humankind, and pointed out that sustainable development had been already consciously practiced with much success for several millennia in Sri Lanka. Judge Weeramantry said; “The notion of not causing harm to others and hence *sic utere tuo ut alienum non laedas* was a central notion of Buddhism. It translated well into environmental attitudes. “*Alienum*” in this context would be extended by Buddhism to future generations as well, and to other component elements of the natural order beyond man himself, for the Buddhist concept of duty had an enormously long reach”.

Contemporary law makers of Sri Lanka too have been alive to their responsibilities to future generations. Thus, section 17 of the national Environmental Act makes it a mandatory duty for the Central Environmental Authority to ‘recommend to the Minister the basic policy on the management and conservation of the country’s natural resources in order to obtain the optimum benefits therefrom and to preserve the same for future generations and the general measures through which such policy may be carried out effectively.”

The call for sustainable development made by the petitioners does not mean that further development of the Eppawela deposit must be halted. The Government is not being asked, to use learned counsel’s phrase to “sit back and do nothing”.

In my view, the human development paradigm needs to be placed within the context of our finite environment. So as to ensure the future sustainability of the mineral resources and of the water and soil conservation ecosystems of the Eppawela region, and of the North Central Province and Sri Lanka in general, due account must also be taken of our unrenowned cultural heritage. Decisions with regard to the nature and scale of activity require the most anxious consideration from the point of view of safeguarding the

health and safety of the people, naturally, including the petitioners, ensuring the viability of their occupations, and protecting the rights of future generations of Sri Lankans.

According to the Geological Survey Department (presently the Geological Survey and Mines Bureau), the 3rd respondent, the Eppawela deposit is said to have a proven reserve of 25 million metric tons and an inferred reserve of another 35 million metric tons. However, as a Director of the 5th respondent, Mr. Gerry L. Pigg, and a Director of the 7th respondent, Mr. U.I. De Dilva Borelessa, state in their affidavits, “the actual extent of the phosphate reserves in Sri Lanka is not known today”, and “it would take exploration to discover the new reserves which would move the inferred reserves into the proven category.” The Secretary of the Ministry of Industrial Development, Mr. S. Hulugalle, in his affidavit states that “only 26.1 million metric tons of rock phosphate will be mined over the entire 30 year project period and the deposit contains 25 million metric tons proved reserve and 35 million metric tons of inferred reserve. Therefore after the 30 year period there would still be a substantial amount to phosphate reserve.” The Deputy Solicitor-General stated as follows: “If the Mining Licence is given in terms of the Mines and Minerals Act No. 33 of 1992, the project company will only be entitled to mine 26.1 million metric tons for the entire 30 year period. This amount when compared with the ‘available resource’ at Eppawela is somewhat negligible.”

How could it be asserted with any degree of confidence at this time, when no exploration has taken place, that only a comparatively “negligible” quantity of the available deposits will be extracted so that at the end of the 30 year project period there would remain a “substantial” amount of phosphate? As Mr. Pigg and Mr. De Silva Borelessa, quite correctly in my view, point out, until exploration, we really do not know what the reserves are, except for the already proven reserve of 25 million metric tons.

The National Academy of Sciences in its report (P10) points out that in May 1995, a committee of five scientists and two economists appointed by the President of Sri Lanka recommended that “a more comprehensive geological reserve evaluation be undertaken in the light of recent research findings so that government can make a decision on the rate of exploration of such reserves. The decision on the rate of exploration should be made taking into account the important concerns about the use of the resources in a manner that future generations can also benefit”. No such survey has been done, although it should, for reasons I shall presently explain, have been done before the negotiating committee appointed by the President to conduct the final round of negotiations recommended the signing of the proposed agreement. The National Academy of Sciences calls attention to the fact that if after exploration is carried out under the proposed agreement it is found that the inferred reserves are less than presently anticipated, there is no provision in the proposed agreement to slow down the exploitation rate with the result that almost all

of the National Reserves could very well be exhausted at the end of the 30 years. The importance of giving effect to the recommendation of the President's Committee which reported in May 1995 that a comprehensive geological evaluation should be done so that more certain information would be available on the quantity and quality of the phosphate at Eppawela cannot be overstated, for on it would depend reliable conclusions being reached on how best in the national interest the mineral resources should be utilized, from the point of view of the rate of extraction, having regard to consideration of sustainable development and the feasibility of alternatives, such as the production of single super phosphate fertilizer to meet only local requirements rather than producing Di-ammonium phosphate. It is also important from the point of view of accurately assessing the Government's contribution. In terms of Article 2.16 of the proposed agreement Lanka Phosphate is given a ten per cent. holding. What if the exploration reveals a deposit that in terms of quantity and quality exceed the current assumptions? Government's contribution would then have been underestimated. And so, even if the Geological Survey is to be undertaken as a part of the proposed agreement, is it in the best interests of the country to limit the share holding to ten per cent. at this stage merely on the basis of a pessimistic guesstimate when better information can be had, and ought, on so important a matter, to be required and had before policy decisions are taken, let alone binding contracts being entered into?

The National Science Foundation's Committee stated as follows: "Mining of rock phosphate should be done at a controlled rate (e.g. 350,000 mt per year) so that the present deposit could be utilized by several generations. However, if more deposit are found, the rate of exploration could be revised, the guideline being that the ore should last at least 200 years for use in Sri Lanka's Agriculture." (The emphasis is mine).

Let us look at the matter in the context of the optimistic scenario predicted by the Secretary of Industrial Development and the Deputy Solicitor-General with regard to the quantum of deposits. Assuming that 26.1 million metric tons will be mined within the 30 year project period, and that the deposits will not be exhausted, is it prudent to enter into the proposed agreement from the point of view of the long term, future interests of the country, having regard to the fact that phosphate is a non-renewable resource? The report of the National Science Foundation (P12) points out that the Eppawela deposit is of considerable value to Sri Lanka because phosphate deposits are non-renewable and dwindling resources in the world like fossil fuel, and should be "wisely utilized." Citing Herring and Fantel's landmark study, the National Science Foundation points out that, on the basis of current information, the worldwide phosphate reserves will be exhausted in 100-150 years. Herring and Fantel state as follows:

"... the ineluctable conclusion in a world of continuing phosphate demand is that society, to extend phosphate rock reserves and reserve base beyond the approximate 100 year depletion in date must find additional reserves and/or reduce the rate of growth of phosphate demand in the future. Society must:

(1) increase the efficiency of use known resources of easily minable phosphate rock; (2) discover new, economically-minable resources; or (3) develop the technology to economically mine the vast but currently uneconomic resources of phosphate that exist in the world. Otherwise, the future availability of present cost phosphate, and the cost or availability of world food will be compromised, perhaps substantially."

(The emphasis is mine).

Adverting to learned counsel's submission about starvation, one might ask, should the lives of future generations of Sri Lankans be jeopardized?

The National Science Foundation states that "The irrefutable conclusion is that the Eppawela rock phosphate deposit should be exclusively reserved for the country's use for generations to come." It indicates alternative methods to ensure the use of the deposit to meet the fertilizer demands of the country while conserving the reserves for the use of future generations. The Secretary of the Ministry of Industrial Development has misunderstood the matter in making his averments in paragraphs 18(c) and 19(b) of his affidavit. It was no one's case that the New Zealand proposal should have been considered in deciding upon responsive bids to the Government's call for tenders. What is asserted is that at some time, in considering policy options, the Government ought to have taken or ought to take the New Zealand proposal into account as being more appropriate (having regard to the inter-generational principle and environmental considerations) in the matter of the development of the Eppawela phosphate deposit before adopting the course of action decided upon by the Government as expressed in the proposed agreement.

The Secretary of the Ministry of Industrial Development in his affidavit stated that "with the development of technology and market conditions, a mineral deposit may also cease to be a resource as has happened to the tin industry in the world with the advent of plastic..." Sustainable development requires that non-renewable resources like phosphate should be depleted only at the rate of creation of renewable substitutes. What is the known renewable substitute for phosphate? Herring and Fantel, as we have seen, refer to a "continuing phosphate demand." "Does the first respondent assume that plants will need bo phosphorous?"

On that matter, Prof. O.A Illeperuma of the Department of Chemistry, University of Peradeniya, with some asperity, had this to say (P11): “ There are some wisecracks who say that scientists will develop new plants which will grow without phosphorous. Anyone with even a rudimentary knowledge of science knows that phosphorous is an essential component of our bone structure and when such varieties of cash crops are indeed possible then we will have humans with no bones who will probably move around like jellyfish!...”

If in fact the optimistic views of the Secretary of Industrial Development and the Deputy Solicitor-General are confirmed by exploration, learned counsel for the petitioners submitted that it does not necessarily follow that at the end of the thirty years after the signing of the proposed agreement, the Government of Sri Lanka will be in control of the mining operations. I find myself in agreement with that submission of learned counsel for the petitioners, for the proposed agreement defines “ operating period” to be a “a period of not less than 25 years following the Commercial production , or such longer period as the Secretary, on the written application may approve.” Article XXX of the proposed agreement states, inter alia, that the Agreement “will continue in force until the later to occur of the following dates: (a) the date which is 30 years following the date of the signing of the Agreement, or (b) the date on which the Operating Period expires. The Company may request the extension of this Agreement on terms to be negotiated...” If the Secretary approves the application of the company for the extension of the Operating Period, he thereby extends the Operating Period; there is then no need for the company to apply for the extension of the agreement on terms to be negotiated.

The petitioners also state that the Eppawela deposit is an agriculturally developed area which is also the location of many historical viharas and other places of archaeological value. It is also the area of the Jaya Ganga/Yoda Ela scheme which is considered to be among the greatest examples of Sri Lanka’s engineering skills and forms an important part of the irrigation network of the North Central Province. They allege that over 20 new and ancient irrigation tanks and about 100 kilometres of small irrigation canals are in danger of being destroyed. Five kilometres of the Jaya Ganga, they say, will be affected which could adversely affect the entire irrigation system of the North Central Province in which it is an important link. The petitioners further allege that a factory for the production of phosphoric acid and sulphuric acid which are highly polluting substances will be constructed at Trincomalee using a 450 acre land next to Trincomalee Bay. The petitioners also allege that the environmental pollution resulting from the said project will be massive and irreversible and will render the affected area unusable in the foreseeable future. Waste products from the large scale mining of phosphate as envisaged by the project include phospho-gypsum and other behind large pits and gullies which will provide a breeding ground for mosquitoes and lead to the spread of dangerous

diseases such as malaria and Japanese encephalitis. the petitioners further state that the past record of environmental pollution by Freeport MacMoran and IMC Agrico (the major share holder in the 5th respondent company) is notorious even in their own home country, namely, the United States of America.

The National Academy of Science of Sri Lanka (see below) also makes critical comments about the past experience of Freeport MacMoran.

With regard to the gypsum as a by-product, the first respondent in his affidavit states: “ The project is expected to produce approximately 1.2 metric tons (sic.) of phospho-gypsum per annum as a by-product.” He suggests that rather than being a problem, it would be a boon for which we should be thankful, for a part of this, he says, could be sold to local cement manufacturers and used in the manufacture of “plaster and boards”. Have market studies been done? Gypsum may pose no danger if the quantities are manageable. The scale of operation is important if the by-products are to be utilized without causing environmental damage. Could the amount of gypsum produced be absorbed by the cement manufacturers and others having regard to the fact that, according to the Academy of Science, there will be “a million metric tons of phospho-gypsum”? The National Science Foundation in its Executive summary states: “The U.S Mining Company proposal is not environment friendly: Mountains of phospho-gypsum will accumulate polluting the environment.” Mr. Thilan Wijesinghe, in his letter dated March 30, 1998 (P7), notes that 2.1 metric tons per annum of rock phosphate would be mined and processed”.

The 1st respondent seems to have been confused about the amount of rock phosphate to be mined and processed and the amount of phospho-gypsum left behind. If, the gypsum is not in fact absorbed in the way envisaged by the first respondent, is it to lie somewhere? Not everyone is willing to form an opinion on grounds admittedly inaccurate or insufficient. Prof. O.A Illeperuma stated as follows (P11) : “ This may not be a problem for large countries such as USA where phospho-gypsum mountains are visible dotting the Florida landscape, since open and barren land is available in large countries such as the U.S.A. Sri Lanka, on the other hand, is one of the most overcrowded countries in the world where even finding a site to dump domestic garbage has become a serious problem.” The evidence before us points to the fact that the quantity of phospho-gypsum would grossly exceed the assimilative capacity of the environment.

In the circumstances would the gypsum end up in the sea? The minutes of the meeting held on the 22nd of January 1998 at the CEA state as follows: “Mrs Priyani Wijemanne, GM/MPPA highlighted the possible impacts on marine eco-systems at the Trincomalee site and requested that those should be carefully looked into during the Environmental Impact Assessment Stage. She submitted

a report to the Chairman of issues that should be addressed.”

I do not know what Ms. Wijemanne said in her report, but attention is drawn, especially of the 4th respondent in applying the National Environmental Act and the regulation framed thereunder, to the principles of the Stockholm Declaration: “The discharge of toxic substances..... in such quantities or concentrations as to exceed the capacity of the environment to render them harmless, must be halted in order to ensure that serious or irreversible damage is not inflicted upon the ecosystem.”

The just struggle of the peoples of all countries against pollution should be supported.” (principle 6). “States shall take all possible steps to prevent pollution of the seas by substances that are liable to create hazards to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea.” (Principle 7). It might be noted, particularly by the 4th respondent, that principle 15 of the Rio De Janeiro Declaration marked a progressive shift from the preventive principle recognized in Principles 6 and 7 of the Stockholm Declaration which was predicated upon the notion that only when pollution threatens to exceed the assimilative capacity to render it harmless, should it be prevented from entering the environment. Principle 15 of the Rio De Janeiro Declaration stated: “In order to protect the environment, the precautionary approach shall be widely applied by states according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.” The precautionary principle acts to reverse the assumption in the Stockholm Declaration and, in my view, ought to be acted upon by the 4th respondent. Therefore if ever pollution is discerned, uncertainty as to whether the assimilative capacity has been reached should not prevent measures being insisted upon to reduce such pollution from reaching the environment.

The National Academy of Sciences states in its report as follows:

“Assuming that the ore reserves are as high as envisaged, and that the ore has a high content of iron and aluminium impurities, di-ammonium phosphate with its high phosphorous content and also containing some nitrogen is a good value added product for the export market. However the high technology required will include setting up ammonia, phosphoric acid and sulphuric acid manufacturing plants, which together with the liquid processing technology involved can lead to serious environmental hazards including the production of high toxic waste by-products and release of toxic pollutants to water bodies and the atmosphere.”

If the economically exploitable ore reserves are not much higher than 30 million metric tons, and 70% of this is high

quality, it might be more prudent to follow the advice of our scientists and accept the New Zealand Fertilizer Group’s proposition (estimated to cost \$ 20 million US Dollars) to produce 150,000 metric tons of single super-phosphate per year to meet only local requirements even if in the short term it may appear to give less monetary benefits. This will preserve our ore reserves for a much longer period, involve simpler technology, leave no environmentally hazardous waste by-products such as a million metric tons of phospho-gypsum, and there will be no need for ammonia and phosphoric acid plants which produce toxic effluent. Of course the lower grade.... single super-phosphate would lose out on high transport cost per unit nutrient and may leave little export demand. Furthermore, under our free market liberal economy, locally produced single super-phosphate may be more expensive to our farmers than imported high phosphorous content fertilizer such as triple super-phosphate on unit nutrient value bases unless the local product is given fiscal protection. The decision on what fertilizer should be produced locally must await the results of the comprehensive exploration phase.

The report adds as follows

“Mining and processing of the products as envisaged will be an operation of unprecedented magnitude in Sri Lanka, and the potential environmental impacts could be equally drastic. At the mining site there will be severe disturbances to the ecology of the area through, among others, the mining operation itself, the infrastructural activities and the discharge of pollutants to the atmosphere. At the processing site, the effluents and other pollutants that will be discharged would pose severe environmental threats unless adequate counter measures are adopted. Although the proposed arrangement with the prospector has provision to the effect that the operations will be carried out with due respect to the laws of the country, and the National Environmental Act does contain provisions to guard against adverse environment impacts, we are of opinion that for an operation of this magnitude additional safeguards should be adopted. This is particularly important as mining prospectors the world over are notorious for creating environmental disasters, and Freeport MacMoran is no exception. In fact, according to media reports, Freeport MacMoran, one of the largest fertilizer manufacturing companies in the world, has the dubious distinction of being also No. 1 polluter in the USA. It has also had a poor record in Indonesia and in the South Pacific island of New Guinea. It would also be prudent to check on the company’s credibility pertaining to environmental matters by calling for the relevant reports from USA, New Guinea and Indonesia before project approval... Through study of such reports, we would be in a better position to insist on the incorporation of stronger and more effective measures in the Agreement to ensure environment safety. It should be expressly stated in the Agreement that the mining operations and the processing should be carried out in accordance

e with the environment standards set by the Government of Sri Lanka. The Agreement should also specifically state the ecological restoration of the areas affected by the mining must be carried out by the prospector at his own cost progressively during the period of mining operations and as directed by the Government of Sri Lanka. The Agreement must be explicit that failure to observe these environmental protection measures could result in the termination of the project. We draw special attention to the fact that the Jaya Ganga which is within the area to be mined has been regraded as a wonder of the ancient world and a cultural monument to be preserved by UNESCO's world Heritage Convention. (D.L.O Mendis, The Island, 14 April 1998)"

The petitioners' assertions with regard to apprehended harm from the proposed project also finds support in the report of the National Science Foundation (P12) which stated that the project "in the view of many of the professional Associations in the country, e.g The Institution of Engineers, Institute of Chemistry, The National Academy of Sciences and most individual scientists and engineers is highly disadvantageous to the country and with highly adverse environmental impacts.'

The report adds:

"The proposal of exploitation of the apatite mine is beset with many problems. Mines always cause damage to (the) environment and minimization of such damage must be examined at length. Further, (the) Eppawela phosphate ore is located in an agriculturally developed system, in an area of extreme historical importance and of archaeological value in the proximity of (national) monuments close to the Cultural Triangle sites with the Sri Mahabodhi and Ruwanweli Saya. Within the bounds of (the) mining area are many ancient villages, which will be adversely affected. The immediate threat to the Jaya Ganga or Yoda Ela cannot be overlooked. If the mining of the ore damages the jaya Ganga, it denigrates Sri Lankan history. Jaya Ganga is an engineering marvel that must be preserved for eternity as the heritage of mankind just as the Taj Mahal, the Pyramids or Ruwanweli Saya are preserved for posterity."

The Eppawela project, as the petitioners, the National Science Foundation and the National Academy of Science point out, is in an area of historical significance. If I might adopt the words of Martha Prickett Fernando in her comments on another proposed project- the augmentation of the Malala Oya basin from Mau ara, "Unless development activities in area like this project are accompanied by proper EIA studies and (proposals for) mitigation of the (adverse impacts on) archaeological resources that will be damaged, vast numbers of sites- in fact, much of Sri Lanka's unrenowable cultural heritage and the raw data for all future studies on ancient Sri Lanka- will be destroyed without record, and an accurate understanding of life in ancient

Sri Lanka will remain forever wrapped in myth and hypothesis." In fact connection, the words of D.D Kossambi (The Culture and Civilization of Ancient India) come to mind: "To learn about the past in the light of the present is to learn about the present in the light of the past."

Ignorance of vital facts of historical and cultural significance on the part of persons in authority can lead to serious blunders on current decision making process that relate to mote that rupees and cents. The first respondent, the secretary to the Ministry of Industrial Development, in paragraph 13 of his affidavit states as follows: " The Southern part of the Yoda Ela has been abandoned after the construction of Jaya Ganga in 1980's under the Mahaweli Scheme." (The emphasis is mine). Judicial restraint prevents me from suggesting why he might, perhaps, have thought it was called "Jaya" Ganga.

The Kalaweva, which helped to supplement the supply of water to Anuradhapura and the area around that great and ancient city, was constructed by King Dhatusena (455-473 AD) and it is , therefore supposed, though not conclusively established, that Dhatusena also built the jaya Ganga which augmented the tanks at Anuradhapura and its environs such as Tissa, Nagara and Mahadaragatta, apart from irrigating a large area of land of about 180 square miles. (See K.M de Silva, History of Sri Lanka, p.30; R.L Brohier, Ancient Irrigation Works in Ceylon, Part II, pp.7-8)

The maps produced show that the Jaya Ganga passes through the Eppawela phosphate deposit region. It was, as Brohier says, a part of " an ingenious net-work of irrigation channels in this district... which , apart from affording edification to future generations, are monuments of the power and edification to future generations, are monuments of the power and beneficence of the ancient rulers of Ceylon." Whether it was built by Dhatusena or not , according to Chapter 79.58 of Mahawamsa, Parakrambahu I (1153-1186 AD) " had the ruined canal called Jaya Ganga restored. It branched off from Kalavapi and flowed to Anuradhapura." It is a 54 1/2 mile long contour channel that starts from a sluice in the bund of the Kala Wewa and ends in the Tissa Wewa and Basawakulama tank in the ancient city of Anuradhapura. Assuming that some people not only do not know the basic facts of history, but might also be ignorant of elementary geography so as not to be able to read the maps that were produced, it might be explained that the function of the Jaya Ganga in ancient times appears to be twofold: to intercept the drainage from the land to the east and issue it to cascades of smaller village tanks to the west , in the basin of the kala Oya; and, by trans-basin diversion, to augment the Anuradhapura city tanks and provide irrigation water in the adjacent Malwatu Oya basin. Brohier states that this ancient canal, which had again been restored in 1885-1888,

"had a gradient for the first 17 miles of only six inches per mile... Such an ingenious memorial of ancient irrigation skill cannot be passed over

without a reference to its peculiar features. It needs to be explained that the Jaya Ganga follows the high ground between the reservoir which serves as its source of supply and the Tissawewa. By this means it intercepts all the drainage between Elagamuwa and the western watershed of the Malwatuoya which otherwise would run to waste and it irrigates the country below the canal by a most perfect system of irrigation. In each of the subsidiary valleys on its course the water is diverted by channels into little village tanks or chains of tanks- the tanka lower down receiving the overflow from the tanks placed higher in each chain.

The scheme was so perfect that the ancient canal afforded irrigation facilities over approximately 180 square miles of country on the east of the Kala-Oya, between Kalawewa and Anuradhapura. It today feeds no less than 60 villages and to the town of Anuradhapura.

There is under such circumstances, little reason to dispute that the Jaya-Ganga must have been of incalculable benefit of Nuwarakalawiya in the days of the Sinhalese Kings, inasmuch as the restoration of the work is today but too aptly described as 'the grandest experiment in irrigation ever undertaken in modern Ceylon.'

The Jaya Ganga, which the petitioners, as well as the National Academy of Sciences and the National Science Foundation, have drawn attention to, is not merely a water course or transportation canal corridor, or even 'an amazing technological feat', as Prof. K.M De Silva describes it; it is also an integral part of a human-made water and soil conservation ecosystem. Its preservation is therefore not only of interest to the literati at a higher plane, as a matter concerning the heritage of humankind that must be preserved, but also, at the more mundane level of the petitioners and thousands of others like them who depend on the continued and efficient functioning of that ecosystem for the pursuit of their occupations and indeed for sustaining their very lives, matter of grave and immediate personal concern.

The respondents and their learned counsel submit that environmental concerns have been sufficiently addressed in the proposed agreement.

The 1st respondent in his affidavit stated that exploration and mining licences cannot be issued in respect of archaeological reserves. Plants for the production of phosphoric acid and sulphuric acid cannot be constructed before compliance with the Environmental Act. If and when the Agreement is entered into, the Project Company is required to carry out exploration and feasibility studies after which the project is required to submit itself to the EIA process before mining is commenced. A detailed Mine Restoration Plan and a Mine Restoration Bond are required. Moreover the company is required to comply with requirements of the Mines and Mineral Act, the National Environmental Act and the Mahaweli Authority Act and

to conduct its operations so as to minimize harm to the environment, protect natural resources, dispose of waste in a manner consistent with good waste disposal practices and in general to provide for the health and safety of its employees and the local community and also be responsible for the "reasonable preservation of the natural environment within which the project company operates." The 1st respondent further stated that the Government is empowered to suspend the operations of the Company "if it determines that severe environmental damage associated with the company's violation of applicable law is resulting from Company's operations which the company has failed to remedy." Attention is drawn to the maintenance of an Environment Restoration Escrow Account, the requirement to furnish a Mines Restoration Bond which, he states, "would be adequate to cover any environmental damage and to effect the necessary restoration work." In his opinion, since there are adequate safeguards in the proposed agreement "to make the Company responsible to take necessary steps to minimize and rehabilitate any damage to the environment and local community", the 1st respondent concludes that "it is premature to form an opinion on the nature and extent of the environmental damage which may take place due to this project."

The Directors of the 5th and 7th respondents stated in their affidavits that in introduction to the agreement it is stated as follows: "(D) In the process of developing mineral resources, the Government gives high priority to the protection of the environment and avoidance of waste and misuse of its resources. (F) The Company (5th Respondent) is ready and willing to proceed in these undertakings, and to assume the risks inherent therein in exchange for the rights and benefits herein provided, all pursuant to the terms and conditions set forth in the agreement." It is stated that until the Environmental Impact Assessment and Feasibility study are done, the concerns set out in the petition cannot be satisfactorily addressed. The Exploration Licences issued to the 6th and 7th respondents are subject to the rights of the owner or occupant of the land covered by the licence and to the provisions of the Mines and Minerals Act and the regulations made thereunder. They state that they would bring to bear current technology for both phosphoric and sulphuric acid which have mitigated very nearly all of the pollution aspects of such plants. All this will be subject to the EIA and Feasibility Study. They submitted the IMC Global Environmental, Health and Safety Standards and Guidelines Manual in support of their averment that the Board of Directors of IMC had adopted a very specific and enforceable policy towards environmental, health and safety policies. They state that with the merger of MacMoran Inc. into IML-Global Inc., Freeport MacMoran ceased to exist. This was a part of the consolidation occurring in the fertilizer industry at the time and not an attempt to hide the former Freeport MacMoran Inc.'s involvement in Sri Lanka on the project. What troubles the petitioners is that although Freeport MacMoran with a bad record on pollution has ceased to exist, its spirit roams doing important things, such as seeing the President (see

P4) and initialling the final draft of the proposed agreement. While liabilities are placed on Sarabhumi, a small local company, whereas the decision to accept the tender was based on the size and capacity of the multi-national giant Freeport MacMoran.

Learned counsel for the respondents submitted that in terms of Article VII of the proposed agreement, there has to be a feasibility study and a report thereon. The report must have a section reporting the results of environmental impacts studies as described in Annex E to the Agreement. The section of the report will be prepared by an appropriately qualified internationally recognized independent consulting firm approved by the Government. The study must meet the requirements of Article 25. Article 25.2 provided as follows:

“ The Company shall include in the Feasibility Study an environmental study in relation to all enterprise activities in accordant with Applicable Law, and shall also identify and analyze as part of the Feasibility Study the potential impact of thoperations on land, water, air, biological resources and social, economic, culture and public health. The environmental study will also outline measures which the Company intends to use to mitigate adverse environmental impacts of the Enterprise (including without limitation disposal of overburden and tailings and control of phosphate and fluorine emissions) and for restoring and rehabilitating the Contract Area and any project Areas at the termination of this Agreement. The Feasibility Study shall provide an estimate of the cost of such restoration and rehabilitation. The Feasibility Study shall also include procedures and schedules relating to the management, monitoring, progressive control, corrective measures and the rehabilitation and restoration of all Contract Areas and Project Areas in relation to all adverse effects on the environment as are identifies in the Feasibility Study. The Study will also provide an estimate of the cost of such activities.”

Article 25.1 provide as follows:

“The Company shall in relation to all matters connected with the Enterprise comply with the Mines and Mineral Act, No. 33 of 1992, the National Environmental Act, No.47 of 1980 (as amended by Environmental Act Np. 56 of 1988, the Mahaweli Authority of Sri Lanka Act No.23 of 1979, the Regulations made thereunder and all other Applicable Law and generally prevailing standards for mining operations. Without in any way derogating from the effect of the above mentioned Applicable Law and mining standards, the company shall conduct all its operations under this Agreement so as to minimize harm to the environment (including but not limited to minimizing pollution and harmful emissions), to protect natural resources against unnecessary damage, to dispose of waste in a manner consistent with good waste disposal practices, and in general to provide for the health and safety of its employees

and the local community. The company shall be responsible for reasonable preservation of the natural environment within which the company operates and for taking no acts without Government approval which may block or limit the further development of the resources outside the mining and processing areas....”

Learned counsel for the respondents submitted that until the feasibility study is done and the development plan is prepared, there is no way of finding out the location of the mine and method of mining and whether in terms of the project any body will be relocated. In terms of the agreement, after the preparation and submission of the feasibility study, if the company decides to proceed with construction, it must submit a development plan with its application for construction to the Secretary, who may withhold approval for proceeding with the project.

In terms of Article 7.7 “ if and only if the Secretary determines that implementation of the Development Plan together with any modification thereof which may be reflected in the Company’s application to construct and operate: (a) will not result in efficient development of the mineral resource, (b) is likely to result in disproportionately and unreasonably damaging the surrounding Environment, (c) is likely to unreasonably limit the further development potential of the mineral resources within the Mining Area, or (d) is likely to have a material adverse effect on the socio-political stability in the area which is not offset by the potential benefits of the project or by mitigating measures incorporated into the Development Plan. The decision shall not be unreasonably delayed and, in light of significant expenditure of time, effort and money which will have been undertaken by the Company, approval shall be granted in the absence of significant and overriding justification.” The Article goes on to state that if the Secretary has any objections or suggestions, they should be communicated to the company, and in the event of any mutually acceptable resolution under Article XX as to whether the Secretary has “ substantial cause for withholding approval of the Feasibility Study Report, Development Plan and application to construct and operate, and if substantial cause is determined to have not existed, the Secretary shall promptly issue his (her) approval of such Report, Plan and application...” (The emphasis is mine)

Learned counsel for the 5th and 7th respondents submitted that if the Secretary wrongfully approved the feasibility study, it is “only at that stage, if at all” persons will be able to challenge matters in Court. How would the petitioners know after the Feasibility Study or development Plan that they are likely to be affected, for in terms of Article 7.9, subject to the provisions of Article 5.5, the Feasibility Study and Development Plan are to be treated as “confidential”. The Government may in term of Article 5.5 disclose “ data and information which the Government determines in good faith is necessary to disclose to third parties in order to protect the national interests of Sri Lanka”; but what is the guarantee that the Government will release the Feasibility

Study and Development Plan when they are available? The petitioners and other persons who may be affected will probably be better informed than they were at the time of making this application. In my view, the petitioners decided wisely in coming before the court when they did. Moreover, who may seek judicial review if damage is caused to the cultural monument or the cultural heritage landscape of Jaya-Ganga? Further, in my view, the words emphasised are so vague as to confer a practically unlimited discretion on the Secretary. They are so broadly framed so as to make judicial review very difficult indeed. In any event, what is the remedy available to anyone, if the Secretary's decision is pursuant to an arbitral award?

Learned counsel for the respondents stated that, since the proposed agreement expressly provides for compliance by the Company with Applicable Law, including the Mines and Minerals Act and the National Environmental Law and the regulations made thereunder, and since the company will be subject to the "stringent" requirements of the licences issued for exploration and mining, the fears of the petitioners are unfounded and "conjectural". Section 30 (1) of the Mines and Minerals Act states that no licence shall be issued to any person to explore for or mine any minerals upon, among other places, "any land situated within such distance of a lake, stream or tank or bund within the meaning of the subject of lands"; "any land situated within such distance of catchment area within the meaning of the Crown Lands Ordinance (chapter 454) as maybe prescribed without the approval of the Minister and the Minister in charge of the subject of Lands." Section 31 of the Mines and Minerals Act provides that no licence shall be issued to any person to explore for, or mine any mineral upon" (a) "an land situated within such distance of any ancient monument situated on state land or any protected monument, as is prescribed under section 24 of the Antiquities Ordinance (Chapter 188); and (b) any land declared by the Archaeological Commissioner to be an archaeological reserve under section 33 of the said Ordinance."

One wonders whether the provisions of the Mines and Minerals Act relating to lakes, streams and bunds and catchment areas as defined by reference to the Crown Lands Ordinance sufficiently protect the water and soil conservation ecosystem of the area affected by the proposed project. No evidence was placed before this court as to whether any land in the exploration, mining, contract or project areas has been prescribed under the law as being land within prescribed distances from ancient monuments and what land has been declared to be an archaeological reserve. Moreover, no provision exists for the preservation of cultural heritage landscape, like the Jaya Ganga, as distinguished from a monument, lest there be some dispute about the word 'monument': No laws can expressly provide for all situations. However, the legislature has foreseen the need to provide against omissions and stated in section 30 (2) as follows:

"In addition to any other condition that may be prescribed under this Act, the Minister of the Ministers...ma, in granting approval for a licence under subsection (1), lay down such further conditions, as may be determined by such Minister or Minister. Where approval is granted subject to any further conditions, the Bureau shall cause such conditions to be specified in the licence."

At the present time, when there has been no Feasibility Study and no Development Plan, and, moreover, when there is no guarantee that such study and plan will ever be made known to them, how could the petitioners feel assured that their individual and collective rights will be protected? There may be conditions that may be prescribed under section (30) 2 of the Mines and Minerals Act to safeguard their interests and the interests of the people of Sri Lanka, and indeed of humankind. But how is this possible without a proper evaluation of the project? A report from an "appropriately qualified", "internally recognized independent environmental firm selected by the company and approved by the Government", is of little or no use to the petitioners and concerned members of the public, having regard to the provisions in the proposed agreement regarding "confidentiality."

For the reasons set out above, I am of the view that there is, within the meaning of the Constitution, an imminent infringement of the petitioner's rights guaranteed by Articles 14 (1) (g) and (h) of the Constitution.

ALLEGED VIOLATION OF ARTICLE 12(1) OF THE CONSTITUTION

The Chairman/Director General of the 2nd respondent in a letter dated March 30, 1988 (P7) quotes the following from the Executive Summary of the report of the President's Committee dated the 9th of May 1995: "Any large-scale venture has the potential to cause an adverse environmental impact, yet it could generate substantial revenue to the country. It is also recommended that the rigorous EIA procedures laid down by the law be followed before any joint venture proposal is implemented because of the possible environmental risks associated with projects of this nature."

Learned counsel for the respondents submitted that Article XXV of the proposed agreement obliges the Company to comply with the National Environmental Act No. 47 of 1980 as amended by Act, No. 56 of 1988 and the regulations made thereunder. In the circumstances the company is obliged to submit an Environmental Impact Assessment in terms of Part IV c of the Act.

The proposed agreement makes no reference to the preparation or submission of any Environmental Impact Assessment as required by the National Environmental Act and the regulations made thereunder. What the proposed agreement does, as we have seen, is to provide for an environmental study to be prepared by an international firm, selected by the company and approved by the

Government, as a part of its Feasibility Study. (Article 7.6) “Feasibility Study” is defined in the proposed agreement as “ a study to determine the feasibility of commercially developing any deposit or deposits identified by the company during the Exploration Period, including the items set forth in Annex “E”.Annex “E” states that the Feasibility Study shall include “Environmental impact and monitoring studies into the likely effects of the operations of the Enterprise on the Environment(such studies to be carried out in consultation with an appropriately qualified independent consultant and under the terms of reference set out in Article XXV of this Agreement).” (But of.Article 7.6 where the study is to be “conducted by an internationally independent environmental consulting firm....”)

Not surprisingly, therefore, although both the Deputy Solicitor General and learned counsel for the 5th and 7th respondents agreed that an Environmental Impacts Assessment was a requirement of the Law, they were unable to agree when that assessment was to be made, and what its significance was in the context of the proposed agreement.

Firstly, therefore, in terms of Principle 17 of the Rio De Janeiro Declaration, there is noGovernmental Impact Assessment subject to “ a decision of a competent national authority”. Nor is the approval ofsuch an authority in terms of the National Environmental Act contemplated by the proposed agreement. What does exist in the proposed agreement is an assurance that the “Applicable Law”, including the provisions of the National Environmental Act, will be complied with.

According to the Deputy Solicitor General, the Company’s application to construct and operate the facility had to be made “after obtaining the approval for the feasibility report, inclusive of the EIA, and the Development Plan...” He stated that “In the event the project Approving Agency refuses to grant approval for the project, the project company will have to abandon the project subject to a right of appeal to the Secretary of the Ministry of Environment. Moreover, if the project is approved after a hearing and been given to the public, the persons who are aggrieved will have an opportunity to come before the Court to have the decision quashed. There are instance where the public have invoked the jurisdiction of th Supreme Court and the Court of Appeal to suspend development projects such as the project such as the project pertaining to the Southern Expressway and the Kotmale Power Project.”

According to learned counsel for the 5th and 7th respondents, “in the first place, after the feasibility report is prepared and the development plan is prepared, this project will be submitted to the project approving agency, in this case the Central Environmental Authority. The CEA, that is the statutory authority, may or may not give its approval. If it does not give its approval, the matter ends there.” ;” The permission and approval of the statutory authorities,

including the CEA, is essential. If that is not obtained, the project comes to an end.” If there is a threat to the environment of to the people, the Central Environmental Authority will not permit the project to go ahead. The CEA is the statutory authority vested by law to determine the matter.” “ The Central Environmental Authority can refuse to permit the project. That is final.” If the Central Environmental Authority does give its approval, the feasibility study, development plan and the report of the international firm on environment, he said, is submitted to the Secretary of the Ministry of Industries, who may refuse it on the grounds specified in the proposed agreement. “It is only after the feasibility study inclusive of the Development Plan (Sic.) is approved by all the statutory authorities including the Central Environmental Authority that the next stage will commence. The next stage is the construction stage.” Referring to the Environment Impact Assessment and the requirements under the National Environmental Act and the regulation framed thereunder, learned counsel for the 5th and 7th respondents gave the assurance that “ all those steps will be followed after the feasibility study is submitted to the CEA... Therefore the public will have every right of protest after the feasibility study report is submitted to the CEA.” As we shall see, the submissions of learned counsel on that matter were, having regard to the statutory requirements of the National Environmental Act and the regulations framed thereunder, seriously flawed.

Learned counsel for the 5th and 7th respondents inquired whether, after bringing in scientific and technical expertise not available in this country, and investing U.S \$ 15 million not available for investment by the Government, it was too much for the 5th respondent to pray that it be permitted to proceed with the construction in the event of the statutory authorities granting approval, and the Secretary accepting the Feasibility Report and Development Plan. Learned counsel for the 5th and 7th respondents said: “Equity, righteousness and fair play demands that the rights of all parties be equally protected; for all persons are equal before the law and such persons include the 5th and 7th respondents.” The petitioners’ state that their rights of equal protection under the law are in imminent danger of being infringed.

Learned counsel for the 5th and 7th respondents, on the other hand, submitted that the Court should not intervene “at this stage”, for “ the proceeding of the project”, meaning probably the signing of the proposed Agreement, “will only result in (a) exploration, (b) feasibility study.” He stated that “ the only comfort(sic.)the 5th and 7th respondents needs and the only comfort (sic.) the 5th respondent gets from this Agreement is that after the exploration and feasibility study is done, and if (a) the statutory authorities grant permission; (b) the Secretary accepts the feasibility report, that the 5th respondent will be permitted to mine subject to the terms and conditions of th Agreement and that they be permitted to mine as set out in the feasibility report subject tot he approval of the Statutory Authority.”

The proposed agreement is so framed that it generously strengthens, assists, supports, aids and abets the company's designs in respect of all of the matters referred to in the analysis of learned counsel in dealing with the various stages of the project. Article 17.3 I have quoted above is one example. There are others. E.g. see Articles 2(2)(b)(i) and (iii) and (iv) and (v), 6 (f), 6(g), 6(h); 2c.4; 2.5; 2.21; 3.2; 3.4 (a) and (b); 6.1; 7.1; 7.8; 8.2; 9.3' 9.4; 9.7; 16.5; 16.6; 17.1; 17.6; 27.7. Once the proposed agreement is signed and converted into a formal, binding contract, there is little else the Government can do except, under Article 20.1 to resort to arbitration. And there will be much less the petitioners, or for that matter any one else, who may be adversely affected, will be able to do. The Deputy Solicitor-General submitted that persons who are aggrieved will have an opportunity to come before the Court. There may be legal rights on paper; but how many individual people, including the petitioners, if and when they are adversely affected by the proposed project will be able to afford the luxury of litigation? If they are in fact adversely affected what are the chances that they will be adequately compensated? The liabilities will not be those of the multi-national giant whose standing in the world's fertilizer business scene it is said was a decisive factor in their selection (see P4 at p.2 and also cf. at p.5), but of Sarabhumi Resources (Private) Ltd. a locally incorporated limited liability Company which presently has an issued share capital of only Rs.58,000/-.

Moreover, learned counsel for the petitioners drew attention to the inadequacy of the protection afforded by Articles 25.1 and 25.3 of the proposed agreement with regard to the repair of environmental damage. The petitioners did not share the belief expressed by the first respondent in his affidavit on the adequacy of the safeguards by way of the proposed Environmental Compliance Bond and Environmental Restoration Escrow Account and the undertaking given with regard to environmental compliance and restoration. It seems to be that the provisions in the proposed agreement on the matter are the product of outdated mainstream economic thought: They appear to be based on the views of persons who at best nominally recognize the environment or have considerable difficulty in placing a 'value' on it. Today, environmental protection, in the light of the generally recognized "polluter pays" principle (e.g. see Principle 16 of the Rio Declaration), can no longer be permitted to be externalized by economists merely because they find it too insignificant or too difficult to include it as a cost associated with human activity. The cost of environmental damage should, in my view, be borne by the party that causes such harm, rather than being allowed to fall on the general community to be paid through reduced environmental quality or increased taxation in order to mitigate the environmentally degrading effects of a project. 'This is a matter the Central Environmental Authority must take into account in evaluating the proposed project and in prescribing terms and conditions.'

The signing of the proposed agreement may, in the circumstances please, and even delight the Company, but there is justification for examining the project as a whole at this stage in deciding whether those dangers referred to by the petitioners might be permitted to hang threateningly over their heads and ready to overcome them in the event of the signing of the proposed agreement and the execution of the project. Fairness to all, including the petitioners and the people of Sri Lanka as well as the 5th and 7th respondents, rather than the company's "comfort", should be our lodestar in doing justice.

In terms of Part (I) (6) of the Order of the Minister on the 18th of June 1993 made under section 23 Z of the National Environmental Act (vide Gazette Extraordinary of 24.06.1993), the proposed project, since it related to mining and mineral extraction either concerned with inland deep mining and mineral extraction involving a depth exceeding 25 metres and /or inland surface mining of a cumulative area exceeding ten hectares, is a "prescribed project" within the meaning of section 23 Z of the National Environmental Act. As such, in terms of section 23AA of the National Environmental Act, it is a project that must have had the approval of project approving agency.

Project approving agencies were, on the 18th of June, 1993 (Gazette Extraordinary, 24.06.1993) under powers vested in him, designated by the Minister under section 23Y of the National Environmental Act, and includes the Central Environmental Authority. Learned counsel for the petitioners, for stated reasons, urged that the Project Approving Agency in respect of the Project relating to the case before us ought to be the Central Environmental Authority. Learned counsel for the 5th and 7th respondents in his oral submissions, and many times in his written submissions, stated or implied that the relevant project approving agency was the Central Environmental Agency. However, at one place he submitted that the preparation of the TOR (Terms of Reference), co-ordination and all activities would be undertaken by the CEA acting with (sic.) the PAA." According to the minutes of a meeting held on the 22nd of January 1998, submitted by learned counsel for the 5th and 7th respondents.

"During the discussion, it was emphasised that as this is the single largest investment which covers mining, transportation and manufacturing of phosphate fertilizer consisting of by-products, it is difficult to process this project as required under the EIA regulation by one single project Approving Agency (PAA).

Therefore it was suggested that the preparation of TOR (Terms of Reference) and co-ordination of all activities would be undertaken by the CEA acting as the PAA. Assessment of the EIAR under main subsections of the project, i.e., mining, transportation and industry would be carried out simultaneously by GS & MB, Ministry in Charge of Transport and the CEA respectively. This mechanism would be drawn up at the next meeting to the concerned agencies."

This Court has no evidence as to what happened at “the next meeting”, if there was such a meeting. I shall, for the purposes of this judgement assume that the decision to make the CEA the project approving agency stands. But in addition to the tentative decision on the modalities of cooperation between concerned agencies and the Central Environmental Authority acting as the Project Approving Agency, according to the minutes, it was also decided as follows at that meeting:

“As the exploration area falls within the jurisdiction of various government agencies, it was suggested that these agencies too would wish to incorporate additional conditions if any to the exploration licence. Director/Gs & MB agreed to convene a further meeting with officials of the FD, DWLC, MASL, BOI and CEA for this purpose.”

It was stated at the meeting that “a project proposal and an exploration plan have been prepared by the project proponent. Hence Mr. Udaya Boralessa was requested to submit 10 copies of the proposal and 05 copies of the exploration plan to the CEA, for distribution among concerned agencies.” Were the copies received and distributed? Were there any responses? This Court does not know, for no evidence was placed before it on those matters.

That meeting, I might observe, in passing, was attended by the representative of several government ministries, departments and agencies, and by Mr. S. Usikoshi and by Mr. Udaya Boralessa. According to the evident on record, Mr. Usikoshi was the General Manager of Tomen Corporation which holds 25% of the shares in the project company Mr. Udaya Boralessa was the Managing Director of Novel Int. and represented IMC-Agrico. Which holds an initial equity of 65% in the 5th respondent. He is a Director of the 7th respondent.

According to the minutes of the meeting submitted by learned counsel for the 5th and 7th respondents, the meeting was chaired by the Director-General of the Central Environmental Authority who is supposed to have stated “the objectives of the meeting”. Why was the meeting held? Was there an application for the approval of the project? On what date was such application made?

If an application for the approval of the project was made to the CEA or to any other project approving agency, why was no reference whatsoever made either in the pleadings or oral or written submissions of counsel for the respondent? Why as stated in the minutes of the meeting, was Mr. Boralessa “invited... to make a presentation on the proposed project for the information of participants,” If there was no project proposal before the Central Environmental Authority at the time?

In terms of the National Environmental (Procedure for approval of projects) Regulations No.1 of 1993 (Government Gazette Extraordinary of the 24th of June

1993), hereinafter referred to as the “NEA regulations”, when the project proponent had the goal of undertaking the mining project at Eppawela and was actively preparing to make a decision in achieving that goal (see the definition of “project” in the NEA regulations), such proponent should have made an application to the Central Environmental Authority (CEA) for approval of the project as early as possible. The project proponent might then have been required to submit to the CEA preliminary information about the project, including a description of the nature, scope and location of the proposed project accompanied by location maps and other details. (see the definition of ‘ preliminary information ‘ in the NEA regulations). Such preliminary information would then have been subjected to “environmental scoping”, that is, among other things, determining the range and scope of proposed actions, alternatives and impacts to be discussed in an Initial Environmental Examination Report or Environmental Impact Assessment. (See the definition of “environmental scoping” in the NEA regulations). A matter of significance is that in the process of ‘scoping’ a project approving agency, such as the Central Environmental Authority, is by law empowered to “take into consideration the views of state agencies and the public.” (NEA regulation 6(ii)). Having regard to the concerns expressed from time to time, the Central Environmental Authority might have exposed themselves to a charge of being remiss in the duties of a project approving agency had they failed to invite and consider the views of the public. The purpose of all this was set the terms of Reference (ToR) either for an initial environmental examination report or an environmental impact assessment (EIA). with regard to the procedures to be followed in case the approval or rejection of a project based upon an initial examination report, attention is drawn to section 23 of the National Environmental Act read with regulations 6 - 9 framed thereunder.

The Central Environmental Authority was the 4th respondent in this case and was represented by learned counsel. However, no affidavits were filed by the 4th respondent nor were any oral or written submission made on behalf of the 4th respondent. The Central Environmental Authority, the fourth respondent, should nevertheless carry out its duties imposed under the order made in this judgment, have due regard to and give effect to the law, including the principles laid down or acknowledge by the Supreme Court in the matter before this Court.

It was assumed by all the other respondents and the petitioners that what would be required by the 4th respondent for the purpose of considering whether the proposed project should be approved or not was an Environmental Impact Assessment, and that if an application had been made to the Central Environmental Authority for approval of the project, that Authority would in all probability, after the process of ‘scoping’ referred to above, which might, as we have seen, including taking account of the views of state agencies and the public, have

called for an Environmental Impact Assessment from the project proponent on the basis of the Terms of Reference determined by the Central Environmental Authority.

Attention is drawn, particularly that of the Central Environmental Authority, the fourth respondent, to Principle 17 of the Rio De Janeiro Declaration which stated as follows: “ Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority. “ This is an important procedural rule designed to facilitate the preventive (Principles 6 and 7 of Stockholm) and precautionary (Ate 15 of Rio) principle already mentioned above. I should like to remind the persons concerned, especially the Central Environmental Authority, that an environmental impact assessment exercise can identify the potential threats of proposed activity or project, and that this information can then be used to modify the proposed activity in order to take these threats into account. Remedial measures can also be introduced in order to mitigate or reduce any perceived detrimental impacts of the project. In this sense, therefore, an environmental impact assessment exercise contemplated by the National Environmental Act can be instrumental in establishing exactly which areas of the proposed project, or activity require precautionary or preventive measures in order to ensure the overall environmental viability of the project.

Where the Central Environment Authority has required an Environmental Impact Assessment, the law requires such Authority to determine whether the matters referred to by the Terms of Reference have been addressed by the project proponent, and if the assessment is determined to be inadequate, the Central Environment Authority is obliged to require the project proponent to make necessary amendments and to re-submit the assessment. Upon receipt of the report required by law by “promptly notice published in the Gazette and in one national newspaper published daily in the Sinhala, Tamil and English languages” to “invite the public to make written comments, if any, thereon to the Central Environment Authority.” The law requires that such notification “shall specify the times and places at which the [assessment] report shall be made available for public inspection.” The Central Environmental Authority is required by law to make available copies to any person interested to enable him or her to make copies. The law provides that any member of the public may within thirty days of the notification published in the Gazette or newspapers referred to above, make his (sic.) comments thereon to the Central Environmental Authority. Since section 23BB(3) refers to making “his or its comments”, having regard to the objects and scheme of the National Environmental Act, in my view, includes comments from statutory or other legal persons, as well as other organizations whether incorporated or not and regardless of questions of legal personality, and by any individual, regardless of gender.

I might observe, in passing, that it is time, indeed it is high time, that the laws of this country be stated in gender-neutral terms and that laws formulated in discriminatory terms should not be allowed to exist, although protected for the time being as “existing law” within the meaning of Article 16 of the Constitution. The argument advanced that the provision in the law relating to the interpretation of statutes that “his” includes her is clearly insufficient: it displays, in my considered opinion, a gross ignorance or callous disregard of such a matter of fundamental importance as the fact that there are two species of humans.

Where it considers appropriate in the public interest, and in the circumstance of this case, I cannot think that the Central Environmental Authority, having regard to what has been stated above, would really have had any choice in the matter, the Authority is by law obliged to afford all those who made comments an opportunity to be heard in support of such comments. The Central Environmental Authority is legally obliged to have regard to such comments, submissions and other materials, if any, elicited at a hearing in determining whether to grant its approval for the project. Upon completion of the period prescribed by law for public inspection or public hearing, if held, the Central Environmental Authority is, (having regard to the provisions of section 23BB, regulation 12 of the NEA regulations and the *audi alteram partem* rule - hear the other side) required by law to forward the comments it received and the representations made at any hearing to the project proponent for responses. The project proponent is required to respond in writing to the Central Environment Authority. Upon receipt of such responses, the Central Environmental Authority is by law required, either to grant approval for the implementation of the project, subject to specified conditions, if any or to refuse approval for the implementation of the projects, with reason for doing so. If approval is granted, the law requires the Central Environmental Authority to publish in the Government Gazettes and in one national newspaper published daily in the Sinhala, Tamil and English Languages the approval as determined. Further, if approval is granted, there must be a place of the Central Environmental Authority to monitor the implementation of the project. (See section 23BB of the National Environmental Act and the NEA regulation 10-13.) Where the National Environmental Authority in its role as the project approving agency refuses to grant approval for a project submitted to it, the person or body of persons aggrieved have a right of appeal against such decision to the Secretary to the Ministry responsible for the administration of the National Environmental Act and the National Environmental Authority created under it.

There are also other project approving agencies designated by the Minister, but the National Environmental Authority is, the final authority in respect of environmental matters. (See also NEW regulations 6 (ii), 13, 14, 17 (ii) and 18).

As we have seen, learned counsel for the respondents were all, in my view, correctly, agreed that if the Central Environmental Authority refuses to approve the project, that is an end of the matter, subject, of course, to the right of appeal.

These salutary provisions of the law have not been observed. In terms of proposed agreement, although there is an undertaking to comply with the laws of the country, which in my view, is an unnecessary undertaking, for every person, natural or corporate must in our society which is governed by the rule of law, comply with the laws of the republic. What is attempted to be done is to contract out of the obligation to comply with the law. The Articles of the proposed agreement dealing with matters concerning environmental issues, read with the provision on confidentiality, in my view, attempt to quell, appease, abate or even, under the guise of a binding contract, to legally put down or extinguish, public protests. Learned counsel for the 5th and 7th respondents stated that Sri Lanka “does not possess the scientific knowledge or the technical know-how or the finances to develop this natural reserve.” I cannot accept the assertion that Sri Lanka does not have scientists who can guide the country. Picking on “yes” persons, or persons who might be suspected to be so, as interim Article 7.6 of the proposed agreement, is another matter, and that is why conforming to the law, as laid down by the National Environmental Act and the regulations framed thereunder is of paramount importance. As for funding, that would no doubt depend on the nature of project to be undertaken and identification of sources of assistance appropriate for the chosen level of operation. Quite different considerations will apply if the decision after due investigation and debate will be to produce a quantity of single super phosphate for local use rather than producing Diammonium phosphate for export.

If the genuine intention was, as claimed by the respondents, to comply with the requirements of the law, it was, in my view, unnecessary to refer in the proposed agreement to a study relating to environmental matters as part of its feasibility report. The law is clearly laid down in the National Environmental Act and the regulation framed thereunder. What was being attempted by the proposed agreement was to substitute a procedure for the laid down by the law. It was assumed that by a contractual arrangement between the executive branch of the government and Company, the laws of the country could be avoided. That is an obviously erroneous assumption, for no organ of Government, no person whomsoever is above the law.

In his letter to Mr. Sarath Fernando dated March 30, 1998 (P7), Mr. Thilan Wijesinghe, the Director/Chairman of the 2nd respondent, who was also a member of the Committee appointed by the President in 1997 to conduct the final round of negotiation, stated that “The Mineral Investment Agreement initialed by the FMRP and the Government incorporated most of the recommendation of the President’s Committee which reported on the 9th of May 1995. The

report of the Committee of the President on the 9th of May 1995 was not submitted to his Court. We can only go by Mr. Wijesinghe’s account of the 1995 recommendations. And going by the accounts there was a failure to incorporate some of the most important recommendations of the Committee reporting on May 9th 1995, e.g. the need for a comprehensive geological evaluation and adherence to the rigorous EIA procedures. I am not for a moment suggesting that either Mr. Wijesinghe or any member of final negotiating Committee appointed by the President acted except in good faith. It might have been supposed that so as the geological survey fitted into the exploration process and the environmental studies proposed in the draft agreement formed a part of the Feasibility Study, all was well. It was not. Learned counsel for the 5th and 7th respondents said that the final round of negotiations and who examined the proposals were “the most responsible and highest ranking officers of the country.” I accept learned counsel’s estimation without any hesitation, but I am constrained in the words of Horace to say, *Indignor quandoque conus dormitat Homerus* - But if Homer, usually good, nods for a moment, I think it a shame.

Its “Guide for Implementing the EIA Process, No. 1 of 1998 (P20), issued by the Central Environmental Authority, it is stated as follows: “The purposes of environmental impact assessment (EIA) are to ensure that developmental options under consideration are environmentally sound and sustainable and that environmental consequences are recognized and taken into account early in project design. EIAs are intended to foster sound decision making, not to generate paperwork. The EIA process should also help public officials make decisions that are based on understanding environmental consequences and take actions that protect, restore and enhance the environment.”

The proposed agreement plainly seeks to circumvent the provisions of the National Environmental Act and the regulations framed there under. There is no way under the proposed agreement to ensure a consideration of development options that were environmentally sound and sustainable at an early stage in fairness both to the project proponent and the public. Moreover, the safeguards ensured by the National Environmental Act and the regulations framed thereunder with regard to publicity have been virtually negated by the provision in the proposed agreement regarding confidentiality. I would reiterate what was said by the Court in *Gunaratne v. Homagama Pradeshiya Sabha*, (1998) 2 Sri. L.R. p.11, namely, that publicity, transparency and fairness are essential if the goal of sustainable development is to be achieved.

Access to information on environment issues is of paramount importance. The provision of public access to environmental information has, for instance, been a declared aim of the European Commission’s environmental policy for a number of years. Principle 10 of the Rio Declaration calls for better citizen participation in environmental decision-making and rights of access to

environmental information, for they can help to ensure greater compliance by States of international environmental standards through the accountability of their governments. Principle 10 states as follows: “Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.”

In the matter before this Court, the proposed agreement makes no mention of an environmental impact assessment in terms of the National Environmental Act. The respondents stated that under its undertaking in the proposed agreement to comply with the applicable laws, it would have submitted an environmental impact assessment, in due course, if it had been required to do so. In fact, learned counsel for the 5th and 7th respondents gave an undertaking that it would provide such an assessment. However, the law, for good reasons, as I have endeavoured to explain, requires the prescribed procedures to be followed. The times prescribed are vital. Project proponents cannot decide when, if ever they will comply with the law. There are many things that have to be done at the very earliest of stages for very good reasons. There is also a prescribed time if and when an environmental impact assessment has to be done. The parties to the proposed agreement attempted to substitute an extraordinary procedure for the proposed project. Such a procedure contravened the provisions of the National Environmental Act, and the regulations made thereunder and the guidelines prescribed by the National Environmental Authority. Thereby, reinforced by the confidentiality provision of the proposed agreement, the proposed agreement effectively excluded public awareness and participation, as contemplated by our legislature as well as by Principle 10 of the Rio Declaration. The proposed agreement ignores the Central Environmental Authority as the project approving agency although it was admitted by the petitioners and the respondents that the Central Environmental Authority in this matter was the project approving agency, and substitutes in its place, the Secretary to the Minister to whom the subject of minerals and mines is assigned for the purpose of approving the environmental study contemplated the proposed agreement. Such Secretary is not a project approving agency in terms of the National Environmental Act: Nor is he or she therefore a “national authority” within the meaning of Principle 17 of the Rio Declaration. A “national authority” is an authority recognized by the law of a concerned State. In any event, having regard to the undertaking given in Article 27.7(b) that “The Government shall render all reasonable assistance to the Company to obtain all approvals, consents, grants, licenses and other concessions as may be reasonable be

require from any Government Authority”, what comfort may the petitioners derive? They are, in my view, entitled to be apprehensive that even if there was an environmental impact assessment submitted to the Central Environmental Authority, such authority may not have been able to act impartially and independently. Of what use are biased decisions or decisions, reasonably suspected to have been made under pressure? Further, although the law of Sri Lanka provides for the judicial review of the acts of administrative authorities, and Principle 10 of the Rio Declaration calls for effective access to judicial and administrative proceedings, the proposed agreement substitutes arbitration for such proceedings, in which, of course, the public have no role.

For the reasons given, in my view, the proposed agreement seeks to circumvent the law and its implementation is biased in favour of the Company as against the members of the public, including the petitioners. I am therefore of the view that the petitioners are entitled to claim that there is an imminent infringement of their fundamental rights under Article 12(1) of the Constitution.

OVERALL ECONOMIC BENEFITS

The respondents submitted that the proposed agreement if implemented would be highly beneficial to Sri Lanka and that “when one balances the purported complaints as a result contained in the petition against the overall benefit that would accrue to Sri Lanka, the petitioners’ application cannot succeed in law.”

The Director of the 5th respondent, Mr. Garry L. Pigg, and the Director of the 7th respondent, Mr. U. I. De S. Boralessa, state in their affidavits that the proposed project would result in economic benefits to Sri Lanka which they specify. The report of the Committee appointed by the President (P4) lists numerous financial benefits.

Learned counsel for the petitioners, however, submitted that the Eppawela project governed by the proposed agreement will not only be an environmental disaster but an economic disaster as well. They relied on the analysis of the social and economic considerations by Prof. V.K. Samaranyake (P10) (a); the comments of Prof. Tissa Vitarana (P9); the comments of Prof. O. A. Illeperuma (P11); the report of the National Academy of Sciences (P10); the report of the National Science Foundation (P12); and the financial analysis by Premila Canagaratna (P17).

A study of the material submitted by the petitioners shows that the question of benefits is a highly controversial matter, but one that must be gone into, for our democratic republic sets great store by the discovery of truth in matters of public importance in the market place of ideas by vigorous and uninhibited public debate. In the debate, perhaps, we need to consider whether income and economic growth on which the respondents lay great emphasis are the sole criteria for measuring human welfare. David Korten, the Founder

President of the People-Centred Development Forum, once observed:

“The capitalist economy” [as distinguished from Adam Smith’s concept of a market economy] “has a potentially fatal ignorance of two subjects. One is the nature of money. The other is the nature of life. This ignorance leads us to trade away life for money, which is a bad bargain indeed. The real nature of money is obscured by the vocabulary of finance, which is doublespeak.... We use the terms ‘money’, ‘capital’, ‘assets’ and ‘wealth’ interchangeably - leaving no simple means to differentiate money from real wealth. Money is a number. Real wealth is food, fertile land, buildings or other things that sustain us. Lacking language to see this difference, we accept the speculator’s claim to create wealth, when they expropriate it.... Squandering real wealth in the pursuit of numbers is ignorance of the worst kind. The potentially fatal kind.”

It is unnecessary for the purposes of the task in hand to enter into the matter of the alleged beneficial nature of the proposed agreement. The petitioners’ case is that there is an imminent infringement of their fundamental rights guaranteed by Articles 12(1), 14(1)(g) and 14(1)(h). I have stated my reasons for upholding their complaint. The “balancing” exercise referred to by learned counsel has been already done for use and the Constitution sets out the circumstances when any derogations and restrictions are permissible. Article 15(7) of the fundamental rights declared and recognized by Articles 12 and 14 are “subject to such restrictions as may be prescribed by law”, among other things, for “meeting the just requirements of the general welfare of a democratic society.” In the light of the available evidence, I am not convinced that the proposed project is necessary to meet such requirements. In any event, the circumstances leading to the imminent infringements have not been “prescribed by law” but arise out of a mere proposed contract, and therefore do not therefore do not deserve to be even considered as permissible.

ORDER

For the reasons set out in my judgement, I declare that an imminent infringement of the fundamental rights of the petitioners guaranteed by Articles 12(1), 14(1)(g) and 14(1)(h) has been established.

There is no assurance of infallibility in what may be done: but, in the national interest, every effort ought to be made to minimize guesswork and reduce margins of error. Having regard to the evidence adduced and the submissions of learned counsel for the petitioners and respondents, in terms of Article 126(4) of the constitution, I direct the respondents to desist from entering into any contract relating to the Eppawelaphosphate deposit up to the time.

(1) a comprehensive exploration and study relating to the (a) locations, (b) quantity, moving inferred reserves into the proven category, and (c) quality of apatite and other phosphate minerals in Sri Lanka is made by the third respondent, The Geological Survey and Mines Bureau, in consultation with the National Academy of Sciences of Sri Lanka and the National Science Foundation, and the results of such exploration and study are published: and

(2) any project proponent whomsoever obtains the approval of the Central Environmental Authority according to law, including the decisions of the superior Courts of record of Sri Lanka.

I make further order that (1) the state shall pay each of the petitioners a sum of Rs.25,000 as costs: (2) the fifth respondent shall pay each of the petitioners a sum of Rs.12,500 as costs: (3) the seventh respondent shall pay each of the petitioners Rs.12,500 as costs.

R. Ammarasinghe, J.

Wadugodapitiya, J. I agree

Gunasekara, J. I agree.

IN THE HIGH COURT OF SOUTH AFRICA
(WITWATERSRAND LOCAL DIVISION)

CASE NO: 97021011

In the matter between:

SAVE THE VAAL ENVIRONMENT

Applicant

and

THE DIRECTOR: MINERAL DEVELOPMENT
GAUTENG REGION

First Respondent

THE DIRECTOR GENERAL: DEPARTMENT OF
MINERALS AND ENERGY

Second Respondent

THE MINISTER OF MINERAL AND ENERGY

Third Respondent

SASOL MYNBOU (EDMS) BPK

Fourth Respondent

SASOL CHEMIESE NYWERHEDE BPK

Fifth Respondent

SASOL LIMITED

Sixth Respondent

THE DIRECTOR: MINERAL DEVELOPMENT
FREE STATE REGION

Seven Respondent

JUDGEMENT

CASSIM, AJ:

The applicant brings this application in terms of Rule 53 against the First Respondent to review and set aside the decision of the First Respondent taken on 22 May 1997 in terms whereof he granted the Fourth Respondent a mining authorization in terms of Section 9 of the Minerals Act No. 50 of 1991 ('the Act') for the establishment of an open case mine at the north-west strip in north-west part of an area where the Fourth Respondent is the holder of extensive mineral rights in the vicinity of Sasolburg. The mining licence dated 23 May 1997 is in respect of this authorization to mine on the river bank of the Vaal River.

The application is opposed by the First Respondent and the Fourth Respondent, and any reference to the Respondents in this judgement is a reference to both First and Fourth Respondents.

In the founding affidavits filed on behalf of the Applicant, the gravamen of the complaint is the failure of the First Respondent to have afforded the Applicant the opportunity to be heard in accordance with the principles embraced in the maxim *audi alteram partem*. In supplementary affidavits filed by the Applicant pursuant to the provisions of Rule 53 (4) and after the record of the proceedings before the First Respondent were made available, the Applicant expended its cause of complaint to include certain alleged misdirections on the part of the First Respondent.

By agreement of the parties concerned, the debate before me at this stage involves a consideration of the issue as to whether Applicant was entitled to a hearing prior to the First Respondent making a decision to issue a mining authorization in terms of Section 9 of the Act. In the event of the Application being successful on this leg, the matter would need to be remitted to the First Respondent to consider the application of the Fourth Respondent afresh and would render consideration of the alleged misdirections unnecessary.

The Fourth Respondent's conditional counter application to declare Section 9 of the Act to be invalid insofar as it sterilises Fourth Respondent's right to exploit its rights to mine coal is premised on the grounds that the decision vested in the First Respondent is contrary to the provisions of Section 25 (1) and 25 (2) of the Constitution of the Republic of South Africa, 1996, and stands over for consideration after I have given judgement on the issue referred to above.

Prior to considering the issue identified, there is a preliminary point of *locus standi*. The Fourth Respondent contended that the Applicant, namely Save the Vaal Environment, does not have the necessary *locus standi* to bring this application because it is illegal, its formation having been prohibited by Sections 30 (1) and 31 of the

Companies Act, 1973. In my view, the critical purpose in the formation and functioning of the Applicant cannot be said to be that of "carrying on any business that has for its object the acquisition of gain by the individual members of the Applicant". The dominant object to be found in the Constitution of the Applicant is to protect and maintain the environmental integrity of the Vaal River and its environs for current and future generations with specific focus on the area between the Letaba Weir and the Barrage, and the identification of other appropriate areas for similar protection. This is not an organization that has as its main purpose the advancement of the business or other financial interests of its members. It may well be that in the pursuit of its objectives, the Applicant's members are enriched materially. Such would be a subordinate purpose and one which would not, on a reading of the Constitution, namely that of maintaining the environmental integrity of the area of concern. This is not an undertaking carried out for commercial purposes, nor is it one where the identify of its members is conceded for an ulterior purpose.

(See Mitchell's Plain Town Centre Merchants Association v McLeod 1996 (4) SA 15 (A) at 1691-J).

Accordingly, I find that the Applicant has *locus standi*. The First Respondent did not raise lack of *locus standi*. The Fourth Respondent did not resist the application to join four further applicants. This was a precautionary measure on the part of the Applicant and its members and in the event of this court finding that the Applicant did not have *locus standi*. The application for joinder was granted. Ronsand Ranch (Pty) Ltd was joined as the Second Applicant, Giovanni Alberto Mario Ravazotti was joined as the Third Applicant, Susan Shellshop the Fourth Applicant and Lynn Dale Green the Fifth Applicant. The consequence of the joinder would have impacted on the question of cost if I were to uphold Fourth Respondent's special plea of lack of *locus standi* on the part of the Applicant. In view of my finding that the Applicant has *locus standi*, there are no cost consequences flowing from the joinder application.

I now turn to the question as to whether the First Respondent ought to have afforded the Applicant an opportunity to make representations prior to the First Respondent making a decision to issue a mining authorization to the Fourth Respondent as prescribed in Section 9 of the Act. Mr. GL Grobler SC, who appeared on behalf of the Fourth Respondent, comprehensively surveyed the law relating to the right to minerals and the intrusion made by legislation and a plethora of regulatory enactments in the ability of the holder of mineral rights in respect of land to pursue his activities. Although the holder of mineral rights enjoys preference over the owner of the freehold, the holder of a right to minerals does not have more or fewer obligations or duties than the owner of the land. In *Malhere v Ceres Municipality*, 1951 (4) SA 501(A), the court expressed the general rule as follows:-

“Die gemeensregtelike reël in Suid-Afrika is dat niemand op sy grond iets mag doen nie wat sy buurman se eiendom beskadig of hom indie redelik genot daaroan belemmer, tensy daar ‘n verpligting in die aard van ‘n servituut op sodanige grond rus.”

The invasion of the common law rights by legislation just, contended counsel for the Respondents, be interpreted restrictively and without further unduly inhibiting the rights of a mine holder. It is against this framework that counsel for the Respondents submitted that Section 9 of the Act did not afford the Applicant any right to be heard.

In the answering affidavit and in argument, Respondents adopted the view that the Applicant and other interested parties were entitled to a hearing prior to the First Respondent taking a decision in terms of Section 39 of the Act to permit the commencement of operations pursuant to the approval of an environmental management programme in respect of the surface of land in any mining operation or intended operations having been submitted by the holder of a mining authorization in terms of Section 9 of the Act.

The concession by the Respondents that the Applicant or any other affected party is entitled to be heard at the Section 39 stage and not the Section 9 stage immediately poses the question as to the rationale for such distinction. For purposes of evaluating the contentions advanced by the Respondents, it is necessary to set out the provisions of Sections 5 (1), 9 and 39 of the Minerals Act 50 of 1991.

Section 5 (1) provides as follows:

“Right to prospect and mine for and to dispose of minerals – (1). Subject to the provision of this Act, the holder of the right to any mineral in respect of land or tailings, as the case may be, or any person who has acquired the consent of such holder in accordance with section 6 (1) (b) or 9 (1) (b), shall have the right to enter upon such land or the land on which such tailings are situated, as the case may be, together with such persons, plant or equipment as may be required for purposes of prospecting or mining and to prospect and mine for such mineral on or in such land or tailings, as the case may be, and to dispose thereof.”

Section 9 provides as follows:

“Issuing of mining authorization –

(1) *The Director: Mineral Development shall, subject to the provisions of this Act, upon application in the prescribed form and on payment of the prescribed application fee, issue a mining authorization in the prescribed form for a period determined by him authorizing the applicant to mine for and dispose of a mineral in respect of which he –*

- (a) *is the holder of the right thereto; or*
- (b) *has acquired the written consent of such holder to mine therefor on his own account and dispose thereof, in respect of the land or tailings, as the case may be, comprising the subject of the application.*
- (2) *If the State is the holder of the right to any mineral, the consent referred to in subsection (1) (b) may, upon written application, be granted by the Minister, subject to such terms and conditions as may be determined by him.*
- (3) *No mining authorization shall be issued in terms of subsection (1), unless the Director: Mineral Development is satisfied:*
 - (a) *with the manner in which the scale on which the applicant intends to mine the mineral concerned optimally under such mining authorization;*
 - (b) *with the manner in which such applicant intends to rehabilitate disturbances of the surface which may be caused by his mining operations;*
 - (c) *that such applicant has the ability and can make the necessary provision to mine such mineral optimally and to rehabilitate such disturbances of the surface; and*
 - (d) *that the mineral concerned in respect of which a mining permit is to be issued:*
 - (i) *occurs in limited quantities in or on the land or in tailings, as the case may be, comprising the subject of the application; or*
 - (ii) *will be mined on a limited scale; and*
 - (iii) *will be mined on a temporary basis; or*
 - (e) *that there are reasonable grounds to believe that the mineral concerned in respect of which a mining licence is to be issued:;*
 - (i) *occurs in more than limited quantities in or on the land or in tailings, as the case may be, comprising the subject of the application; or*
 - (ii) *will be mined on a larger than limited scale;; and*
 - (iii) *will be mined for a longer period than two years.*
- (4) *Section 7 shall apply **mutatis mutandis** in relation to the performance of mining operations under a mining authorization.*
- (5) *Any application for a mining authorization shall be lodged with the Director: Mineral Development concerned and shall, in addition to the other information and documents which may be required by him, be accompanied by:*
 - (a) *proof of the right to the mineral in respect of the land or tailings, as the case may be, comprising the subject of the application;*
 - (b) *a sketch plan indicating the location of the intended mining area, the land comprising the subject of the application, the lay-out of the intended mining operations and the location of surface structures connected therewith;*

- (c) particulars about the manner in which the scale on which the applicant intends to mine such mineral under such mining authorization optimally and to rehabilitate disturbances of the surface which may be caused by the intended mining operations;
- (d) particulars about the mineralization of the land or tailings, as the case may be, comprising the subject of the application;
- (e) particulars about the applicant's ability to make the necessary provision to mine such mineral optimally and to rehabilitate such disturbances of the surfaces;
- (f) particulars about the applicant's ability to mine in a healthy and safe manner;

acceptance to the Director: Mineral Development.

- (6) The Director: Mineral Development may exempt any applicant for a mining authorization from one or more of the provisions of subsection (5) (b), subject to such condition as may be determined by him.
- (7) The Director: Mineral Development shall consult as to the issuing of a mining authorization with the Chief Inspector, and no mining authorization may be issued unless the Chief Inspector is satisfied that the applicant has the ability and can make the necessary provision to mine in a healthy and safe manner.
- (8) Subsection (7) shall apply *mutatis mutandis* in relation to the issuing of a prospecting permit in terms of Section 6 or a permission in terms of Section 8."

Section 39 provides as follows:

“Environmental management programme:

- (1) An environmental management programme in respect of the surface of land concerned in any prospecting or mining operations or such intended operations, shall be submitted by the holder of the prospecting permit or mining authorization concerned to the Director: Mineral Development concerned for his approval and, subject to subsection (4), no such operations shall be commenced with before obtaining any such approval.
- (2) The Director: Mineral Development may:
 - (a) on application in writing and subject to such conditions as may be determined by him, exempt the holder of any prospecting permit or mining authorization from one or more of the provisions of subsection (1) or grant an extension of time within which to comply with any such provision;
 - (b) approve an amended environmental management programme on such conditions as may be determined by him; or
 - (c) without application being made therefore, but after consultation with such holder, amend

any approved environmental management programme.

- (3) Before the Director: Mineral Development:
 - (a) approves any environmental management programme referred to in subsection (1) or any amended environmental management programme referred to in subsection (2) (b); or
 - (b) grants any exemption or extension of time under subsection (2) (a) or any temporary authorization under subsection (4); or
 - (c) affects an amendment under subsection (2) (c),
he or she shall consult as to that with the Chief Inspector and each department charged with the administration of any law which relates to any matter affecting the environment.
- (4) The Director: Mineral Development may, pending the approval of the environmental management programme referred to in subsection (1), grant temporary authorization that the prospecting or mining operations concerned may be commenced with, subject to such conditions as may be determined by him.
- (5) (a) The Director-General may, pending the approval of an environmental management programme referred to in subsection (1), require that an environmental impact assessment be carried out in respect of the intended prospecting or mining operations by a professional body designated by the Director-General.
- (b) Any costs in respect of an environmental assessment referred to in paragraph (a) shall be borne by the holder of the prospecting permit or mining authorization referred to in subsection (1).

Section 5 expressly restricts the rights of the holder of the right to any mineral in respect of land; the ability to prospect or mine a mineral is further curtailed by the provisions of Sections 9 and 13. Without the authorization prescribed in Section 9 of the Act, the mineral rights holder cannot exercise a right to mine. Finally, there is a subsequent hurdle encompassed in Section 39, which involves the control and management and the impact of mining on the environment.

In **Sachs v Minister of Justice; Diamond v Minister of Justice 1934 AD 11 at 22**, the court accepted the general proposition that unless the statute expressly or by necessary implication indicates the contrary, a statute giving power to a public official or body to give a decision prejudicially affected shall have an opportunity of defending himself. (See too: **Administrator, Transvaal & Other v Traub & Other 1989 (4) SA 731 (A) at 748E-1**). The Respondents accepted that the decision of the First Respondent at the Section 39 stage would affect the “liberty, property or existing rights” of the investigation it was argued pertains directly to land on which mining was to be undertaken as

opposed to the Section 39 enquiry which investigates the environment surrounding the land wherein the mining is envisaged. I find the distinction artificial. It cannot be said that representations by interested affected parties as to the measures the mineral right holder intends to take apropos rehabilitation disturbances of the surface may not have an impact on surrounding property. There is in my view nothing in Section 9 to suggest that the legislature expressly or by necessarily implication excluded the right of concerned parties to make representation. Having regard to the discretion and functions vested in the First Respondent by Section 9 of the Act, it is apparent that the First Respondent does not exercise merely administrative powers because the decision:

- (a) requires an inquiry into matters of fact; and
- (b) resulted in a decision which affected the rights of, or involved civil consequences to, the members of the Applicant. (See **Hack v Venterspost Municipality and Others 1950(1) SA172(W) at 190**).

The right of the members of the Applicant affected is the ability to make representations as to make representations as to why the First Respondent ought not to grant a mining authorization. The matters whereupon they can be heard cannot at this stage extend beyond the investigative matters prescribed in Section 9. Counsel for the Applicant correctly submitted, in my view, that at the Section 39 stage it would no longer be opened to interested and affected parties to raise objections as to the manner or scale of mining or whether because of considerations such as mining such mineral “optimally” and the balancing of conflicting interests the application in the manner applied for should be granted or not. Where for instance the authorization has already been granted in terms of Section 9, a Section 39 enquiry is not concerned with the planning permission envisaged by Section 9, but the subsequent management control phase after the right to mine has been granted. Indeed the granting of authorization in terms of Section 9 entitles the Fourth Respondent to mine, provided its environmental management programme is approved. Section 39(4) moreover empowers the First Respondent to grant temporary authorization to enable mining operations to commence, subject to the conditions as determined by the First Respondent. This is indicative that there is no greater scope in the Section 39 stage as opposed to Section 9 to recognize a right to be heard. As the Respondents concede the right to be heard at the Section 39 stage, there is, in my view, a more compelling purpose for such right to be recognized and accorded prior to the decision to grant the authority to mine being made.

In general the principles of natural justice must be observed where quasi judicial powers are exercised. (Dlamini v Minister of Education and Training 1984(3) SA 255(N) to 257 F to H). Although the terminology of a particular function under consideration being legislative

rather than administrative or executive has in recent times been regarded as confusing the issue, it is nevertheless, in my view of assistance in ascertaining the enquiry whether the legislature intended the empowering enactment to either expressly or by implication to exclude the incorporation of the maxim audi alteram partem principle. (See E Snell and Company v Minister of Agricultural Economics 1986(3) SA 532(D) at 536 F to 537 A). Whereas in this instance the First Respondent adopts the view that the members of the Applicant have a right to be heard at the Section 39 stage it must follow, in my view, they similarly have a right at the stage where the First Respondent considers the application to grant authorization to the Fourth Respondent to conduct mining activity. The decision of the First Respondent to grant mining authorization within the scope of Section 9 affected the surrounding property and the decision therefore undoubtedly prejudicially affected the rights of the members of the Applicant.

The concession on the part of the Respondents that the Applicant was entitled to be heard at the Section 39 stage and the absence of any contrary indications in Section 9 when compared with Section 39, amplified by the discretionary power vested in the First Respondent in Section 9 supports the case of the Applicant.

The approach would also promote the values which underlie an open and democratic society based on freedom and equality as espoused in the Constitution of the Republic of South Africa, Act No. 108 of 1996. The approach is further supported by and is consonant with the provisions of item 23(2)(b) of Schedule 6 of the Constitution prescribing lawful and procedurally fair administrative action where the rights of any person is affected or threatened. (See **Foulds v Minister of Home Affairs and Others 1996(4) SA 137(A)**). In practical terms, the Applicant’s members cannot prevent the First Respondent from taking a decision he considers appropriate for the optimal utilization of minerals – they seek and have the right to make representations and to be heard prior to such decision being taken.

In the result I find that Section 9 of the Act entitles the Applicant to be heard prior to the First Respondent taking a decision whether to grant or not to grant authorization to the Fourth Respondent the right to mine.

In these circumstances it is not necessary to make a finding as to whether the First Respondent created a legitimate expectation that he would permit the Applicant to make representations at the Section 9 stage for purposes of determining the main issue at this stage before me. I have nevertheless taken the view that it is necessary to deal with this aspect as it will have a bearing on cost.

A legitimate expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can

reasonably expect to continue (See **Counsel of Civil Service Unions and Others v Minister for the Civil Service [1984] 3 All E R 935(HL) at 943J – 944a quoted in the Traub case at 7561**).

The expectation may take many forms one may be an expectation of prior consultation. Another may be an expectation of being allowed time to make representations. In the Traub case Corbet CJ said at 758D- E:

“(T)he legitimate expectation doctrine is sometimes expressed in terms of some substantive benefit or advantage or privilege which the person concerned could reasonably expect to acquire or retain and which it would be unfair to deny such person without prior consultation or a prior hearing; and at other times in terms of a legitimate expectation to be accorded a hearing before some decision adverse to the interests of the person concerned is taken”

Counsel for the First Respondent correctly submitted that I cannot have regard to the conduct of the Fourth Respondent in determining whether the First Respondent created the environment by his part before he took a decision to authorize as mining licence in terms of Section 9 of the Act. Having considered the respective versions on behalf of the Applicant and the First Respondent it appears to me that there is a bona fide dispute as to whether the First Respondent agreed or entertained the notion that First Applicant was entitled to be heard prior to him making a decision in terms of Section 9 of the Act. On the principles stated in **Plascon-Evans Paints v Van Riebeeck Paints, 1984(3) SA 632 (A)** the respective versions must be decided on the First Respondent’s version. The First Respondent maintains that he steadfastly adopted the view that the Applicants did not have the right to be heard at the Section 9 stage but that it did have such a right at the Section 39 stage. In view thereof it is unnecessary to analyze the different versions and that the Applicant must fail on this leg. Although I did not hear full argument on the issue of

costs I propose to indicate my prima facie view on this aspect. The First Respondent took the view that Section 9 did not entitle the Applicant to a hearing prior to a decision being made by the First Respondent. This is a narrow dispute and one which could have resolved itself by way of a stated case. The First Respondent was justified in dealing with the allegations concerning the basis relied upon by applicant to establish legitimate expectation. I have also had a preliminary consideration of the misdirection contended for by the Applicant. This also entails a narrow enquiry. In my view the Applicant was not justified in delving into the merits of its case, in particular not to the extent in which it did so. This prolonged the preparation and consideration of the issues before me. Accordingly on a prima facie basis insofar as costs are concerned and having regard to the full scope of the application I propose to make an order on the following terms:

1. That the Fourth Respondent pay 75% of the cost of the Applicant which shall include the costs of two counsel;
2. No order as to costs is made against the First Respondent.

Should any party wish to make submissions as to my proposal concerning the cost order, I will entertain such argument as I specifically reserved to do so. I have decided not to order the full cost of the application although the Applicant has been successful in view of the extensive matters raised by the Applicant and which were unnecessary for this application.

For present purposes I make the following order:

1. That the decision of the First Respondent a mining authorization in terms of Section 9 of the Minerals Act, No. 50 of 1991, particularly in respect of the establishment of the north-west open

DECISION NO. A8/99

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of three appeals under section 120 of the Act

BETWEEN **G A PAYKEL and others**
(Appeal RMA 202/97)

D L NATHAN and others
(Appeal RMA 204/97)

OYSTER COVE LIMITED
(Appeal RMA 211/97)

Appellants

AND **THE NORTHLAND REGIONAL
COUNCIL and THE FAR NORTH
DISTRICT COUNCIL**

Respondents

BEFORE THE ENVIRONMENT COURT

Environment Judge DFG Sheppard (presiding)
Environment Commissioner P A Catchpole
Environment Commissioner F Easdale

HEARING at WHANGAREI on 14, 15 16, 17 and 18 September 1998, at Waitangi on 24
and 25 November 1998 and at Auckland on 26 November 1998

APPEARANCES

R B Brabant for the appellants in Appeals RMA 202/97 and 204/97
P Kapua and K Taurau for Oyster Cove Limited
M A Ray for the Northland Regional Council and the Far North District Council
B Waller and L Gibbs for the Eastern Bay of Islands Preservation Society (Incorporated)
C H Hall for the Bay of Islands Coastal Watchdog Incorporated

DECISION

INTRODUCTION

1. These are three appeals against the grant and refusal of various resource consents by a joint committee of the Far North District Council and the Northland Regional Council. The consents relate to a proposal by the applicant, Oyster Cove Limited (“Oyster Cove”) to develop a fishing lodge and associated facilities at Paroa Bay in the Bay of Islands.

2. The Regional Council granted coastal permits for a boat ramp, and a dinghy-pull mooring, discharge permits for domestic wastewater and stormwater, and a water permit to take water from a deep bore. Those decisions were the subject of Appeals RMA 202/97 by G M Paykel and D M Paykel and others.

3. The Regional Council declined consent for the remainder of the proposal within its jurisdiction: a jetty, pontoon landing, walkway and associated piles, and proposed swing moorings. That part of the Regional Council’s decision was the subject of Appeal RMA 211/97 by the applicant, Oyster Cove.

4. The Far North District Council granted land-use consent to Oyster Cove to construct and use a fishing lodge with an on-licence, eight associated accommodation units, boat shed and helicopter pad on a property in the Coastal 1A Zone at Paroa Bay¹. That decision was the subject of Appeal RMA 202/97 by the appellants Paykel and others, and by Appeal RMA 204/97 by D L Nathan and G B Clark.

5. As all three appeals arose from the same proposal they were heard together², and this decision relates to them all.

6. Paroa Bay, a small, relatively shallow inlet, is situated on the eastern side of the base of the Russell Peninsula, in what is known as the “outer Bay of Islands”. The site is approximately 14 kilometres from the town of Russell, and land access to the site from Paroa Bay Road is by a series of rights-of-way shared with other properties in the area.

7. At present there is a large private residence on the site, with a tennis court, a helicopter pad, and a concrete boat ramp with a formed access from the residence. It is proposed that the residence be converted and extended to form the administrative activity centre and restaurant of the fishing lodge

8. The appellants in Appeals RMA 202 and 204/97 own other properties in Paroa Bay which are used as holiday homes. Those appellants allege that the proposed fishing lodge and associated facilities:

- would be inappropriate having regard to the location, proposed scale, intensity, function and design of the development;
- would be inconsistent with the provisions of the operative and proposed district plans;
- would cause significant adverse environmental effects;
- would adversely affect the quiet natural character of Paroa Bay and the surrounding coastline including its visual and other amenity values;
- would lead to adverse cumulative effects by providing precedent for further developments of a similar type;
- is not proven to be financially viable, and could lead to a waste of resources and a temptation to allow inappropriate subdivision.

9. Further, these appellants claim that the coastal permits granted by the first respondent are contrary to the principles of resource management by authorising the use of resources in association with and for the purposes of an inappropriate and unjustifiable commercial fishing lodge.

10. There is no challenge to the Regional Council’s grant of the water permit or the discharge permits.

11. The issue at the heart of Appeals RMA 202 and 204/97 is the appellants’ assertion that the locality of the site is inappropriate for the scale and intensity of the proposed fishing lodge and associated activities, due to the visual and landscape effects, the detraction from the natural character of the environment, and because its marine structures and commercial nature are inappropriate. As long-term owners of holiday homes in Paroa Bay, the appellants in Appeals RMA 202 and 204/97 seek that the status quo be retained.

12. The appellants in Appeal RMA 202/97 seek cancellation of the consents granted by the Regional and District Councils, or alternatively, that conditions be imposed on the consents to protect the pleasantness, amenity and convenience of Paroa Bay. During the course of the appeal hearing their counsel announced that they no longer challenged the grant of consent for the existing boat ramp and dinghy pull. The appellants in Appeal RMA 204/97 seek that the decision of the Far North District Council be cancelled and the land-use consent be refused.

¹ The legal description of the site is an area of 1.7904 hectares being Lot 1 and part Lot 2 DP 160944 (North Auckland Registry).

² Resource Management Act 1991, section 270(1).

13. By Appeal RMA 211/97, the applicant Oyster Cove Ltd appealed against the Regional Council's decision declining consent for the proposed jetty, pontoon landing, walkway and associated piles, and the proposed swing moorings.

14. These appeals were lodged in March 1997, prior to the commencement of the Resource Management Amendment Act 1997. Accordingly by section 78(5) of that Act, the appeals have to be decided as if the 1997 Amendment Act had not been enacted.

THE PROPOSAL

15. Oyster Cove's proposal is that the existing residence on the site be converted and extended to form the administrative activity centre for the fishing lodge, and a licensed restaurant for up to 40 people, being guests resident at the lodge and casual visitors arriving by boat. Accommodation would be provided for three resident staff.

16. Accommodation for guests would be provided in eight new dormitory units in two groups. Each group would comprise three single units and one double unit.

17. Initially it had been proposed to erect a boathouse for two 8-metre cruiser boats. As the case developed, the applicant proposed instead a boatshed to house smaller tenders about 6 metres in length, to be used to take guests out to charter fishing boats offshore. The boatshed would be set in the hillside near the existing boat ramp.

18. It is also proposed that an existing helipad be used as an accessory transport facility for tourists.

19. A pontoon jetty is proposed, with access formed by decking along an esplanade reserve and over part of the foreshore. The existing boat ramp would be retained and resurfaced, with new paving from it to the boatshed. In addition two dolphin mooring piles alongside the pontoon jetty, and two swing moorings off the end of the boat-ramp, would be constructed. An existing dinghy pull from the boat-ramp is to be retained.

CONDITIONS ATTACHED TO LAND-USE CONSENT

20. In granting land-use consent for the proposal, the District Council imposed a number of conditions. The conditions included directions about landscaping and colours of buildings to mitigate visual effects. They limited the number of helicopter flights to 4 return trips per month, between 7 am and 7 pm. The District Council also restricted the restaurant and on-licence for use by staff, residents and guests of the lodge, with a maximum of 30 people. In addition the conditions required upgrading of the right-of-

way access, and the making of a contribution towards road upgrading. The applicant accepted those conditions.

21. In her reply counsel for the applicant, Ms Kapua, acknowledged that the restaurant had not been the subject of the application as a separate activity, that the condition about the restaurant means that the dining room is essentially limited to lodge residents, and that there is no capacity for casual visitors. We should therefore consider the proposal on that footing, and need not consider whether resource consent should be given for a restaurant for casual visitors who are not resident at, or staff of, the fishing lodge. Accordingly we do not deal with the effects on the environment of a restaurant open to the general public.

STATUTORY CONSIDERATIONS

22. Section 104(1) of the Act directs that, subject to Part II, when considering a resource consent application and any submissions received, a consent authority is to have regard to the classes of matter listed in that subsection as are relevant to the case.

23. The effect of the phrase "Subject to Part II" is that the direction to have regard to the classes of matter listed in subsection (1) is not to be complied with where to do so would conflict with the content of Part II³. In this case no-one contended that for us to have regard to the various matters directed by section 104(1) would conflict with Part II, so we proceed to do so.

24. The classes of matter to which regard is to be had are any actual and potential effects on the environment of allowing the activity, and any relevant objectives, policies, rules or other provisions of a plan or proposed plan. In this case, assessment of the effects on the environment can be assisted by reference to the relevant provisions of the planning instruments, so we address them first.

PLANNING INSTRUMENTS

25. We have considered no fewer than ten planning instruments, many of them substantial documents. As may be expected, although the language may differ, the various instruments identify similar issues and contain substantially similar provisions for addressing them.

26. We have concluded that the guidance which will be significant for the decision on the land-use consent sought can be found in the transitional Far North district plan, and in respect of the structures proposed in the coastal marine area it can be found in the proposed regional coastal plan. However as we are obliged to have regard to all the instruments, we will refer to the others as well, if more briefly.

³ *Russell Protection Society Inc v Far North District Council*, Environment Court Decision A125/98.

NEW ZEALAND COASTAL POLICY STATEMENT

27. The New Zealand Coastal Policy Statement⁴ is important, being the only national policy statement. The relevant policies contained in it have been given effect in the appropriate regional instruments.

28. Policy 1.1.1 carries forward section 6(a) of the Act, and provides –

It is a national priority for the preservation of 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;
- (b) taking into account the potential effects of subdivision, use or development on the values relating to the natural character of the coastal environment, both within and outside the immediate location; and
- (c) avoiding cumulative adverse effects of subdivision, use and development in the coastal environment.

29. Policy 1.1.3 provides for the protection of particular features of the natural character of the coastal environment as a matter of national priority; this includes protection of significant representational examples of landforms.

30. Policy 3.2.2 provides that the adverse effects of subdivision, use or development in the coastal environment should be avoided as far as practicable, and otherwise mitigated, and provision made for remedying those effects to the extent practicable.

PROPOSED REGIONAL POLICY STATEMENT

31. A proposed regional policy statement for Northland was notified by the Regional Council on 5 October 1993. Submissions and relevant references have been decided, and the provisions material to this case are beyond challenge under the First Schedule to the Act. Because the statement has been prepared under the Resource Management Act, and because it has reached the stage that it has, the relevant objectives and policies are particularly significant for deciding resource consent applications.

32. Section 22 of the statement addresses coastal management. It applies the relevant provisions of Part II of the Act and of the New Zealand Coastal Policy Statement, and foreshadows the regional coastal plan. The statement identifies significant coastal management issues⁵, including –

- ...
3. Impacts, including cumulative effects, of subdivision use and development on the natural character of the coastal environment, particularly its ecological, cultural, and amenity values.
- ...
7. Provision for, and rationalisation of, mooring facilities for recreational craft.
8. Maintenance, and where possible enhancement of, public access to and along the coast
- ...
15. Proliferation of structures and their effect on landscape values.
- ...

33. The statement contains the following objectives and policies which are material to this case–

22.3 Objectives

1. The preservation of the natural character of the coastal environment, including protection from inappropriate subdivision, use and development.
- ...
3. Maintenance and enhancement of public use, enjoyment of and access to the coastal environment.
- ...

22.4 Policies

(a) PRESERVATION OF NATURAL CHARACTER

Policies

1. In ... resource consent processes, to preserve the natural character of the coastal environment by, as far as practicable, avoiding adverse effects on:
 - (i) significant landscape values, including seascapes and significant landforms which impart a distinctly coastal character ...
 - ...
 - (vi) intrinsic and amenity values, including the values of wild and scenic areas.

Where avoidance is not practicable adverse effects should be mitigated and provision made for remedying those effects to the extent practicable.

2. In protecting the coastal environment from inappropriate subdivision, use and development (including any adverse effects associated with location, scale and/or character), councils will have particular regard:
 - (a) In relation to preservation of natural character avoiding
 - (i) types of use and development (including sporadic and sprawling subdivision) that would be likely to have adverse effects on the coastal environment; and
 - (ii) cumulative adverse effects (including those associated with incremental change and a shift towards dominance of the built form); and

⁴ *New Zealand Gazette*, 5 May 1994, page 1563.

⁵ Section 22.2

- (iii) any conflict (potential or actual) with current or existing uses, values and the natural character of adjacent land and water areas, and

Where it is not practicable to avoid these matters, councils will have regard to the extent to which they may be remedied or mitigated.

...

- 6. To adopt a precautionary approach to coastal management where knowledge is limited about the likely impact on the natural character of the coast of the effects of subdivision, use and development in the coastal environment.

...

(c) ALLOCATION OF SPACE IN THE COASTAL MARINE AREA

Policies

- 1. To enable the establishment and planned expansion of activities which have an operational need to be located in the coastal marine area, provided the adverse effects can be avoided, remedied or mitigated.
- 2. To limit the occupation of space including the erection of structures and facilities in areas of high cultural, ecological, landscape or recreational value.
- 3. To avoid, remedy, or mitigate the adverse effects of the establishment and expansion of activities in the coastal marine area; to encourage the multiple use and/or consolidation of structures and other facilities; and where an area is already adequately served by such structures and facilities require their multiple use and/or consolidation.

...

(d) PUBLIC ACCESS

Policies

- 1. To maintain and enhance the provision of public access to and along sections of the coast for scientific, educational, recreational and cultural purposes.

...

REGIONAL PLAN (TRANSITIONAL)

34. The water permit required to authorise the proposed taking of ground-water for the proposed fishing lodge is a noncomplying activity in terms of the transitional regional plan. However the water permit was granted by the Regional Council and is not challenged in these proceedings.

REGIONAL PLANNING SCHEME

35. The Northland regional planning scheme was prepared and approved under section 24 of the Town and Country Planning Act 1977. By section 367 of the Resource Management Act, regard is to be had to its provisions until there is both a proposed regional policy statement and an

operative regional coastal plan, to the extent that those provisions are not inconsistent with Part II of the 1991 Act.

36. Although there is a proposed regional policy statement for Northland, there is not yet an operative regional coastal plan. Accordingly we are required to have regard to the regional planning scheme⁶.

37. None of the parties in these proceedings referred to any relevant provisions of that instrument. We have ourselves referred to it. We find that the material contents relating to the natural environment, visual quality, and coastal management are general in nature. Although they are not inconsistent with Part II of the 1991 Act, they do not add to the considerations provided by the proposed regional policy statement prepared under that Act.

PROPOSED REGIONAL COASTAL PLAN (NEW)

38. The Regional Council notified a proposed regional coastal plan in December 1994. Decisions on submissions were published on 5 September 1998, and the proposed plan is deemed to have been amended in accordance with those decisions⁷. There have been a number of references to the Environment Court of provisions of the proposed plan, but none has been heard yet.

39. Without prejudice to the outcome of those references, we consider that the relevant provisions of the proposed plan are significant for deciding the aspects of the present proposal to which it applies, because it is an instrument which has been prepared under the 1991 Act, and has applied to the circumstances of the region the provisions of that Act and those of the New Zealand Coastal Policy Statement and the proposed regional policy statement, and because it has reached the stage of incorporating decisions on submissions on it.

40. Carrying through section 6(a) of the Act, section 1.1.1 of the New Zealand Coastal Policy Statement, and section 22.3.1 of the proposed regional policy statement, the proposed plan contains the following objective⁸ –

The preservation of the natural character of Northland's coastal marine area, and the protection of it from inappropriate subdivision, use and development.

41. Related policies include the following⁹ –

- 1. In assessing the actual and potential effects of an activity, to recognise that all parts of Northland's coastal marine area have some degree of natural character which requires protection from inappropriate subdivision, use and development.

⁶ *Paihia and District Citizens Assn v Northland Regional Council*, Planning Tribunal Decision A77/95.

⁷ Resource Management Act, First Schedule, clause 10(3).

⁸ Section 7.3

⁹ Section 7.4

2. To avoid, remedy or mitigate the adverse environmental effects including cumulative effects of subdivision, use and development on those qualities which collectively make up the natural character of the coastal marine area including:
- ...
- (b) landscapes and associated natural features
- ...
3. Within ... Marine 2 Management Areas to adopt a precautionary approach, through the use of rules in this Plan, in defining what subdivision, uses and developments are appropriate within Northland's coastal marine area because of actual or potential effects on natural character.
- ...
6. To promote an integrated approach to the preservation of the natural character of Northland's coastal environment as a whole.
42. There is an objective about public access¹⁰ –
- The maintenance and enhancement of public access to and along Northland's coastal marine area except where restriction on that access is necessary.
43. There is an objective in respect of structures in the coastal marine area ¹¹ –
- The provision for appropriate structures within the coastal marine area while avoiding, remedying or mitigating the adverse effects of such structures.
44. The following are among the policies related to that objective¹² –
3. Within all Marine Management areas, to consider structures generally appropriate where:
- (a) there is an operational need to locate the structure within the coastal marine area; and
- (b) there is no practicable alternative location outside the coastal marine area; and
- (c) the proposed purpose of the structure cannot be catered for by existing structures within the same locality of the coastal marine area; and
- (d) the structure is of the minimum area necessary for its proposed purpose; and
- (e) any landward development necessary to the proposed purpose of the structure can be accommodated; and
- (f) any adverse effects are avoided, remedied or mitigated.
4. Notwithstanding Policy 3, within ... Marine 2 management areas, to assess applications for new structures, with particular reference to the need for the proposed structure or structures to be located within the coastal marine area and to any potential effects on the natural character of the coastal marine area, on public access, and on sites or areas of cultural heritage value.
- ...
8. In assessment of coastal permit applications to require that all structures within the coastal marine area are maintained in good order and repair and that appropriate construction materials are used.
45. This is the objective for moorings ¹³ –
- Provision for the appropriate location and use of moorings within the coastal marine area while avoiding, remedying or mitigating the adverse effects of these activities on the coastal marine area.
46. Relevant policies related to that objective are¹⁴ –
4. As far as practicable, to avoid the proliferation of moorings in ... Marine 2 ...management areas through the classification of new ... moorings as discretionary and require the applicant to justify why the mooring is required in these areas and why the new mooring cannot be located within a Marine 4 Management Area.
5. To control the adverse effects of moorings and mooring use on the coastal marine area and other uses of it, particularly in regard to recreational activity and marine farming.
- ...
7. To promote the integrated management of moorings and associated land based facilities.
47. The parts of the foreshore and seabed which are the sites for the proposed marine structures are in the Marine 2 zone. The zone statement for that zone is–
- 26.4.1 Marine Management Area Statement
- The Marine 2 (Conservation) Management Area is applied to areas to be managed to conserve ecological, cultural and amenity values while still providing for appropriate use and development. This category is applied to all those parts of the coastal marine area which are not otherwise covered by any of the other four classes of management area.
- The creation of this management area recognises:
- (a) the high existing natural character and amenity

10 Section 10.3

11 Section 16.3

12 section 16.4.3

13 Section 21.2.2

14 Section 21.2.3

value of most of the coastal marine area and the significant contribution that this makes to the social, economic and cultural well-being of Northland, its people, and communities; and, (b) our current lack of knowledge of Northland's coastal marine area and the precautionary approach which is therefore necessary to ensure that it is sustainably managed.

48. The proposed structures are discretionary activities. Assessment criteria are provided, and the following are capable of being applicable to consideration of the application for consent to those structures¹⁵ –

27.1 GENERAL CRITERIA

The primary criteria for assessing applications for coastal permits are the relevant provisions of the Resource Management Act, New Zealand Coastal Policy Statement and the Regional Policy Statement which in turn require regard to be had to the objectives and policies within this plan. These criteria are intended to assist consent authority [sic] and applicants in determining the actual and potential effects of activities which are subject to consent requirements under section 26 of this Plan.

Additional general assessment criteria which will be applied in the consideration of applications for discretionary activities and noncomplying activities within all marine management areas are set out below.

1. The necessity for the proposed use or development within the coastal marine area and the extent to which alternative options to a location within the coastal marine area have been considered.
2. The extent to which existing facilities of a similar scale and nature to the proposed use or development are:
 - (a) located in the vicinity of the site of the proposed use or development especially on land; and
 - (b) are fully utilised or otherwise not able to satisfy the potential demand for such use or development.
3. The extent to which the proposal will add to the cumulative adverse effects of use and development on the coastal environment, including those associated with similar existing uses or developments within the same locality.
4. The extent to which cumulative effects on the coastal environment can be minimised by rationalisation of use and development similar to that proposed.
5. The extent to which the proposal will avoid sprawling, sporadic or ad hoc use of development in the coastal environment.
6. The extent to which the proposed activity is consistent with the planning provisions of the adjacent land (where there are associated land-

- based requirements).
7. The extent to which the proposed use or development will maintain or enhance public access to and along the coastal marine area with particular consideration to the possible effects on the natural character of the coast.
8. The extent to which the proposed activity will maintain or enhance recreational opportunities in the coastal marine area or on adjacent land.

...
10. Any effects of the proposed activity on those in the neighbourhood and, where relevant, on the wider community, including any socio-economic and cultural effects.
11. The effect of the proposed activity on the natural character of the site or area within which the activity is proposed and the measures to be undertaken to ensure that natural character will be preserved, particularly in relation to:
 - (a) the topography or bathymetry of within [sic] site or area

...
16. The extent to which the proposed activity will restrict public access and the likely effectiveness of any proposed measures to avoid or mitigate adverse effects, including the provision of alternative routes or points of public access.

27.2 ADDITIONAL CRITERIA FOR SPECIFIC ACTIVITIES

- ##### 27.2.1 Structures (excluding swing and pile moorings)
1. Within ... Marine 2 Management Areas, whether the proposed structure will be the only structure or the first of its type or the first of any significant size, within an estuary, embayment, or unmodified stretch of coastline and whether the approval of the proposed structure is likely to lead to additional proposals for structures or other types of use and development.

...
 5. The extent to which public access to and along the coastal marine area is maintained or enhanced through the use of the proposed structure.
 6. The degree of multiple use proposed.
 7. The use to which the proposed structure is to be put and the appropriateness of that use in the proposed locality.
 8. Whether the proposed structure is the minimum size practicable, consistent with its location and proposed function.

...
 10. The extent to which adverse visual effects are considered and the likely effectiveness of any mitigation measures proposed...
 11. Whether the proposed structure will compromise the recreational use of the site and the surrounding area.

¹⁵ Section 27.1

...

27.2.6 Swing and Pile Moorings

1. The need for the proposed mooring including:
 - (a) whether the proposed mooring is associated with a property which is only accessible by water.
 - (b) whether the vessel intended to be moored to the proposed mooring is of a size or design able to be stored on land.
 - (c) whether the applicant already owns or has the use of an existing permanent mooring within the locality or within the same estuary, harbour or coastal stretch.
 - (d) whether the mooring is required for a commercial enterprise whose function is dependent on being located within the coastal marine area.
2. Within ... Marine 2 management areas, whether the proposed mooring will be the only mooring within an estuary, embayment, or unmodified stretch of coastline and whether the approval of the proposed mooring is likely to lead to additional proposals for moorings.

Proposed regional coastal plan (transitional)

49. The second review under the Town and Country Planning Act 1977 of the Bay of Islands district scheme had been publicly notified before the commencement of the Resource Management Act 1991 on 1 October 1991. It extended to apply to the waters of the Bay of Islands.

50. To the extent that it applied below mean high water mark, it has not been made operative. To that extent, by section 370(3) of the 1991 Act, it is deemed to constitute a provision of a proposed regional coastal plan for the region. Therefore we are directed by section 104(1)(d) of that Act to have regard to the relevant objectives, policies, rules and other provisions applicable to the parts of the present proposal in the part of the coastal marine area below mean high water mark.

51. However those provisions were prepared under the 1977 Act. They were prepared without the benefit of the New Zealand Coastal Policy Statement or the proposed regional policy statement. By contrast, the proposed regional coastal plan was prepared under the 1991 Act, and has applied to the circumstances of the region the provisions of that Act and those of the New Zealand Coastal Policy Statement and the proposed regional policy statement, and has reached the stage of incorporating decisions on submissions on it. For those reasons we consider that better guidance for the decision under and for the purpose of the 1991 Act on the coastal permits sought in these proceedings can be found in the proposed regional coastal plan than in the deemed proposed regional coastal plan. Accordingly, although we have had regard to the provisions of the latter, we do not detail them in this decision. It is sufficient to record that in general none of them raises issues which are not raised more relevantly by the proposed regional coastal plan.

52. The only exceptions are specific objective and policies about wharves¹⁶ –

To provide for the construction of wharves, landings and public boat launching ramps in the Bay of Islands consistent with the need and purpose for the development and the avoidance of navigational hazards and environmental damage.

Policies:

- (a) By providing for, as conditional uses, wharves, jetties, landings and public boat launching ramps in the marine areas of the district, except those areas subject to conservation orientated planning controls.
- (b) By ensuring that in marine areas of high scenic and natural value, only those jetties and landings which are necessary in the public interest, to provide access to Crown-owned reserves and conservation areas are provided as permitted uses.

...

- (e) By prohibiting jetties and landings from locating adjacent to publicly owned coastal land, except where constructed by the Crown agency administering the land.
- (f) By requiring that wharves, jetties, landings and boat launching ramps be available for public use as appropriate and reasonable in the circumstances.

53. By the deemed proposed plan the sites for the proposed pontoon jetty, boat ramp and moorings are in the Marine 1B zone and are discretionary activities. The Marine 1B zone is a moorings zone, and moorings are a permitted activity provided the maximum number of moorings does not exceed that prescribed by Appendix F of the plan. The Appendix prescribes a maximum of 15 moorings for Paroa Bay. As this number is exceeded, the proposed mooring is a discretionary activity.

Regional coastal plan (deemed)

54. The former Bay of Islands County Council district scheme which had been approved in 1979 under the Town and Country Planning Act 1977, and the Final Classification of the Bay of Islands under the Water and Soil Conservation Act 1967, were in force immediately before the commencement of the Resource Management Act on 1 October 1991. By section 370(1) of that Act, a regional coastal plan was deemed to have been constituted for the Northland region which included such of those instruments as applied to the part of the region in the coastal marine area. That deemed plan was deemed to have been operative from the commencement of the 1991 Act until a regional coastal plan prepared under the 1991 Act becomes operative for the region.

¹⁶ Section 5.2.2(5).

55. However the operative district scheme did not contain zoning or other provisions for the seabed and waters of the site, nor any provision applicable to the coastal permit applications now before the Court.

56. The waters of Paroa Bay are classified SA by the Final Classification. However the proposal before the Court would not affect the maintenance of the waters of the Bay to that standard.

57. Accordingly we have concluded that there is nothing in the deemed operative regional coastal plan which should influence the decision of these appeals.

Proposed regional water and soil plan

58. The Regional Council has notified a proposed regional water and soil plan for its region. The provisions of that proposed plan are relevant to the Oyster Cove proposal only in respect of the discharge of stormwater and wastewater to ground. Those discharges are not challenged in these proceedings. Accordingly the provisions of that proposed plan cannot influence the decision of these appeals either.

Far North district plan (transitional)

59. Prior to the Resource Management Act 1991, the former Bay of Islands County Council had proposed a reviewed district scheme for its district under the Town and Country Planning Act 1977. The process of appeals had not been completed by the time the 1991 Act commenced. To the extent that it applied above the coastal marine area, the Far North District Council completed the processing of the scheme and the instrument became operative in 1992. By sections 373 and 378 of the 1991 Act the district scheme then took effect as a deemed district plan under that Act to that extent. Its provisions apply to the applications for land-use consents now before the Court for the fishing lodge, the boathouse, and the private helipad.

60. The sites for those activities are in the Coastal 1A zone, and they are all discretionary activities in that zone. The zone statement reads–

This sub-zone is applied to sensitive parts of the coastal environment where conservation orientated policies can protect the natural character whilst providing for managed change to the landscape. The provisions of this sub-zone - although similar in general terms to those of the Coastal 1 (Environment) zone - are particularly designed to provide limited opportunities for managed change to occur in certain parts of the coastal environment, provided that the landscape can accept that change, without substantial degradation of quality and environmental damage to sensitive marine areas.

61. The plan prescribes development standards about height, location and coverage of buildings, access, and conservation of landscape. The proposal meets all those requirements save a 3-metre internal setback for the boatshed adjacent to the esplanade reserve. The applicant has sought a waiver of this requirement so that the boatshed can be set into the hillside behind the reserve.

62. Comprehensive assessment criteria are provided for conditional uses (discretionary activities). We quote relevant contents from them¹⁷ –

103.3.1 General Assessment Criteria – All Zones
General assessment criteria which apply in the consideration of conditional uses in all zones are as follows :

- (1) The site ... size, shape, stability, drainage, topography, environmental ... characteristics relative to :
 - (a) the exact nature and the intensity of the proposed use;
 - (b) its suitability for any proposed building or structure;
 - (c) adequate space ... off street parking.
- (2) The site ... location relative to:
 - (a) the local street pattern;
 - (b) main traffic routes;
 - (c) areas of pedestrian movement.
- (3) The nature, size, location and design of buildings or structures for the accommodation of or associated with the proposed use in the light of the exact nature of the proposed use and the likely effect of such buildings and structures on:
 - (a) the use and permitted development potential of neighbouring sites and areas of water;
 - (b) the existing landscape character of the area;
 - (c) views to and from the area;
 - ...
 - (e) ... vehicle traffic movement and navigation;
 - ...
 - (g) public access to, from and along the foreshore.
- (4) The effects of the general characteristics of the proposed use ... and the extent to which adverse effects on neighbouring sites or areas of water can be mitigated, including but not limited to effects with respect to :
 - (a) traffic, both land and water-based;
 - (b) noise ...
 - (c) ecological systems;
 - (d) water quality.
 - (5) the extent to which the site may be modified by the proposed use and any remedial measures proposed to be undertaken, particularly in terms of:
 - (a) ground contour and features;
 - (b) vegetation cover;
 - ...
 - (d) valuable, scarce or scenic natural features.
 - ...
 - (7) the utility and servicing requirements of the proposed use and the extent to which the proposed use will cause demands for the

17 Section 103.3

uneconomic or premature installation, upgrading or extension of public utilities and services, particularly in terms of:

- ...
- (b) access and roading.
- ...
- 103.3.2 General Assessment Criteria – Particular Zones

General assessment criteria which apply in the consideration of conditional uses in the particular zones specified below are as follows:

- ...
- (3) Coastal 1 to 4 and 6 Zones
- (a) The necessity for the proposed use or development to locate in the coastal environment;
- (b) The extent to which the proposed use will affect the natural character and landscape qualities of the coastal environment;
- (c) The extent to which regard is had to ... scenic landscapes ...
- ...

63. We agree with the opinion expressed in evidence by Mr A O Parton that the following criteria for assessing controlled activities are useful in applying the criteria¹⁸ –

- (a) Design and external appearances
 - (i) Buildings and structures should complement and appear to be part of the landscape and consequently appear to sit in the landscape rather than on it.
 - ...
- (c) Landscape design
 - (i) Where it is necessary that buildings break the landform or vegetated skyline, foreground plantings of high pruned forest tree species will assist in reducing the visual impact of buildings.

Status of fishing lodge under district plan

64. An issue was raised by counsel for the appellants opposing the application, Mr Brabant, about the status of the proposed principal activity in terms of the transitional district plan. Counsel submitted that the fishing lodge should be classified as ‘travellers accommodation’, which would also have the effect of making the proposal as a whole a non-complying activity. Although fishing lodges are provided for as conditional uses (discretionary activities) in the Coastal 2 zone, the term ‘fishing lodge’ is not defined in the plan. He contended that the clear implication is that accommodation would only be made available, in terms of the consent granted by the District Council, to people who seek accommodation in order that they can carry out the activity of fishing in the Bay of Islands and further off-shore.

65. Mr Brabant continued by observing that there is also provision in the district plan for ‘licensed tourist house premises’ and for ‘travellers accommodation’, both subject to a limit of 10 travellers’ accommodation units. He contended that as no more than 10 units are proposed by the Oyster Cove application, it would fall into those activity categories.

66. A Regional Council coastal permits officer, Mr T G Grove, touched on that subject in his evidence. He expressed the opinions that the proposed accommodation would be attractive to tourists “irrespective of the marine facilities that are provided”, and that “the proposed lodge will accept tourists who do not, for various reasons including the weather at times, utilise the fishing experiences that the lodge may offer.”

67. The Eastern Bay of Islands Preservation Society also contended that the Oyster Cove proposal is best described as a tourist hotel because it includes accommodation units, a restaurant, sale of liquor to guests, and common areas such as lounge, sauna and exercise room, tennis court and swimming pool.

68. We accept that the term ‘travellers accommodation’ is wide enough to include fishing lodges. However the term ‘fishing lodge’ has a separate meaning. It certainly implies that a substantial purpose of the patrons will be fishing. It would be pedantic to exclude people accompanying those who go for the fishing even if the accompanying people prefer other activities. It would also be pedantic to expect that those who come for the fishing may not pursue other activities as well while they are there. In our opinion, a fishing lodge can be properly so described if fishing is the main activity of the guests, and if other activities and facilities provided for them are incidental to that main activity.

69. The district plan expressly provides for fishing lodges in the Coastal 2 zone as a discretionary activity, and the applicant is entitled to apply for resource consent for one. It was appropriate for the District Council to accept the application as being for that class of activity¹⁹, and there is nothing before the Court to indicate that the applicant is cynical or insincere in pursuing its application on that basis.

70. Accordingly we hold that we should consider the application as being for a fishing lodge, not for travellers accommodation generally, and that its status is as a discretionary activity.

¹⁸ Section 103.2.1.(5)

¹⁹ See *Barry v Auckland City Council* (1975) 5 NZTPA 312 (CA); *Holm v Auckland City Council* Environment Court Decision A10/98.

Proposed Far North district plan

71. A proposed district plan for the Far North district was notified by the District Council on 31 October 1996. However the proposed plan was withdrawn by the District Council²⁰, with effect from 19 October 1998, prior to the completion of the hearing of these appeals. Accordingly, we do not make further reference to the provisions of that planning instrument.

EFFECTS ON THE ENVIRONMENT

72. We have now to have regard to the actual and potential effects on the environment of allowing the activity. Several adverse effects were advanced at the appeal hearing and evidence was given by some 15 witnesses. Rather than summarise the testimony of each, we address each of the effects asserted separately, and refer to the evidence relevant to that context which has assisted us to make our finding in respect of it.

73. At the appeal hearing there were two principal issues about environmental effects. One was the visual effect of the proposed buildings and structures on the natural character of the coastal environment. The other was the restricted use that could be made of the proposed jetty. Although that is not itself an effect on the environment, it is relevant to make a finding on that issue to address the question of the operational need for the jetty (a question raised by the proposed coastal plan), and to inform a balanced judgment of the proposal as a whole. Because our findings on those issues are significant in our assessment of the proposal as a whole, we address them first.

74. In the assessment of the effects generally, we take into account the proposed mitigation measures (including conditions). We note here Mr Brabant's submission that the conditions imposed by the District Council in that respect are inadequate, and that some of the proposed planting relied on by the applicant would be beyond the boundaries of the specific site the subject of the application. If appropriate, those questions and improvements to the conditions could be considered later.

Visual effects on the coastal environment

75. It was the case for the opposing parties that the proposed development would have such significant adverse effects on the character of the coastal environment that consent should be declined. Even taking into account the proposals for use of natural materials for cladding the accommodation units and for planting about them and the lodge itself, their location on or near the ridge is such that land-use consent should be declined. Further it was

contended that there is an unspoilt natural interface between the land and the sea in Paroa Bay, on which the proposed pontoon jetty would have a significant adverse effect.

76. The importance of these issues is clear from section 6(a) of the Act, which provides^a

6. Matters of national importance– 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 following matters of national importance:

- (a) The preservation of the natural character of the coastal environment (including the coastal marine area) ... and the protection of them from inappropriate subdivision, use, and development.

77. As we have seen, that theme has been carried through the hierarchy of instruments to the proposed coastal plan. It is not making too much of this issue then for us to start our consideration of it by reviewing the evidence about the existing visual quality of the site and of Paroa Bay.

78. The site of the proposed fishing lodge is located on the south-eastern headland of inner Paroa Bay, with a north-western aspect overlooking outer Paroa Bay and the waters of the Bay of Islands along the coast to Tapeka Point. A planning consultant called on behalf of the District Council, Mrs S M Harris, commented that the headland and ridgeline afford spectacular views, and that the property has extensive native revegetation currently being undertaken at its eastern end.

79. The inner area of the bay is shallow (less than 1 metre depth), with a foreshore of mud, sand, shingle and mangrove trees. There is an oyster farm development within the inner bay.

80. The shoreline of the outer bay area has four small sand-shingle beach areas separated by low cliff headlands. There are some 17 swing moorings, 3 boat ramps, and approximately 15 dwellings in the bay. The eastern part of the Bay (where the development site and the appellants' properties are situated) has less development than the south-western end.

81. Mrs Harris reported that there are six residences around Paroa Bay, between 200 and 1800 metres distant from the site, most of which are holiday homes occupied occasionally. There is an existing boatshed on a neighbouring property some 100 metres west of the existing boat ramp.

²⁰ The proposed plan was withdrawn pursuant to clause 8D of the First Schedule of the Act.

82. Mr Taylor gave the opinion that the “natural character of the bay has been highly modified and degraded by human development and requires a pro-active conservation enhancement approach which can only evolve with appropriate development, based on sustainable management principles”.

83. A landscape architect called on behalf of the applicant, Mr D J Scott described the area as exhibiting a high degree of landscape modification. He gave evidence to the effect that the site needs to be understood in the context of the maritime recreation area of Bay of Islands, where the character includes boats, related activities, moorings, ramps and jetties.

84. One of the appellants, Mr D L Nathan, questioned the less positive descriptions of the locality, based on his personal experience from a long-standing connection with the area. He gave the opinion that the bay is an area of beauty and substantial natural character and tranquillity, characterised by trees, second generation regrowth, farmland and scattered beach houses.

85. Mr Grove described the site as being in an area and locality of high natural character and quality of the environment.

86. Mr S K Brown, a landscape architect called on behalf of the appellants Mr and Mrs Paykel, gave the opinion that the bay has “significant appeal, based not only upon a preponderance of native/natural elements evident within it, but also on the relatively high degree of cohesion and continuity evident in the presentation of those elements.” He deposed that the Bay is “visibly dominated by natural, rather than man-made objects”; and gave the opinion that the only landscape detractors were the lack of mature canopy species in the regenerating bushland (a common problem in this part of Northland), and that there was an awareness of the odd dwelling, structure, earthworks, and some introduced plants. He confirmed that he remained satisfied that Paroa Bay was deserving of the ‘outstanding’ landscape categorisation that it achieved in an earlier survey in which he had taken part.

87. Mr Parton adopted Mr Brown’s evidence in relation to the location and nature of the application, and the detailed character of Paroa Bay.

88. With the consent of the parties, we have ourselves visited Paroa Bay, both by land and by sea, and have taken those opportunities to make our own observations to assist us to make findings on the evidence. We find that all of the elements described above are present to some degree, and that while Paroa Bay has been modified in various ways, in general it retains a natural character in the coastal environment. We have now to consider the effects on that character of the proposed buildings and structures.

89. Mr Scott deposed that a knoll to the north of the existing house is proposed to be lowered by two metres, that the rooflines of the three smaller chalets to be located there would follow a similar height to that of the existing residence, and that a larger chalet would be located slightly higher on the contour. The chalets to the south of the main building would be located in an arc around a knoll and would have views of Paroa Bay filtered through existing and proposed vegetation. He testified that the chalets would be single-storey, low apex structures, the exteriors would be clad in timber in natural timber tones, and with painted iron roofs.

90. The boatshed would be 8 metres wide, 9 metres deep and 3 metres high, and would be set into the bank so that only the front elevation would be visible from the water. The proposed pontoon jetty would be on a reef at the base of a semi-vegetated cliff, about 60 metres east of the boatramp, and would be about 30 metres long.

91. Mr Scott gave the opinion that in areas such as the Bay of Islands, built form is often subservient to more dominant natural elements, and that well-designed proposals can contribute significantly to an improvement in the environment and result in a positive contribution to the natural character of an area. He described the proposals for revegetation of the coastal edge, and for integration of structures within the site by location and mitigative measures to reduce their visibility, and concluded that the land-based elements would be integrated into the landscape. The witness also gave the opinion that structures along the waterfront, such as a jetty, provide a physical and emotional link between land and water, and that the associations implied are beneficial in enhancing the water-focused recreational character of the Bay of Islands.

92. Mr Scott detailed the mitigative planting he proposed, which would continue and expand on a current planting programme, replacing weed species with native species. There would be some eucalyptus and pine trees removed, and a pohutukawa would be moved.

93. The witness deposed that from the entry to Paroa Bay, the buildings would blend into the surrounding landform and “seemingly become part of the vegetative mass”. From the water below the property, all but one of the buildings would have a vegetative backdrop, and the buildings would be seen as a secondary element to the landform and vegetation, and as an extension to the existing scattered built form of Paroa Bay.

94. Mrs Harris deposed that the building coverage of the site would increase from 1.34% to 4.17%, which would be mitigated by painting in colours sympathetic to the landscape and continued planting. She concluded that the visual and landscape effects of the development would be minor, due to the small number, size and location of the

buildings below the ridge, their materials and colours, and the planting programme aimed at blending them into the landscape.

95. Mr Grove stated that the promontory proposed for the marine facilities is at the entry to the inner eastern arm of the bay, and that the pontoon jetty and associated piles would result in a substantial visual change in the locality. He gave the opinion that they and the walkway and adjacent moorings would have a dominating visual effect in the locality, and that it would be preferable for the jetty/pontoon and walkway to be constructed of materials as natural as possible.

96. Mr Brown reminded us that existing degradation of part of a landscape should not be regarded as an excuse for additional development²¹. He stated:

My assessment is based on the premise that adverse impacts upon amenity and landscape values typically arise where discontinuity is evident between what exists and what is proposed, and where the resultant 'challenge' to the existing order of things is perceived in a negative light.

97. Having analysed the proposed buildings and planting, he concluded that :

... the residential development would be visible but most of its built form would not be overly obvious or excessively intrusive. Most of the units would merge reasonably well into their general surrounds, without significant modification of Paroa Bay's visual character and landscape value.

...

...this deviation from the prevailing pattern of residential development around Paroa Bay would not, in its own right, have a major impact on the bay landscape. The units would still be reasonably subdued because of their recessive finishes and low individual profiles ... such change would be incremental and essentially modest in terms of its overall effect.

98. Mr Brown acknowledged that Mr Scott's planting proposals would help to both improve the condition of the subject property and buffer some of the development proposed. However he preferred use of native plants rather than exotics.

99. Addressing the marine structures, Mr Brown observed that the boatshed (originally) proposed would be similar in scale to that recently constructed at the Heatley property in another part of Paroa Bay, next door to the Paykel property. He accepted that boat sheds are a normal feature of the Bay of Islands coastline, although they contribute to a progressive and incremental change in character.

100. The witness agreed with Mr Grove that the jetty would be a substantial structure, and that it would result in substantial change and substantially at odds with the significant natural qualities of the locality. Mr Brown gave the opinion that it would modify the character of the wider land-sea interface, that the natural continuity of the coastline at the eastern end of Paroa Bay would be appreciably disrupted and the combination of the jetty and the boatshed would "increase the concurrence of built elements in that one part of the bay and lend it a feeling of being significantly more developed than at present"; and that it would have greater than minor effects in its own right.

101. In summary, Mr Brown gave the opinion that the proposal's physical components would give rise to an amalgam of smaller scale effects, but that potentially much more serious is the nature and intensity of activities associated with the physical development.

102. Mr Parton considered that the visual effects of the roof lines of the proposed units would be significant, and that there may be 'scars' resulting from the construction earthworks for the golf-buggy track to the beach. However he considered that in the longer term, as the planting proposed by Mr Scott matures, the positive effects would gradually outweigh the adverse effects. Mr Parton suggested that Mr Scott's landscape plan be subject to conditions such as those imposed in *Di Andre Estates v Rodney District Council*²² (W36/97), including planting density, overall plant numbers, initial plant size, planting programme, and maintenance measures.

103. It is our duty to make a finding on this issue where there have been well qualified and experienced expert witnesses giving differing opinions. Our resolution of the issue has been guided by our understanding of the location and scale of the proposed structures from the drawings produced and from our observations of the site and locality, particularly from on the waters of the bay.

104. We bear in mind that the site is in a bay where there are already many buildings, and which is in a subzone particularly designed for managed change to occur, provided that the landscape can accept that change without substantial degradation of quality. It is not a locality which calls for precluding all development, or change.

105. We consider that the planting proposed by Mr Scott would be effective, as it matures, to soften the view of the lodge buildings from the bay, so that in context and perspective, their final overall effect on the natural character of the coastal environment is minor. In short we find ourselves persuaded by the opinions given by Mr Scott, Mrs Harris and Mr Brown.

21 *Gill v Rotorua District Council* (1993) 2 NZRMA 604; 1A ELRNZ 374.

22 Environment Court Decision W36/97.

106. Turning to the visual effects of the marine structures, we accept that the sight of the boatshed can only be partly softened by planting, and that of the pontoon jetty and associated piles and walkway not at all. We agree with Mr Grove's opinion that it would be preferable for those structures to be constructed of natural materials where practicable. However we do not accept that it is proportionate to describe those structures as having a dominating visual effect in the locality, nor as being substantially at odds with the natural qualities of the locality. Nor are we persuaded that the natural character of the bay would be substantially disrupted, especially because of the low and narrow nature of the structures in the total land- and seascape. In the scale of Paroa Bay, we consider that the visual effects of the 30-metre jetty and associated structures, built as designed to a modest height above sea level, would not be more than minor, particularly as the surfaces weather.

107. Having considered the visual effects of the lodge and marine elements of the proposal separately, we have now to consider the total or cumulative visual effects of the proposal as a whole. We find that there would be some degradation of the natural character of the coastal environment of the bay, particularly initially until the planting matures and the marine structures weather. In our opinion that adverse visual effect, in context and scale, should be taken into account, but on the basis that it would not be more than minor.

Limitations on operational use of jetty

108. The other major issue is the restricted use that could be made of the proposed jetty, relevant to the operational need for the jetty (which is a question raised by the proposed coastal plan). It was the case for the applicant that the jetty would be essential for successful operation of the fishing lodge, to allow patrons to embark on fishing trips at all stages of the tide. It was the case for the opponents that the proposed jetty would not perform that function with its proposed length and location, because there is not sufficient depth of water for most of the tidal cycle.

109. The basis for our finding on this issue is evidence about the conditions, including depth of water available, at the end of the jetty, and evidence about the draft of charter fishing vessels likely to be used for fishing trips from the lodge. It is convenient to address that sub-issue first.

Drafts of typical vessels

110. Mr S D G Hunter, formerly manager of Game Fishing Charters in the Bay of Islands, gave the opinion that the average draft of typical game fishing boats using the Bay of Islands is 3 feet (0.9 metres). He agreed that allowance would have to be made for under-keel clearance, and a greater allowance in an area of rocky outcrops.

111. Mr G R Stevens, a qualified professional engineer, testified that the proposed jetty and pontoon had been designed under his supervision; that research had been undertaken into the drafts of boats likely to use the jetty; that (i) light displacement vessels such as runabouts commonly used for all types of recreational fishing have a draft in the range 0.4 to 0.7 metres; and that (ii) charter launches in the range 7 to 20 metres which more commonly target game fish were found to have drafts in the range 0.4 metres to 1.6 metres with an average of 0.9 metres.

112. Captain J L Harrison is a retired master mariner, now a nautical surveyor, with experience of hydrographic surveying in the Royal New Zealand Naval Reserve. From his experience he gave the opinion that the average draft of vessels used for sport and game fishing in Northland is about 1.5 metres. Having made enquiries of others, he concluded that the draft of typical vessels used for sport and deep sea fishing in the Bay of Islands is 1.4 metres. In cross-examination he agreed that the draft of a vessel *Te Ariki Nui* had been measured for him by a boatbuilder, Jim Ashby, and he accepted that the design draft of that vessel may be 1.2 metres. He also accepted that there has been a tendency towards shallower draft boats, and that there are boats which have drafts less than 1.4 metres.

113. Commander I S Monro is in practice as a hydrographic surveyor and marine consultant, having had 25 years' experience in surveying in the Hydrographic Service of the Royal New Zealand Navy, including 4 years in command of an inshore survey craft, 4 years in command of HMNZS Lachlan, and 7 years as the Hydrographer, RNZN. In cross-examination he stated that he would have thought that the average draft for charter boats out of Paihia and Russell would have been more than 0.9 metre.

114. Having reviewed the testimony of those witnesses, we accept the value of Mr Stevens's distinction between runabouts and game-fishing charter launches. Runabouts drawing 0.4 to 0.7 metres would not always be suitable for open-sea conditions, where charter launches drawing up to 1.6 metres would be more likely to be preferred. In considering the extent of the use that could be made of the proposed jetty for fishing lodge patrons to go on and return from fishing trips at various stages of the tide, it is appropriate to take into account the use of both classes of vessel which may be appropriate according to the kind of fishing preferred by various patrons of the fishing lodge.

115. On that basis we find that for recreational fishing, vessels drawing up to 0.7 metre are likely to be used, but for game fishing, vessels drawing up to 1.6 metres may be preferred and should be considered.

Conditions at end of jetty

116. We now address the evidence about the conditions, including depth of water available, at the end of the jetty.

117. Mr Taylor explained that for a vessel to have access to the pontoon at all times, the draft would need to be no more than 600 millimetres.

118. Mr Hunter agreed that under-keel clearance would have to be allowed, and greater allowance in conditions when there is a north-easterly swell. He also agreed that if there is an area of rocky outcrops under water, an additional allowance should be made for clearance.

119. Mr Stevens deposed that a bottom depth of 1.0 metres below chart datum can be achieved generally within a distance of 30 metres of the edge of the rocky shelf at the eastern end of the beach, and that a bottom depth of 1.0 metres below chart datum would give a water depth of 1.6 metres on mean low water neap tides and 1.4 metres on mean low water spring tides; and the lowest low water spring tides would produce a minimum water depth of 1.1 metres, twice a month on average.

120. Mr Stevens deposed that he had personally checked depths and confirmed that the soundings originally measured by Mr M Poynter and those plotted by Captain Harrison and Commander Monro were in general agreement, subject to the limitations noted by Captain Harrison. In summary, this witness testified that at a distance of approximately 20 metres out from the rocky shelf the outer face of the proposed pontoon would be in water with a bottom depth which is a minimum of 0.7 metres below chart datum, which would give an available water depth of 1.3 metres on mean low water neap tides and 1.1 metres on mean low water spring tides, and that those depths would be adequate at all times for type (i) runabouts and at most times for type (ii) boats.

121. In cross-examination Mr Stevens agreed that some charter vessels in the Bay of Islands would not be able to use the jetty at some stages of the tide; he would not agree that 1.65 metres is the appropriate depth to consider; but he agreed that for safe operation allowance has to be made for underkeel clearance. He explained that he had assumed a maximum wave height of 900 millimetres, considering the fetch and accepted wind velocities, and that Paroa Bay is exposed to the north-west.

122. In cross-examination, Mr Parton deposed that Mr Stevens's chartings were 0.2 metre too generous because he had erroneously taken low spring tides at 0.6 metre instead of 0.4 metre. However that had not been put to Mr Stevens in cross-examination for his comment, so we do not consider it safe to make a finding to that effect.

123. Mr Grove also testified that on occasions there would be inadequate water depth for charter boats to get in to the jetty, and that on occasions wave conditions would make it unsafe to use the jetty.

124. Captain Harrison considered that a minimum underkeel clearance of 0.25 metres should be added and,

as the lowest predicted tide in the location is -0.3, allowance for this gives a total of 1.68 metres. The witness stated that if he were responsible, he personally would adopt a minimum depth of 2 metres.

125. Captain Harrison and Commander Monro had established the depth of water at the site and found that the site of the proposed pontoon is in an area of rock outcrops and kelp with actual depths below datum of 0.5 to 0.7 metres.

126. Captain Harrison testified that its use by vessels drawing 1.4 metres with an underkeel clearance of 0.25 metres would be limited to a period of 3 hours 45 minutes each side of high water at neap tides, 3 hours 30 minutes at spring tides, and 3 hours 15 minutes at maximum tides. He agreed that boats drawing less than 1.4 metres would not be limited by depth to the same extent, and stated that with a water depth of 0.5 metre, a boat with a draft of 0.9 metre would be able to use the pontoon facility for 5 hours each side of high water, but that for 4 hours a day it would not be able to use it. He considered it is not a wise place to put a berthing facility.

127. Commander Monro had checked the survey made with Captain Harrison, and confirmed it. He had compared it with naval hydrographic surveys in the Bay of Islands in 1990-1992 and found good agreement with it. Although he was not familiar with game fishing boats operating out of Russell, he did not think that game-fishing boats would have the kind of hull that would be able to operate alongside the jetty. In re-examination the witness stated that it would not be safe to take a vessel into the location of the proposed jetty because of shoals.

128. In cross-examination Commander Monro agreed that it would be feasible to use a tender, and with a tender the jetty could be operational 24 hours a day, although in re-examination he stated that he would not use a tender carrying a few people to go out game fishing. He also gave the opinion that embarking and disembarking would be safer with a jetty than over a beach.

129. Mr Parton added his concern about how the jetty would operate from a practical viewpoint. He explained that advantages of the jetty for public access to the esplanade reserve would be minimal; and that the approaches to the jetty from the east and the west would be shallow. He concluded that the proposed jetty would not be able to operate satisfactorily because of inherent physical limitations, and would constitute an inappropriate development in the coastal area because of the operational constraints. In particular he referred to foul ground because of "bricks", ie, rocks, lying on the seabed affecting safe navigation in the vicinity of the jetty site. Mr Parton agreed that that the approaches could be used at high tide, but could not say what extent of the tide would enable craft to be clear of the foul ground. He agreed that charter fishing operators would have local knowledge from their frequent

visits to the area. He told the Court that he would prefer use of the jetty restricted to the fishing lodge, to diminish the likelihood of danger to members of the public without local knowledge.

130. Mr Nathan deposed that in his experience it will not be practicable to bring typical fishing launches and yachts safely into the area of the proposed jetty; and that for a considerable period each day, fishing launches and yachts would not be able to get anywhere near it, as there would not be enough water to operate safely. He also stated that wind from the north-west to the north-east can expose the area to considerable swell in rough conditions, and in those conditions transferring people from launches to dinghies, or navigating to the jetty and embarking or disembarking there would be difficult. He too considered the marine aspects of the proposal impractical, and the site unsuitable. In cross-examination Mr Nathan agreed that in 1992 he had supported a proposal for a jetty from the rocks, and explained that it is the whole proposal that he objects to, and he would oppose any kind of visitor accommodation in the outer Bay of Islands.

131. Mr Paykel deposed that the jetty would be inoperable half of the time because of the low water depth.

132. Considering the totality of the evidence on this topic, we find that because of rocky seabed and limited water depth at the end of the proposed jetty, the availability of the jetty for directly embarking and disembarking people on fishing trips is likely to be restricted. The extent of the restriction would depend on the draft of the fishing boat, the state of the tide, and the prevailing weather conditions, but it would not be likely to be able to be used for boats suitable for game-fishing at all stages of the tide. When the tide is low, tenders could be used to transfer people to and from game-fishing boats. For boats with less draft suitable for sport fishing (drawing up to about 0.7 metre), the jetty would be capable of being used for most stages of the tide and in most weather conditions, by operators with local knowledge. Bearing in mind that weather conditions which are adverse for use of the jetty may not be comfortable for fishing anyway, we do not accept that these limitations on the use of the jetty would justify a finding that it would be inoperable or inappropriate as accessory to a fishing lodge, or that they negate an operational need for a jetty.

Other adverse environmental effects

133. Having made our findings on those two principal issues, we now address other possible adverse effects on the environment that were raised at the appeal hearing.

Marine ecosystems

134. Mr Grove deposed that some destruction of fauna would be involved through the piling and construction, and that recolonisation of the area and minor enhancement

through the additional habitat provided by the piles, could be expected within a short time.

135. An environmental and marine ecological consultant, Mr M Poynter, gave evidence of having assessed the ecological effects of the proposed marine structures. As he was not cross-examined, it is not necessary for us to give the detail of his evidence. It is sufficient to record that we accept his uncontested conclusion that there would be no significant adverse effects or significant cumulative adverse effects on the local marine ecology or water quality.

Road traffic

136. Mr Taylor adopted a District Council assumption of daily one-way vehicle movements for tourist hotels of two per room, giving a maximum of 16 one-way vehicle movements. He deposed that this would be equivalent to the traffic movements generated by 4 residential units, and gave the opinion that it would be insignificant.

137. The witness also deposed that some improvements to sight benching on the Paroa Bay Road have recently been made, that the District Council has increased its funding for work on roads such as Paroa Bay Road. He also reminded us of the condition of consent imposed by the District Council and accepted by the applicant requiring payment of a contribution of \$5,000 towards the cost of minor improvements on that road.

138. Mrs Harris gave the opinions that the likely increase in traffic movements would be easily accommodated on the sealed road to the eastern Bay of Islands, and that improvements for the Paroa Bay Road and rights-of-way might become necessary. In cross-examination she confirmed that she had consulted with the District Council roading engineer before forming her view on that, and on the number of car parking spaces required at the lodge.

139. We find that with the improvements contemplated, the amount of road traffic that would be generated would not have adverse effects on the environment.

Water traffic

140. Mr Taylor deposed that assuming full occupancy of the fishing lodge of 20 people, and 4 persons per boat, there might be 10 one-way boat trips per day. He gave the opinion that this would be a minimal amount of water traffic having regard to the overall boating activity in Paroa Bay. We accept that and find that the water traffic generated by the fishing lodge would not have adverse effects on the environment.

Air traffic

141. The conditions of consent would limit use of the helicopter pad to 4c return trips per month. Mr Taylor gave the opinion that this amount of air traffic would be

insignificant. Mrs Harris reported that helicopter movements are currently a common event in the Bay of Islands. She too considered that the noise or disturbance from four helicopter flights per month to and from the site would not be significant, provided that a reasonable number occur during working hours. The witness held to that view in cross-examination. She explained to the Court that the nearest building to the helipad off-site is at least 200 metres from it, and that she had only considered relevant small aircraft. Having consulted Mr Hegley (an acoustic engineer) she considered that the attenuation of sound at that distance would be such that the noise of a helicopter engine coming up to take-off speed would not infringe the noise limits in the transitional district plan.

142. In cross-examination, Mr Brown agreed that the noise from the limited number of helicopter movements would not be a major concern.

143. The applicant has accepted the condition of four return helicopter trips per month. We consider that the condition should confine the activities to the relatively small type of helicopter that had been considered by Mrs Harris. Even on that basis the helicopter activities could not be said to have no adverse effect on the environment. However they would be mitigated to the point where we find that the effects would not be significant.

Noise of vessels

144. Mr Grove gave the opinion that the pontoon and jetty would result in a concentration of activity, including additional noise.

145. Mr Taylor accepted that there would be some noise associated with increased boating and helicopter activity. He gave the opinion that the incidence of those activities would be far below the accepted noise standards and would have negligible adverse effect compared with normal background noise, including that of jet ski activity prevalent in the bay.

146. Mrs Harris gave the opinion that because the site is relatively isolated, the increase in noise would not be significant.

147. We accept that water ski and jet ski activities in Paroa Bay are likely to be greater sources of noise than that of tenders and fishing boats coming and going. We find that the noise generated by vessels associated with the fishing lodge would not be likely to have a significant adverse effect on the environment.

Intensity of activity

148. Mr Grove gave the opinion that the jetty and pontoon structure and the proposed moorings would result in a concentration of activity. In cross-examination he

explained that the coming and going of the types of boats, the frequency of visits by boats, and their use of the pontoon jetty would be perceived as a commercial intensity of activity.

149. Mr Nathan expressed concern about increased, regular boating activity, with fishing launches regularly arriving, departing, anchoring or mooring in part of the bay which at present is not used heavily by any craft, increased numbers of helicopter flights and increased road traffic.

150. In cross-examination Mrs Harris gave the opinion that the addition of the number of people from the fishing lodge using Paroa Bay could easily be accommodated in the area of the bay; and that even in the low season two or three more vessels in the bay would be a very small increase in the scale of activities there.

151. We accept Mrs Harris's opinion and so find.

Amenity values

152. Mr Brown accepted that boat sheds and activities associated with boat use are a normal feature of parts of the Bay of Island's coastline, but gave the opinion that –

... the regular dispersal of such elements along those coastal margins which remain predominantly natural at present, cannot help but contribute to a progressive and incremental change of character, including the dilution of those other qualities, such as solitude and freedom from significant urban development, which make areas like Paroa Bay so attractive and special.

153. Mr Brown gave the opinion that the jetty and boat shed would increase the concurrence of built elements in that part of the bay and lend it a feeling of being significantly more developed than at present. He also considered that the values of tranquillity and relative solitude would be affected by the intermittent arrival and departure of helicopters, the regular coming and going of charter launches and tender craft, gatherings on the beach in the summer, and vehicle movements around the lodge.

154. Mrs Harris gave the opinion that it would be unlikely that 20 to 40 guests at the lodge using two vessels at various times of the year would have noticeable impact on the amenity values of the area.

155. The Resource Management Act does not mandate tranquillity and solitude, or an absence of change in Paroa Bay, nor do the planning instruments. The activity generated by the fishing lodge would be an addition to the activity already carried out there, particularly in the summer. In our judgment the increase in activity would not be so great that it would qualify as degrading the amenity values of the bay to a significant extent.

Archaeological values

156. Mrs Harris deposed that if any sites of archaeological significance are uncovered, it is a requirement that they be investigated and protected. She reported that no known archaeological sites are present on the property, and that enquiries among local residents and iwi in the area had established that it is unlikely that the subject property contains any subsurface evidence of occupation before 1900. The witness gave the opinion that the effects of development on archaeological values are likely to be minor. We agree and so find.

Bank stability

157. Mrs Harris identified that sites for the proposed accommodation units would need to be formed in relation to steep mixed-clay banks, and advised that care would be required in foundation design and stormwater routing to minimise adverse effects on bank stability. We accept that care is needed, and we consider that control can be exercised by the regulatory authorities to avoid or mitigate any adverse effects.

Public access to shore

158. Mr Grove considered that the proposed structures and mooring would compromise to some degree any traditional access and use of the foreshore in that area. He gave the opinion that the potential for public use of the jetty would be limited, given its location, but, in combination with the proposed adjacent moorings, there would be a dominating visual effect in the particular locality which could imply that the facilities were private. Similar points were made by the Bay of Islands Coastal Watchdog Inc. In cross-examination, Mr Grove conceded that the applicant has given no indication it would discourage public use of the foreshore and esplanade, and he told the Court there is no reason why there could not be a sign on the pontoon indicating that it could be used by the public.

159. Mr Parton considered that the proposal is in general accordance with the objectives and policies which seek to improve public access to the foreshore, but observed that the relatively poor quality of the beach diminishes the likely frequency of public use of the jetty.

160. Mr Taylor gave the opinion that the proposal would not impede public access to and along the coastal marine area, but would enhance access around the foreshore reef where it would be traversed by the boardwalk to the pontoon jetty, and would encourage access from the sea to and the use of the esplanade reserve. He considered that provision of the landing pontoon, and the walkway in association with existing boat ramp for public and private use, would improve public access to and along the coastal marine area from the sea; and reported that the applicant

is willing to provide picnic tables and other facilities for public use on the esplanade reserve.

161. Mrs Harris reported that the only present public access to the esplanade reserve is by the sea from the beach. She acknowledged that use of the reserve to gain access to the jetty pontoon would represent a more intensive use of the reserve and may contribute to an erroneous impression that the area is largely private land. The witness considered that it would be necessary to minimise the numbers and types of vehicles from the lodge moving across the reserve and beach.

162. Mrs Harris also acknowledged that the applicant accepts public use of the proposed pontoon and walkway, and intends to provide picnic facilities on the esplanade reserve to encourage public use. She considered that the proposal represents an improvement in public access and a positive environmental effect; and recommended conditions requiring removal of a fence, prohibiting permanent surfacing of the access track across the reserve, prohibiting storage or long-term parking of vehicles on the reserve, and requiring provision of public facilities on the reserve by the applicant.

163. Leaving aside perception, we find that in reality public access to the foreshore and the esplanade reserve would not be diminished, and may to some extent be enhanced by the proposal. Privately provided structures in public space could give an erroneous perception that the general public are not welcome. Those perceptions could be reduced by removal of inappropriate fencing and by appropriate signs. Our finding should be based on the reality, not on the possibility that some people may make erroneous perceptions. We find that that there would not be an adverse effect on public access to the foreshore or esplanade reserve from allowing the proposed fishing lodge and associated facilities.

Wastewater and stormwater discharge

164. Mrs Harris recognised that discharges of wastewater and stormwater could have adverse effects if not properly controlled. She deposed that management of those environmental effects would be the responsibility of the Northland Regional Council, and stated that the scale of the proposed discharges would not be likely to present effects that are more than minor. We so find.

Social and economic effects

165. Mrs Harris gave the opinion that the capacity of the proposed fishing lodge would provide for 7.3 % of the anticipated demand for luxury fishing accommodation; that a staff of three would find employment at the lodge; and concluded that there would be overall positive social and economic effects for the area. We accept that opinion.

Cultural effects

166. Mrs Harris reported that from information from three iwi groups there are no known sites of cultural significance on the site. There being no evidence or indication to the contrary, we so find.

Cumulative effects

167. Mr Grove expressed concern of a precedent effect, as consent for the jetty might be followed by applications for jetties to serve other properties in the Bay of Islands. He referred to pressure the Regional Council had had for jetties; and acknowledged that he was uncomfortable with the provision for jetties as discretionary activities in the outer Bay of Islands, and looked forward to a future change to the regional coastal plan in which they might be noncomplying activities in the outer Bay.

168. Mrs Harris had given consideration to possible cumulative effects of the proposal. She gave the opinion that there is likely to be continuing demand for luxury fishing lodge accommodation in the Bay of Islands. However the number of possible suitable sites which are appropriately zoned is limited and because of the small scale and location of the present proposal, she concluded that it would not have cumulative effects.

169. There are very few jetties in the outer Bay of Islands. The proposed regional coastal plan now provides appropriate control over new structures in the coastal marine area. It would not be appropriate for our decision to be influenced by Mr Grove's reservations about the contents of that plan. We find Mrs Harris's opinion on this question persuasive, and find that granting consent to the present proposal would not create a significant risk of cumulative effects from consent for other jetties.

Effects overall

170. Mrs Harris gave the opinion that the applicant has proposed all reasonable steps to mitigate adverse effects of the proposal. Mr Parton considered that in the short-to-medium term, the adverse effects would outweigh the positive effects, but in the longer term, as the landscaping matures, the positive effects would outweigh the adverse effects. He explained that if the jetty and public restaurant had not been included, and the planting proposed by Mr Scott was imposed by enforceable conditions, his opinion would favour the development. He had no argument with provision of dining facilities for resident guests of the fishing lodge.

171. We have found that there would be some degradation of the natural character of the coastal environment from

visual effects of the proposal, particularly in the short term until planting matures and structures weather. Although there may be limitations on the times when the jetty could be used, they would not make it incapable of reasonable use as accessory to the proposed fishing lodge. The proposal would not have significant adverse effects on the environment in other respects.

APPLICATION OF PLANNING INSTRUMENTS

172. Having made our findings on the effects on the environment of allowing the activity, we have now to apply the relevant provisions of the planning instruments which we identified earlier in this decision. Mr Parton had analysed the instruments applying to the land, and found "a common thread or theme which flows through most of them":

- the objective of avoiding developments which have an adverse effect on the natural character of the coastline, and where such avoidance is not possible, the mitigation and remedying of such effects to the greatest extent practicable.
- the objective of ensuring that jetties should preferably only be allowed in situations where they provide for multiple use, and improved public access.
- the objective of only allowing those activities which have a functional or operational need to be developed in the coastal environment.
- in addition the Bay of Islands Operative District Plan includes several more specific provisions relating to the basic purpose of the coastal 1A zone, the general locational preferences for tourism and water related activities, and the avoidance of ridge-top development...

173. Because, as noticed earlier, the various instruments identify similar issues and contain substantially similar provisions for addressing them, we find Mr Parton's summary of the common theme helpful. Mr Parton had analysed the instruments applying to the land. Our examination of the objectives, policies and assessment criteria of the instruments relating to the coastal marine area²³ revealed that in addition, in that context, attention is called to minimising the scale of structures, avoiding proliferation of moorings, considering cumulative effects, and taking a precautionary approach to what is appropriate in the coastal marine area. We therefore address the factors identified by Mr Parton, and then those additional factors.

174. Avoiding adverse effects on the coastal environment is a matter of natural importance. We have found that the proposal would have an adverse visual effect on the natural

²³ The New Zealand Coastal Policy Statement, the proposed regional policy statement, and the proposed regional coastal plan.

character of the coastal environment of Paroa Bay, particularly initially, and that in context and scale, the effect would not be more than minor. The effect should be required to be mitigated and remedied as far as practicable.

175. Because jetties occupy part of the public domain in the coastal environment, they should be available for public use. In this case, the applicant has accepted that. It may be that not many members of the public would wish to take the opportunity to use the proposed jetty and walkway to access the foreshore and esplanade reserve in front of the site. However the proposal allows for them to do so.

176. A jetty has a functional and operational need to be in the coastal environment. Although people could travel to Russell to embark on fishing trips, we consider that a fishing lodge at Paroa Bay has a reasonable functional and operational need to have a jetty. In this case, the challenge was directed to whether, because of the water conditions at the end of the jetty, it would be capable of being functional and operational. Having considered the evidence on that topic, we have found that the availability of the proposed jetty for use would be restricted because of those conditions. We have not accepted that the limitations on its use would render the jetty inoperable or inappropriate as accessory to a fishing lodge, nor that they negate an operational need for it.

177. Adverting to the district plan, the basic purpose of the Coastal 1A zone is to protect the natural character while providing for change to the landscape which is managed to avoid “substantial degradation of quality and environmental damage to sensitive marine areas.” Our finding on the visual effects of the proposal shows that, with the proposed landscaping, the proposal would succeed in avoiding substantial degradation, especially after time for planting to mature and for weathering. Referring to the assessment criteria, we also find that in general there is a reasonable need for a fishing lodge to locate in the coastal environment, and our finding about visual effects of the proposal shows general consistency with the locational criteria. Referring to the controlled activity criteria cited by Mr Parton, we find that on the whole the proposed buildings would appear to sit in the landscape rather than on it, and to the extent that one or more of them may appear from some vantages to break the landform or ridge, appropriate plantings can assist in reducing the visual impact.

178. On the scale of the structures, we find from the evidence of Mr Stevens that the restricted use that would be able to be made of the proposed pontoon jetty results from its having been designed to minimise its size and

visual effect. We find that the scale of that structure, of the walkway, and of the boatshed are in keeping with the size and context of Paroa Bay. The bay is an accepted moorings area, having some 17 moorings already. We find that the proposed additional moorings are required for a commercial enterprise the function of which is dependent on being located in the coastal marine area. We do not consider that the addition of two moorings associated with the fishing lodge would constitute a proliferation of moorings. We find that there would not be a significant risk of cumulative effects from consent being granted for the proposed pontoon jetty and other proposed marine structures in addition to those associated with similar uses and developments in the area.

179. The policies in the proposed regional coastal plan of taking a precautionary approach to management of the Marine 2 areas carries forward references to such an approach in the NZ Coastal Policy Statement²⁴ and the proposed regional policy statement²⁵. Those policy statements show that this approach is considered appropriate because of “lack of understanding about coastal processes and the effects of activities”, and “where knowledge is limited about the likely impact on the natural character of the coast of the effects of ... use and development in the coastal environment.” However as the evidence given at the hearing of these appeals shows, there is no lack of understanding or knowledge about effects on the natural character of the coastal environment of the proposed fishing lodge and associated structures, nor does any question arise of effects on coastal processes. The district plan identifies fishing lodges as a discretionary activity, and the proposed regional coastal plan provides for the proposed marine structures as discretionary activities. Accordingly we find that there is no place for application of the precautionary approach in deciding these appeals. We do not overlook section 27.2.1(1) of the proposed regional coastal plan which provides a criterion about a proposed structure being “the only structure or the first of its type or the first of any significant size, within an ... embayment ... and whether the approval of the proposed structure is likely to lead to additional proposals for structures or other types of development”. The proposed pontoon jetty would be the only or first such structure in Paroa Bay. We have already given our finding that there would not be a significant risk of additional jetties arising from consent to this proposal in association with a fishing lodge.

180. In summary, having applied the relevant provisions of the planning instruments to our findings about the proposal and its effects, we conclude that with appropriate conditions to avoid and mitigate effects on the environment the proposal is generally consistent with those instruments.

²⁴ NZ Coastal Policy Statement *NZ Gazette* 5 May 1994, page 1563 at 1564, col 2.

²⁵ Proposed Northland Regional Policy Statement, paragraph 22.4.6.

CONDITIONS

181. Conditions were attached to the land-use consent granted by the Far North District Council. Mr Taylor proposed conditions which might be attached to a coastal permit for the proposed marine structures. We have now to consider whether amendments to those sets of conditions are appropriate as a basis for considering whether those consents should be granted or refused.

Land-use conditions

182. The conditions attached to the land-use consent included directions about landscaping and colours of buildings, limited the number and times of helicopter flights; restricted the use of restaurant, required upgrading of the right-of-way access, and the making of a contribution towards road upgrading. If that consent is upheld, the condition about the restaurant should be amended to contain a clear prohibition on access to the dining facility and associated bar by members of the public who are not themselves currently resident at the fishing lodge.

183. In addition, the condition about landscaping should be amended, as proposed by Mr Parton. The amended condition should require early restoration measures on the earthwork batters and retaining walls adjoining the carriageway intended to serve the eastern group of accommodation units; that fast-growing species be planted and maintained around the accommodation units to substantially screen the units when viewed from the sea; that the boat ramp be re-surfaced with local aggregate; planting around three sides of the shed to screen it, and any exposed batters be promptly restored; and retention or replacement by native species of an existing grove of eucalyptus and conifer trees to the north of the tennis court. (The witness had originally deposed that that the proposed boat-shed should be relocated, but recognising the reduced size sufficient to house tenders instead of cruisers, he fairly acknowledged that it might be built in the location originally proposed.)

184. We made our findings about the visual effects of the proposal taking into account the proposed mitigation measures, including proposed planting recommended by Mr Scott. His landscaping plan included planting on land outside the subject site, namely on the esplanade reserve, and an area between the site and the boundary of the right-of-way giving access to the reserve. The question arose whether planting beyond the site could be the subject of a condition of consent.

185. In respect of the esplanade reserve, the Far North District Council (which administers that reserve) has

approved the planting in accordance with Mr Scott's landscape plan, on the basis that the applicant is responsible for maintenance of the plantings.

186. In respect of the private land, the applicant has asserted that the conditions on which it sold that land ensure that there will be no obstacle to implementing the landscape plan. The applicant submitted that as the landscape plan is put forward as integral to its proposal, it would be estopped from suggesting that it cannot comply a condition requiring that it give effect to the plan. Counsel cited *Augier v Secretary of State for the Environment*²⁶.

187. Mr Brabant reported that he had requested, but had not been provided with, a copy of the relevant condition of sale. He submitted that the applicant's response was insufficient to address this issue, and that the appellant cannot agree to conditions of consent if it is not the owner of the land.

188. In a number of cases²⁷ the Planning Tribunal held that conditions should not be imposed which required infringement of the rights of third parties, unless the third parties consent. However it is not always necessary that the applicant become the owner of land on which conditions have to be performed. In some cases rights to do things on third parties' land which fall short of full ownership may be sufficient.

189. In this case, the administering body of the esplanade reserve has formally resolved to approve the implementation of the landscaping plan on the reserve. The applicant has sold the intervening land on conditions which it is satisfied enable it (or its successor) to implement the landscaping plan on that land. It is the grantee who has the responsibility of complying with conditions of consent, and whose resource consent and investment in work to exercise it are at stake if it is unable to comply with the conditions. So long as it is clear that the applicant has obtained rights with which it is satisfied to enable it to comply, and that compliance with the condition is essential to the right to exercise the consent, we do not consider that a consent authority is required to review the conveyancing.

190. In this case the applicant has itself put forward the landscaping plan, and has acknowledged that it would be estopped from challenging a condition requiring it to implement it. We have considered the proposal on the basis that it would be implemented. To avoid doubt, we expressly stipulate that if land-use consent is granted, compliance with a condition requiring that the plan be implemented would be essential to the consent. In those circumstances we consider that such a condition could properly be

²⁶ (1979) 38 P & CR 219 (QBD).

²⁷ For example, *Holt v Napier City Council* TCPAB Decisions D9560; *Campbell v Southland District Council* Planning Tribunal Decision W114/94; *Banks v Waikato Regional Council* Planning Tribunal Decision A31/95.

imposed. A grantee has the responsibility of ensuring that it can perform all conditions before exercising a consent to which they are attached.

Coastal permit conditions

191. The conditions proposed by Mr Taylor for a coastal permit would link the jetty, pontoon and walkway to being accessory to the fishing lodge; would require public access over the permit area; would prohibit contamination of the water; would prohibit permanent mooring of vessels at the jetty; and would require Regional Council approval of colours.

192. Mr Parton suggested requiring a sign on the jetty stating that it is available for public use, and warning that care is needed in approaching the jetty due to the foul ground and shallowness of the adjoining water. Mr Parton also proposed a condition to the effect that the lodge not provide guests or staff with jet-skis or the like. We adopt those additions to the set of coastal permit conditions suggested by Mr Taylor.

193. In summary, we consider that if the resource consents sought are to be granted, then sets of conditions should be attached as outlined in this section of the decision. The detailed drafting could be done initially by counsel for the parties.

DISCRETIONARY JUDGMENT

194. We have had regard to such of the matters listed in section 104(1)(a) of the Act as are relevant to the case. We have now to make a judgment in terms of section 105(1)(c) of the Act²⁸ to grant or refuse consent. That judgment has to be made to achieve the purpose of sustainable management of natural and physical resources as stated and defined in section 5 of the Act, and in compliance with any relevant directions in the other sections of Part II of the Act, recognising that they are subordinate and accessory to the purpose of the Act.

195. In section 6 the relevant provision is paragraph (a) calling for recognition and provision for preservation of the natural character of the coastal environment and protection of it from inappropriate use and development. Earlier in this decision we have made findings which show that the proposal would be consistent with that provision. Paragraph (b) of that section refers to protection of outstanding natural features and landscapes from inappropriate use and development. Although much of the Bay of Islands may qualify as outstanding, we are not persuaded that Paroa Bay deserves to be so classified. In any event, we find that the proposed fishing lodge and associated structures would not be inappropriate there.

Paragraph (d) relates to maintenance of public access to and along the coastal marine area. We find that the proposal is consistent with that.

196. Section 7 calls for consideration of maintenance and enhancement of amenity values, and of the quality of the environment; and of intrinsic values of ecosystems. We have addressed substantially similar issues in this decision, and we find that, subject to compliance with the amended conditions contemplated, the proposal would be consistent with those relevant directions in section 7.

197. Section 7(b) directs consideration of efficient use and development of natural and physical resources. The appellants in Appeals RMA202/97 and 203/97 contended that the proposed fishing lodge would not be financially viable, and called the evidence of a tourism resource consultant, Mr DAC Bamford, to give his opinion to that effect. In that regard, their counsel stated –

The purpose in producing this evidence is not to invite the Court to extend its jurisdiction outside the matters it is to address by reference to the statutory provisions in the Act, but to highlight concerns about the very specific nature of the proposal.

198. Be that as it may, we hold that section 7(b) does not call for a consent authority to make a finding whether a proposal the subject of a resource consent application would be a commercial success or not. Those questions are for the commercial market, not for those concerned to make decisions to achieve promotion of sustainable management of natural and physical resources. By the relevant planning instruments, the proposed fishing lodge is a discretionary activity, and so are the accessory structures. We do not consider that Mr Bamford's doubts about the viability of the fishing lodge project should influence our decision on these appeals.

199. The meaning to be given to the term 'sustainable management' is set out in section 5(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 æ
- (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.

²⁸ Section 105(1) was substituted by section 55(1) of the Resource Management Amendment Act 1993.

200. We make no judgment on whether the proposed fishing lodge would be a successful business venture or not. However if it is, then it would enable the patrons (who may not themselves own property in the outer Bay of Islands) to provide for their health, and the employees (and perhaps other stakeholders in the business) to provide for their economic wellbeing. Our findings show that, if carried out in conformity with the amended conditions contemplated, it would not fail to sustain the potential of the resources involved, nor fail to safeguard the capacity of the relevant media and ecosystems, and would avoid remedy and mitigate any adverse effects of the activities on the environment. In short, it is our judgment that granting the resource consent sought subject to those conditions would be consistent with the achieving the purpose of the Act, and that those consents should be granted accordingly. To that extent Appeal RMA 211/97 will be allowed, and Appeals RMA 202/97 and 204/97 disallowed.

201. We invite counsel to submit agreed forms of consents and conditions to enable us to make a final order to give effect to this outcome. If counsel are unable to reach agreement we will consider memoranda identifying the issues, and will then have to settle the form of the order.

202. The question of costs is reserved.

DATED at **AUCKLAND** this day of 1999.

D F G Sheppard
Environment Judge

JUDGEMENT ON: 28-8-1997

IN THE SUPREME COURT OF BANGLADESH HIGH COURT DIVISION (SPECIAL ORIGINAL JURISDICTION)

WRIT PETITION NO. 998 OF 1994 WITH WRIT PETITION NO. 1576 OF 1994

IN THE MATTER OF:

An application under Article 102(1) and (2)(a) of the Constitution of the People's Republic of Bangladesh

-AND-

In the matter of:

Dr. Mohiuddin Farooque
.....Petitioner in Writ Petition No. 998 of 1994

Sekandar Ali Mondol
.....Petitioner in Writ Petition No. 1576 of 1994

- Versus -

Bangladesh, represented by the Secretary, Ministry of Irrigation, Water Development and Flood Control, Government of the People's Republic of Bangladesh, Bangladesh Secretariat, P.S. Ramna, Dhaka and other
.....Respondents in both the writ petitions

Dr. Mohiuddin Farooque, with
Mr. Iqbal Kabir
Mr. Ehsanul Habib
Ms. Bahreen Khan and
Ms. Shabnaaz Zahereen

....for the petitioner in both the writ petitions
Mr. Tofailur Rahman, with
Ms. Sarker Tahmeena Beguma dn
Ms. Sufia Ahammed
.....For the respondent Nos. 2-4 in both Writ Petitions.

Heard on: 28-7-1997, 5-8-1997 and 6-8-1997
Judgement on:28-8-1997

PRESENT
MR. JUSTICE KAZI EBADUL HOQUE
AND
MR.JUSTICE A.K. BADRUL HUQ

A.K. BADRUL HUQ, J:

1. The two petitioners of Writ Petition Nos. 998 of 1994 and 1576 of 1994 by two applications under Article 102 of the Constitution, called in question the activities and implementation of 'FAP-20', undertaken in the District of Tangail apprehending environmental ill effect of a Flood Control Plan affecting the life, property, livelihood, vocation and environmental security of more than a million of people of the District whereupon two separate Rules were issued calling upon the respondents to show cause as to why all the activities and implementation of 'FAP-20', undertaken in the District of Tangail should not be declared to have been undertaken without lawful authority and of no legal effect and or such other order or further orders passed as to this court may seem fit and proper.

2. In the two Rules, similar facts and common questions of law having been involved, those were heard analogously and are being disposed of by this single judgement.

3. In Writ Petition No. 998 of 1994, the petitioner is Dr. Mohiuddin Farooque, Secretary General, "Bangladesh Environmental Lawyers association", briefly "BELA", a group of environmental lawyers. "BELA" was registered under the Societies Registration Act, 1860. The petitioners has been authorized by a resolution of the Executive Committee of "BELA" to represent the same and move the High Court Division of the Supreme Court of Bangladesh under Article 102 of the Constitution. Petitioner claims that "BELA" has been active since the year 1991 as one of the leading organizations with documented and well recognized expertise and achievement in the field of environment, ecology and relevant matters of public interest and "BELA" has developed itself into an active and effective institution on environmental regulatory framework with widespread recognition. Writ Petition No. 998 of 1994 has been initiated pro bono publico. Initially, the petition was summarily rejected by the High Court Division on the ground of locus standi. The Appellate Division has sent the matter to the High Court Division for hearing on merit after setting aside the said order of rejection holding that the petitioner has locus standi to file and maintain the writ petition.

4. In Writ Petition No. 1576 of 1994, the petitioner is Sekandar Ali Mondol, a farmer, living in the village of Khaladbari under Police Station Tangail Sadar in the District of Tangail for generations and owns small piece of ancestral land, part of which he uses as homestead and part for cultivation for subsistence and cash earning of his family. The petitioner's land is under the process of acquisition under 'FAP-20' project.

5. Facts leading to the issuance of the two Rules are summarized as under:

(a) The two consecutive severe floods of 1987 and 1988 in Bangladesh aroused national and international

concern on the water resources issue in particular and the question of environmental management in general for the country. Studies were made and as a result of studies, a list of 11 Guiding Principles of Flood Control has been formulated. In July, 1989 in Washington D.C., a meeting of the Government of Bangladesh and some donors was held and it was agreed that an Action Plan would be undertaken as a first step for long term Flood Control Programme in Bangladesh. On 11 December, 1989, a document entitled "Bangladesh-Action Plan for Flood Control" was placed before the meeting of the foreign donors in London and 'Flood Action Plan', hereinafter referred to as 'FAP' was born. World Bank took up the responsibility to co-ordinate the activities. To manage the activities under the 'FAP', the 'Flood Plan Co-ordination Organization', hereinafter referred to as 'FPCO', was created by the respondent No. 1, the Ministry of Irrigation, Water Development and Flood Control, briefly, "MIWDFC". 'FAP' consists of 26 components of which 11 are main components consisting of regional and project oriented activities and 15 are supporting studies which includes Pilot Project. 'FAP' has been undertaken initially for 5 years, 1991-1995 but Pilot Project under it will continue beyond 1997. 'FAP-20' is one of the 15 supporting studies in which the concept of Flood Control through Compartmentalization is to be Tested and hence, project is called 'Compartmentalization Pilot Project', briefly, 'CPP'.

Within the First two years, the 'FAP' aroused wide attention for being allegedly anti-environment and ant-people project. 'FAP' is being accused of not only for its discrete activities but also for defying the process and requirements of participatory Governance manifested in the letters and spirit of the Constitution, the law of the land and 11 Guiding Principles of Flood Control. The 'FAP', instead of being the largest environmental management programme of the country, the same has become the most controversial programme ever undertaken in this land for committing various illegalities, violation of laws and posing ecological threats. The 'FAP-20' Project is being implemented in Tangail Sadar, Delduar and Bashail Police Stations of the District of Tangail encircling an area of 13,169 hectares including Tangail Town and encompassing 176 villages of 12 Unions, 45,252 households according to 1991 census, 32 beels and 46 canals. The Project site is under the direct confluence of the rivers Dhaleswari, Lohajang, Elanjani and Pongli estuaries of the river Jamuna. 'FAP-20' is likely to adversely affect and uproot about 3 lacs of people within the project area and the extent of adverse impact outside the project area may encompass more than a million human lives, the natural resources and natural habitats of men and other flora and fauna.

The total impact area is, although large, only 210 hectares of land are being acquired without complying with the requirements of law. The experimental project impact area includes two Mosques, namely, “the Attia Mosque” the picture of which appears on Taka 10 - note and “Khadem Hamdani Mosque” which are in the list of archaeological resources and are protected against misuse, restriction, damage etc. under the Antiquities Act, 1968 in the spirit of Article 24 of the Constitution.

- (c) There was no people’s participation except some show meetings which were managed through manipulation. The local people were not at all afforded any opportunity to submit their objections and, thus, the aggrieved people have been deprived of their legal rights and legitimate compensation and also to protect their lives, professions and properties. The “FAP-20” have been undertaken violating the laws of the land including the National Environmental Policy, 1992. Scope of the so called land acquisition matters, if lawfully applied, only related to a small number of people and lands i.e. 210 hectares compared to the total physical and ecological area to be affected due to various direct, indirect and casual impact of the project. The fate of the greater section of the people whose lands and other belongings, rights and legitimate interest would be adversely affected, both within and outside the project area, have been left out of any consideration. By undertaking the experimental ‘FAP-20’ Project, the respondents have ultimately infringed and would further, inevitably infringe the Fundamental Rights to life, property and profession of lacs of people within and outside the project area.
- (d) The Bangladesh Water Development Board briefly, ‘BWDB’ has been vested by the Bangladesh Water and Power Development Boards Order, 1972 (President’s Order No. 59 of 1972), the statutory right of control over the flow of Water in all rivers and canals of Bangladesh and the statutory responsibility to prepare a comprehensive plan for the control of flood and the development and utilization of Water Resources of Bangladesh. Since, ‘FPCO’ is neither under ‘BWDB’ nor created by it, nor created in the exercise of any authority of any law of the land, the same got no legal authority to plan, design or to undertaken any project falling within the domain of the ‘BWDB’ or other statutory agencies and as such all the activities coordinated by and conducted under ‘FPCO’ are illegal and unlawful. The ‘FPCO’ was created by the then regime of 1989 by passing all legal and institutional framework sanctioned by the law of the land, and the ‘BWDB’. The ‘FPCO’, therefore, illegally encroached upon the public statutory domain of other agencies responsible for sustainable Water

Management Policy and Planning of Flood Control The fate of the legal rights and interest of the people of Bangladesh is being arbitrarily decided by the respondents in total disregard of the law and the legal system. Local people’s resistance and objection have been severely undermined and instead, oppressive and deceitful measures had been adopted by the respondents.

- (e) The ‘FAP-20’ activities are contrary to the various provisions of law of the land and violative of the Fundamental rights enumerated in Part-III of the Constitution. The affected people of the ‘FAP-20’ project area are entitled to the protection under Article 28(1), 23, 31, 32 and 40 and 42 of the Constitution. It is emphasized that the ‘FAP-20’ project is being implemented in gross violation of the provisions contained in The Conservation of Fish Act, 1950, (E.B. Act No. XVIII of 1950), The Embankment and Drainage Act, 1952, (East Bengal Act I of 1953), The Antiquities Act, 1968, The Acquisition and Requisition of Immovable Property Ordinance, 1982 (Ordinance No. II of 1982) and The Environment Conservation Act, 1995.
6. Respondent No. 1, Ministry of Irrigation, Water Development and Flood Control, Government of Bangladesh, in spite of service of notice upon it, did neither appear nor did oppose the Rule.
7. Respondent Nos. 2-4, the Chief Engineer, Flood Plan Coordination Organization, The Chairman, Bangladesh Water Development Board and the Project Director, Flood Action Plan Component-20, Compartmentalisation Pilot Project, respectively entered appearance in both the Rules and opposed the Rules by filing two affidavits-in-opposition. The statement made in the two affidavits are almost common.
8. In the affidavits-in-opposition, it is stated that ‘FAP’ is a very ambitious programme undertaken by the Government of Bangladesh with the assistance of the Foreign counters and agencies. The programme is very important for the developmental work and the same will have far reaching effect in the developmental programme of Bangladesh. ‘Compartmentalization Pilot Project’ ‘CPP’, has completed an elaborate Environmental Impact Assessment, shortly ‘EIA’. ‘EIA’ for ‘CPP’ shows that project will have more positive impact compared to negative one. The only negative impacted environmental issue will be a slight loss of seasonal wetlands and its habitats. To compensate, the project is implementing a Community Wet-land conservation Programme in 3 Beel areas, namely, Jugini Bara and Garindhha Beels. It is stated, further, that since a long time, a good many Water Development Projects have been implemented in the country and no where there is any allegation of any damage to any ecological site due to interventions caused by the project and there is no chance of any damage on any

archaeological resources in the project area due to implementation and physical interventions under the projects.

9. Further statements are that ‘CPP’ is not constructing new embankments except retirements at places and re-sectioning at other places. The destruction of fish by hindering their access to the swamping grounds does not hold true.

10. In the affidavits-in- opposition it is asserted that the planning, designing and implementation of physical interventions under ‘FAP-20’ are being done by Bangladesh Water Development Board while ‘FPCO’ is only acting as a monitor of the project activities on behalf of the Ministry maintaining liaison with the donors on behalf of the Government. It is pleaded that in all stages of project formulation, all group of people concerned and affected by the project have been consulted and their participation have been ensured. There had been many meetings attended by Union Parishad Chairman, Journalists, Elite, Professionals and concerned Government officials. Moreover, 3 seminars were held at Tangail wherein Members of the Parliament of the locality participated and expressed their views regarding the project. Views of the elected representatives from the local level upto the National level have been taken. All possible groups of people likely to be affected as a result of implementation of the Project, such as, fishermen, landless people and women have been consulted before starting any sort of physical intervention in the project and their participation in many activities of the project have been ensured.

11. Further assertions made in the affidavits-in- opposition are that the local people welcomed the project. Many local News Papers published opinion of the local people concerning the project which indicates the positive attitude of the people towards the project. It is also asserted that the project is arranging to pay compensation to those land owners who lost their lands, and, in many cases, the contractors have implemented works on having consent from the affected land owners. The land acquisition procedure for ‘FAP-20’ is strictly in conformity with the existing legal procedure of the country and the project is not following anything in the matter of land acquisition which contravenes the existing legal procedure. It is pleaded that considerable provisions in the name of mitigation measure are there in the ‘FAP-20’ project to mitigate the needs and the suffering of all people affected by the execution of ‘FAP-20’, be it displacement of people or any other inconvenience that may arise as a result of execution of the project.

12. Dr. Mohiuddin Farooque, learned Advocate appearing in person in Writ Petition No. 998 of 1994 and on behalf of the petitioner of writ Petition No. 1576 of 1994 not only challenges the formation and activities of

‘FAP-20’ and ‘FPCO’ adversely affecting and injuring more than a million people in the District of Tangail by way of displacement, damage to soil, destruction of natural habitat, of fishes, flora and fauna and creation of drainage problem threatening human health and worsening sanitation and drinking water supplies and causing environmental hazards and ecological imbalance but also alleges the violation of Article 23, 24, 28, 31, 32, 40 and 42 of the constitution and the laws, such as, the Bangladesh Water and Power Development Boards Order 1972, (President’s Order No.59 of 1972), The Embankment and Drainage Act, 1952 (East Bengal Act I of 1953), The Protection and Conservation of Fish Act, 1950, The Antiquities Act 1968 and the Acquisition and Requisition of Immovable Property Ordinance (Ordinance No. II of 1982) and other laws.

13. Dr. Mohiuddin Farooque, first, directed his effort to assail the formation of ‘FPCO’. He submitted that ‘FPCO’ is neither created under the authority of Bangladesh Water and Power Development Boards Order, 1972, nor created in the exercise of any authority of any law of the land and ‘FPCO’ got no authority and legal status to plan, design and undertaken any project falling within the domain of ‘BWDB’ and other statutory agencies and the same, thus, encroached upon the public statutory domain of other agencies responsible for sustainable Water Management Policy and Flood Control.

14. In repelling the said submission, Mr. Tofailur Rahman, learned Advocate for the respondents, contended that the planning, designing and physical interventions under ‘FAP-20’ are being done by ‘BWDB’ while ‘FPCO’ is only acting as a monitor of the project activities on behalf of the Ministry of Irrigation, Water Resources and Flood Control.

15. To appreciate the contentions raised from both the sides, it is necessary to extract Article 9 of Bangladesh Water and Power Development Boards Order, 1972.

Article 9 runs as follows:

“9. (1) “The Water Board shall prepare, for the approval of the Government a comprehensive plan for the control of flood in, and the development and utilization of Water resources of Bangladesh.

(2) The Board shall have power to take up any work as contemplated in clause (3) or any other work that may be transferred to it by the Government and to realize levy thereof subject to the approval of the Government

(3) The Board may frame a scheme or schemes for the whole of Bangladesh or any of the following matters, namely:

(a) Construction of dams, barrages, reservoirs and other original works; irrigation, embankment

and drainage, bulk water supply to communities and recreational use of water resources;

- (b) Flood control including water-shed management;
- (c) Prevention of salinity, water congestion and reclamation of land;
- (d) Except within the limits of sea-ports, maintenance, improvement and extension of channels for inland water transport, including dredging of channels, but excluding all such operations as may be assigned by the Government to any other agency;
- (e) Regulation of channels to concentrate river flow for more efficient movement of water, silt and sand, excluding all such operations as, in the opinion of the Government, may be carried out by any other agency”

16. Sub-article (1) of the said article 9 provides that Water Board shall, for the approval of the Government, prepare comprehensive plan for control of flood in and the development and utilization of water resources of Bangladesh. Sub-article (2) enjoins that the Board shall have power to take up any work as contemplated in clause 3 or any other work that may be transferred to it by the Government. Sub-article (3) states that Board may frame scheme or schemes for construction of dams, barrages, reservoirs and other original works, irrigation, embankment and drainage, bulk water supply to communities, flood control including water shed management. Prevention of salinity, water congestion, reclamation of land, maintenance, improvement and extension of channels for inland water transport, including dredging of channels and regulation of channels to concentrate river flow for more efficient movement of water, silt and sand excluding all such operations as in the opinion of the Government, may be carried out by any other agencies.

17. On reading of the above provisions, it is evidently clear that Water Board is a State controlled statutory corporation and the controlling authority of Water Board is the Government, that is, the Ministry of Irrigation, Water Resources and Flood Control, respondent No.1. Water Board, since, is under the control of the said Ministry and ‘FPCO’ is stated to be only acting as a monitor of the project activities on behalf of the said Ministry, it cannot be said that the ‘FPCO’ got no authority to plan, design and undertake the project falling within the domain of Water Board. It is significant to note that Water Board is not challenging the authority of ‘FPCO’? Thus, we have no manner of hesitation to hold that the petitioners got no right nor any legal authority to challenge the authority of ‘FPCO’. The contention raised, though, may be attractive, does not appear to have any substance.

18. The next contention raised by Dr. Farooque is that the ‘CPP’ has been unlawfully planned and designed by the respondents without adapting appropriate institutional framework prescribed by law and the implementation of the said project undertaken in the name of ‘FAP-20’ is against public interest and also, undertaken in total disregard of the Guidelines of ‘FAP’ and ‘FPCO’. It is also urged that the participation of the people within the project area have not at all been ensured in implementing the project and the Pilot Project is absolutely illegal and without lawful authority.

19. It is canvassed, further, from the side of the petitioners that the ‘FAP-20’ is likely to affect adversely and uproot a large number of people within the project area and the extent of adverse impact outside the project area will encompass human lives, natural resources and the natural habitats of human and other beings. Contention has been also advanced that the affected people were not afforded any opportunity of being heard and the objections and protests raised by the people have been totally ignored by the respondents who were duty bound to take into consideration the fate of the people, directly, indirectly and casually affected by the implementation of ‘FAP-20’ and, thus, the Fundamental Rights Guaranteed under Article 31, 32, 40 and 42 had been grossly violated.

20. In reply to the said contentions raised from the side of the petitioners, Mr. Tofailur Rahman, learned Advocate submitted that the idea of ‘FAP’ has been conceived by people having highest degree of competence in the relevant field and suitability of that idea is being judged through 15 supporting studies and ‘CPP’ is one of those studies which will help in judging environmental suitability of the idea of ‘FAP’ and ‘FAP-20’ is aimed at experimenting the concept of Compartmentalization and the project will give maximum benefits to the farmers of the project area and the same will have far reaching effect in the economic development of the country. It is the further contention of Mr. Tofailur Rahman that the people’s participation in undertaking and implementing the Pilot Project has been ensured and the people of the locality welcomed the project and no Fundamental Right guaranteed under the Constitution has been violated.

21. Since, the violation of Fundamental Rights guaranteed under Article 31, 32, 40 and 42 of the Constitution has been seriously alleged by the petitioners, it would be profitable to quote Article 31, 32, 40 and 42 of the Constitution.

22. Article 31 of the constitution reads as under:

“31. To enjoy the protection of the law, and to be treated in accordance with law, and only in accordance with law, is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Bangladesh, and in particular no action detrimental to the life, liberty, body reputation or property of any person shall be taken except in accordance with law”.

23. Article 32 runs as follows:

“32. No person shall be deprived of life or personal liberty save in accordance with law”.

24. Article 40 is as follows:

“40. Subject to any restriction imposed by law, every citizen possessing such qualifications, if any, as may be prescribed by law in relation to his profession, occupation, trade or business shall have the right to enter upon any lawful profession or occupation, and to conduct any lawful trade or business.”

25. Article 42(1) is to the following terms:

“42.(1) Subject to any restrictions imposed by law, every citizen shall have the right to acquire, hold, transfer or otherwise dispose of property, and no property shall be compulsorily acquired, nationalized or requisitioned save by authority of law”.

26. Article 31 gives right to a citizen to enjoy the protection of law and to be treated in accordance with law. It gives the guarantee that no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law. Article 32 mandates that no person shall be deprived of life or enter upon any lawful profession or occupation and to conduct lawful trade or business. Article 42 commands that every citizen shall have the right to acquire, hold, transfer or otherwise dispose of the property and no property be compulsorily acquired, nationalized or requisitioned save by authority of law. The question of violation of fundamental right raised by the petitioners will be considered after deciding other points raised.

27. People’s participation and their commitment in all developmental activities has been enshrined in the Guiding principles of ‘FAP’, Bangladesh Action Plan for Flood Control published by ‘FPCO’ on March, 1993 and the National Environmental Policy of 1992.

28. In principle No.11 of 11 Guiding Principles of ‘FAP’, maximum possible popular participation by the beneficiaries was suggested to be ensured in planning, implementation, operation, and maintenance of flood protection infrastructures and facilities. In the Guidelines for people’s participation on Bangladesh Action Plan for Flood Control published by ‘FPCO’ it is stated that to ensure sustainable Flood Control, Drainage and Water Development, it is essential that local people “participate” in full range of Programme activities including need assessment, project identification design and construction, operation and maintenance, monitoring and evaluation. The National Environmental Policy, 1992 states that in the context of environment, the Government recognizes that the active participation of all the people at all level is

essential to harness and properly utilize all kinds of national resources and to attain the goal of environmental development and improvement.

29. It is the contention from the side of the petitioners that instead of people’s participation, the ‘FAP-20’ is being implemented on the face of the people’s protest without attempting to redress people’s grievances. This contention was resisted by the respondents with the assertion that the people have been consulted and there has been people’s participation in implementing the project. The petitioners had annexed applications addressed to the Water Development Authority by the villagers of Rasulpur village and also to the Deputy Commissioner, Tangail on behalf of local people of Tangail for stopping the activities of ‘FAP-20’ alleging that the people of the locality would be affected by way of displacement, damage to the soil and creation of environmental hazards. The petitioners have also annexed some paper cuttings showing staging of demonstration, procession and holding of meetings by thousands of male and females. The letters and paper cuttings are Annexure-F series. The respondents, on the other hand, annexed some paper cuttings in the affidavits-in-opposition of the Writ petition No. 1576 of 1994 evidencing people’s participation and people’s support for the project but no paper had been annexed in the affidavit-in-opposition filed in Writ Petition No. 998 of 1994. The respondents, also, annexed a copy embodying expression of reaction of the people of the District of Tangail in view of a Legal Notice by “Bangladesh Environmental Lawyers Association” asking to stop the activities of ‘FAP-20’ and the same was signed by Chairman, Tangail Pourashava, President of Awami League, Tangail District Unit and also the Secretary of District Unit of Jatiya party ad some other persons holding the offices of President and Secretary of various organizations and associations of the District of Tangail. The respondents also annexed some papers showing holding of meetings and seminars for people’s participation in ‘FAP-20’ project.

30. The assertions by the petitioners as to the non-participation of the people of the locality in the implementation of project and the counter assertion by the respondents as to participation of the people in the implementation of the project, thus, have become a disputed question of fact and this court will not embark upon an investigation of the same in writ jurisdiction. Judicial review is generally not available for ascertaining facts but for a review of law emanating from accepted facts. Moreover, Guidelines do not have the force of law and no legal right is created on the basis of Guidelines and no right, also, can be enforced on the basis of Guidelines in the courts of law.

31. Dr. Mohiuddin Farooque next addressed us raising the contention that all activities envisaged and being carried out by the ‘FPCO’ through the ‘FAP’ are subject to the provisions of the Embankment and Drainage Act, 1952

and 'FAP-20' has not followed the prescribed provisions of law contained in the said Act. No objection was recorded, no Notification in the official gazette has been published and no compensation has been assessed as enjoined in section 28, 30 and 31 of the said Act of 1952.

32. Mr. Tofailur Rahman, on the other hand, only, submitted that whether provisions of the Embankment and Drainage Act, 1952 have been complied with or not is a disputed question of fact and the High Court Division cannot enter upon such disputed question of fact.

33. The East Bengal Embankment and Drainage Act, 1952 was enacted to consolidate the laws relating to embankment and drainage and to make better provision for the construction, maintenance, management, removal and control of embankments and water-courses for the better drainage of land and for their protection from floods, erosion and other damage by water.

34. It will be useful to look to the relevant provisions of law embodied in the Act of 1952. Relevant portion of section 5 is quoted below:

"5. Except as otherwise provided in this Act, all plots or parcels of land which, before the commencement of this Act, have been used for the purpose of obtaining earth or other materials for the repair of any public embankment, water-course or embanked two-path as aforesaid, or which by agreement have been substituted for such lands, shall be deemed to be at the disposal of the Provincial Government or the Authority for such compensation for the use of removal of such earth or other materials. The Engineer may cause all such plots or parcels of land to be ascertained, surveyed and demarcated".

35. Relevant portions of section 7(4) and (5) are extracted below:

"7. Subject to the provisions of Part III, whenever it shall appear to the Engineer that any of the following acts should be done or works (including any work of repair) executed, that is to say:

- (1)
- (2)
- (3)

(4) that the line of any public embankment should be changed or lengthened, or that any public embankment should be renewed, or that a new embankment should be constructed in place of any public embankment, or that any embankment should be constructed for the protection of any lands or for the improvement of any water-course, or that a sluice in any public embankment should be made; that any sluice or water-course should be made, or that any water-course should be altered for the improvement of the public health, or for the protection of any village or cultivatable land ;

(5) that any sluice or water-course should be made or that any water-course should be altered for the improvement of the public health, or for protection of any village or cultivatable land;

(6)he shall prepared or cause to be prepared estimates of the cost of such works, including such works, including such proportion of the establishment changes as may be changeable to the works in accordance with the prescribed rules or as may be specifically directed by the Provincial Government as the Authority, together with such plans and specifications of the same as may be required. He shall also prepare or cause to be prepared from the Survey Map of the district, a map showing the boundaries of the lands likely to be benefited or affected by the said acts and works and he shall issue a general notice of his intention to execute or cause to be executed such works".

Section 8 reads thus:

"8. Such general notice shall be in the prescribed form stating, as far as possible, the prescribed particulars of all lands which are likely to be affected by the proposed work and to be chargeable in respect of the expenses of executing the same and shall be published in the prescribed manner. A copy of the said estimates, specifications and plans together with a cop of the maps aforesaid, shall be deposited in the office of the Engineer and shall be open to the inspection of the person interested who shall be allowed to take copies thereof and to file objections, if any, against the execution of the proposed work, within thirty days from the date of the publication of such notice".

36. Section 9 is as follows:

"9. The Engineer shall, on the day appointed for the hearing, or on any subsequent day to which the hearing may be adjourned, hold an enquiry and hear the objections of any persons who may appear, recording such evidence as may be necessary".

37. Section 27 runs thus:

"27. Whenever, in the course of proceedings under this Act, save as hereinafter provided, it appears that land is required for any of the purposes thereof, proceedings shall be forthwith taken for the acquisition of such land in accordance with the provisions of the Land Acquisition Act, 1894, or other law for the time being in force for the acquisition of land for public purpose".

38. Section 28 reads thus:

"28. Subject to the provisions of section 5, wherever any land other than land required or taken by the Engineer, or any right of fishery, right of drainage, right of the use of water or other right

of property, shall have been injuriously affected by any act done or any work executed under the due exercise of the powers or provisions of this Act, the person in whom such property or right is vested may prefer a claim by petition to the Deputy Commissioner for compensation:

provided that the refusal to execute any work for which application is made shall not be deemed to be an act on account of which a claim for compensation can be preferred under this section”.

39. Section 30 states thus:

“30. When any such claim is made, proceeding shall be taken for determining the amount of compensation, if any, which should be made and the person to whom the same should be payable, as far as possible, in accordance with the provision of the Land Acquisition Act, 1894, or other law for the time being in force for the acquisition of land for public purpose”

40. Section 31 is quoted under-

“31. In every such case which is referred to the judge and assessors or to arbitrators for the purpose of determining whether any, and if so, what amount of compensation should be awarded, the judge and assessors or the arbitrators:

- (i) Shall take into consideration—
 - (a) the market-value of the property or right injuriously affected at the time when the act was done or the work executed,
 - (b) the damage sustained by the claimant by reason of such act or work injuriously affecting the property or right,
 - (c) the consequent diminution of the market-value of the property or right injuriously affected when the act was done or the work executed, and
 - (d) whether any person has derived, or will derive, benefit from the act or work in respect of which the compensation is claimed or from any work connected therewith, in which case they shall set off the estimated value of such benefit, if any, against the compensation which would otherwise be decreed to such person; but
- (ii) shall not take into consideration-
 - (a) the degree of urgency which has led to the act or work being done or executed, and
 - (b) any damage sustained by the claimant, which if caused by a private person, would not in any suit institute against such person justify a decree for damages”.

41. Part-III of the Act of 1952 prescribes procedure in cases of imminent danger to life or property.

42. ‘Authority’ in the Act of 1952 is defined in section 3(a) the said Act which is as follows:

“32(a). “authority” means East Pakistan Water and Power Development Authority established under section 3 of the East Pakistan Water and Power Development Authority Ordinance, 1958”.

43. The East Pakistan Water and Power Development Authority Ordinance, 1958 has been replaced by the Bangladesh Water and Power Development Boards Order, 1972 (President’s Order No. 59 of 1972). So, the authority as defined in section 3(a) of the Act of 1952 as it stands now is Bangladesh Water and Power Development Board.

44. From a reading of the above provisions contained in the Act of 1952, it appears that the prescribed laws in implementing and carrying out the activities of ‘FAP-20’ project have not been followed. No notice had been published, no objection had been recorded, no procedure for hearing of the objection had been followed, no procedure has been made for putting forward the claim of compensation for damages for the loss of properties and deprivation of enjoyment of fishery as required under section 28 of the said Act. Procedure contained in section 30 and 31 of the Act has not been followed. In both the writ petitions, there is clear assertion that the provisions embodied in The Embankment and Drainage Act of 1952 had not at all been followed. This assertion has not been controverted by the respondents in the affidavit-in-opposition. There was no assertion that the provisions and procedure of law contained in the Act of 1952 had been followed. Only there is a statement that the land acquisition procedure for ‘FAP-20’ is strictly in conformity with the existing legal procedure of the country like other developmental project and the project is not following anything in the matter of land acquisition which contravenes the existing legal procedure. The respondents in the affidavit-in-opposition against Writ Petition No. 1576 of 1994 only annexed Annexure-1 series showing initiation of acquisition proceeding under Ordinance No.II of 1982 with respect to 1.36 acres of land belonging to Yousuf Ali and others. No paper had been annexed in the affidavit-in-opposition nor any paper had been annexed in the affidavit-in-opposition nor any paper had been produced before this Court showing fulfillment of requirements of law embodied in the Act of 1952. So, it is manifestly clear that the provisions and procedure of law embodied in The Embankment and Drainage Act of 1952 had not, at all, been followed. It is worth noting that the above provisions are aimed at assisting citizens to realize their rights, including the right to property guaranteed under the Constitution and those provisions and procedure are, as such mandatory.

45. Referring to Article 11(1)(c) of Bangladesh Water and Power Development Boards Order, 1972, argument has been advanced that the said Article, though, requires that every scheme prepared under clause 3 of Article 9 shall be submitted for approval to the Government with a statement of proposal by the Board for the re-settlement or re-housing, if necessary, of persons likely to be displaced by the execution of the scheme no scheme for re-settlement or re housing of the persons likely to be displaced by the execution of the scheme has been made in 'FAP-20' project. It is argued that there is every likelihood that by the implementation of the project, people of the locality will be displaced and a scheme for re-settlement or re-housing of those persons likely to be displaced is a requirement of law.

46. In reply, it is contended from the side of the respondents that an important and considerable provisions in the name of mitigation measure has been incorporated in 'FAP-20' to mitigate the needs and sufferings of all people affected by the execution of 'FAP - 20' in the event of any displacement of people or any other inconvenience that may arise as a result of execution of project.

47. In order to appreciate the contentions raised, it is appropriate to quote the relevant provision of law contained in Art. 11 (1) (c) of the Boards order, 1972 which runs thus:

"11 (1) Every scheme prepared under clause (3) of Article 9 or clause (3) of Article 10 shall be submitted, for approval, to the Government with the following information:-

(a).....

(b)

(c) a statement of proposal by the Board for the re-settlement or re-housing if necessary of persons likely to be displaced by the execution of the scheme".

Article 10 is not relevant for the present purpose. Article 9 has been extracted above and the same, thus, is not quoted here.

48. The respondent in the affidavit-in-opposition filed in Writ Petition No. 1576 of 1994 annexed 1 page photocopy of page No.49 of Revised Technical Assistance Project Proform (TAPP) of 'FPCO', Ministry of Irrigation, Water Development and Flood Control. It is pointed out here that nothing can be gathered or understood about the said Assistance Project. In the affidavit-in-opposition, nowhere is it stated that before going for implementation of "FAP-20" project or even during the implementation stage, the provisions contained in Article 11 of the said Order of 1972 had been complied with and a statement of proposal by the Board for re-settling or re-housing of persons likely to be displaced by the execution of the scheme enjoined in Article 9(1) and (3) of the said Order

of 1972 has been submitted to the Government. Bangladesh Water Development Board got the responsibility and duty also to prepare a comprehensive plan for the re-settlement and re-housing of persons likely to be displaced by the execution of the project at which the Water Board does not appear to have done. The provisions embodied in Article 11, therefore, does not appear to have been followed in implementing "FAP-20" project.

49. The petitioners next challenged the compatibility of the 'FAP-20' project. It is argued that the respondent's attempt to experiment with the people's lives and properties under 'FAP-20' without following appropriate, compulsory and mandatory provisions for adequate accountability would lead to a denial of the rights of the people. It is further urged that the respondents got no legal right to conduct experiment in the name of 'FAP-20' risking the lives and properties of lacs of people including significant changes in the environment and ecology. The Evaluation report, 1993 of FAP, Bangladesh Country Report for the United Nations Conference on Environment and Development (UNCED) Brazil, 1992, the speech made by Mr. Saifur Rahman, former Finance Minister of Government of Bangladesh in the Third Conference of Flood Action Plan in 1993 held in Dhaka and some other documents had been referred to in this context.

50. The 'FAP-20' project is an experimental project for developing controlled flooding mechanism. Annexure-N is Evaluation report, 1993 of Flood Action Plan, Bangladesh. The extract of Civil Engineering aspect of the said report is as follows:

"Because 'FAP-20' is a Pilot Project, because experience with current practice in Water Management Projects indicate a low level of design, implementation and maintenance, and because specially the poor are vulnerable to the effects of possibly unreliable water works, it is entirely appropriate to demand high standards in 'FAP-20' technical experiments.

It appears that 'FAP-20' makes no use of certain aspects of modern planning and design such as risk analysis, sensitivity analysis, integration of operation and maintenance in the design and documentation system. If applications of these aspects of modern planning and design should have been impossible, it would a priori seem irresponsible to move on the implementation".

51. Annexure-L is a Resolution of European Parliament being No. Doc/EN/RE/230/230343 dated 23 June 1993 adopted on 24th June 1993.

52. Resolution No. 5 is hereunder:

"5. Criticizes the fact that the preliminary studies have not sufficiently taken into account the full extent of the harm caused by previous attempts to control floods by constructing embankments

and the positive role of annual river flooding for soil enrichment, navigation, ground water exchange, biodiversity and wetlands, agricultural production and floodplain fisheries.

53. Resolution No. 7 reads thus:

“7. Stresses the urgency of changing the FAP’s classification within the World Bank’s Project Scheme from category B to category A, requiring full environmental assessment for projects which appeared to have significant adverse effect on the environment”.

54. Resolution No. 8 runs as follows:

“8. Calls for EC involvement in the ‘FAP’ only on the following conditions:

- (a) an adequate institutional framework for the FAP should be guaranteed, in which flexibility, an interdisciplinary approach, improved information and an improved learning capacity are key components,
- (b) the full involvement of local communities in project planning, implementation and management in agreement with the World Bank’s own explicit point of view.
- (c) a far-reaching interdisciplinary approach, taking effective account of the implications for the environment and for fisheries in addition to economic and technical aspects,
- (d) The social and economic rights of any people to be resettled must be fully respected.”

55. Resolution No. 11 is quoted hereunder:

“11. Stresses that, for the protection of Urban areas, construction could be started only on condition that there is a provision that maintenance will be carried out adequately”.

56. Annexure-0 is a paper cutting of the speech of Mr. Saifur Rahman, the former Finance Minister, published in the Bangladesh Observer on 18 May, 1993 in the Third Conference on the Flood Action Plan, 1993 held in Dhaka. The Finance Minister in his speech in the Conference questioned the feasibility of the gigantic Flood Action Plan and suggested regional approach in tackling the problem of cataclysmic flooding. The Minister further criticized the multi-million dollar ‘FAP’ programme for its continued concentration and studies. He favoured giving due consideration to environment and all other related issues which might affect the people in the Flood Action Plan.

57. Reference may also be made to a speech delivered by Ms. Matia Chowdhury, Food and Agriculture Minister, Government of Bangladesh on 19 August, 1997 in an

International Workshop on “South Asian Meeting on Flood, ecology and culture: In the context of livelihood struggles of rural communities” held at Bishnapur, a quiet village under Delduar Police Station in the District of Tangail.

The Food and Agriculture Minister speaking in the workshop as Chief Guest said that the debate with the donor is whether the Government would endorse the ready made prescription of the donor to go for building more and more embankments or they would agree to the proposal of the Government for dredging the rivers. The Minister further said the Government considers dredging of rivers and re-excavation of water bodies as the ultimate solution of flooding and the Prime Minister herself is trying to make the funding agency understand the multifarious benefits of the strategy. The Minister in this regard also quoted former Finance Minister as saying that the raising of embankment on the river Manu had endangered the life of the neighborhood.

58. In this context, the Bangladesh Country Report for United Nations Conference on Environment and Development (UNCED), Brazil, 1992, published by Ministry of Environment and Forest, Government of Bangladesh in the month of October, 1991 may, also, be looked into. Some extracts of the Report are given below:-

“Embankments have been employed as one possible solution to controlling floods, and several thousands of kilometers have been built in Bangladesh. The aim of most of these embankments is to modify the water regime to reduce crop losses, allow more intensive land use and, in recent times, the cultivation of higher yielding rice varieties which require some measure of water control.

However, these structures have adversely affected the utilization of resources in other sectors. Embankments can cause severe environmental problems such as (i) impede the reproductive cycle of many aquatic species and thus reduce productivity of inland and to some degree marine fisheries, (ii) induce water logging as tidal rivers silt up after they have been embanked, (iii) induce changes in river morphology, such as increasing scour rates in the embanked areas and consequently increasing deposition rates downstream. Some tidal rivers and creeks in the Khulna area have silted up following construction of embankments (polders) on adjoining land leading to perennial water logging of land inside the polders. Such water logging could induce iron toxicity in soils, and, in some areas, sulphur accumulation leading to extreme soil acidity”.

“Displacement of Inland Capture Fishery

Despite the importance of fisheries in terms of nutrition, employment, and its contribution as an open-access resource, Bangladesh’s inland fisheries have been displaced and disrupted by agriculture, flood control, road embankments, and

other land uses. As a result of these interventions, inland capture landings have been declining at a steady rate since 1983. This economic loss has been offset at the national level by increased marine catches and shrimp culture exports. However, the decline in the inland capture fisheries has significant nutritional consequences for many people, since capture fisheries are a major open-access resource for the poorer segments of the population and often the only source of protein, essential minerals and vitamins. A large number of children in poor families become blind every year because of improper and inadequate diet.”

Relevant portion of the Report is Annexure-G1.

59. Annexure-G is recommendation of the Open Forum on “FAP” organized by the Institution of Engineers of Bangladesh.

Recommendation Nos. 2 and 3 run as under:

“2. Since flooding often results form drainage congestion, canal and river digging/dredging should be examined more favourably,

3. The performance of past flood control and drainage projects should be reviewed thoroughly. Social and environmental impacts of these projects are to be assessed scientifically.

60. Annexure-G4 is a Report of the National Conservation Strategy of Bangladesh published by Ministry of Environment and Forest, Government of Bangladesh. In the said Report, 5.9.2.2 is on “Flood Control and Drainage Projects” which are extracted below:

“1. Operation and Maintenance: Flood control and drainage projects have accounted for about half of the total funds spent on water development projects since 1960. Despite this, the benefits have been less than planned and projected. There are a number of reasons for this, including cost and time overruns (due to a number of factors e.g. land acquisition) and problems in the operation and maintenance of projects. There is a tendency to see projects as being finished when the physical works are complete. Insufficient attention is paid to ensuring adequate water control. Problems in the operation and maintenance of projects have also been common. There have been few in-depth evaluation of flood control and drainage projects to assess the operational and other problems involved and to find the best ways to overcome these.”

61. From the above stated materials on record and also the extract of speech made by the former Finance Minister and the present Food and Agriculture Minister, it seems that the compatibility/viability/feasibility of ‘FAP-20’ is not above question. Previous experience manifested that huge structural projects in the water sector were executed and then left without adequate provisions for their

maintenance and the target achievements, hence, remained too far from realization. Since 1960, a huge fund had been spent on water development project like flood control and drainage project. Despite this, the benefits have been much less than planned and projected. Embankment alignments were sometimes poorly planned leading to failure and frequent retirements. The multiple use of embankments was rarely taken into consideration at the planning stage. Drainage project suffer from severe drainage congestion due to faulty hydrological assessments and the absence of an adequate drainage network and the lack of proper maintenance after the construction of embankments. A common symptom of drainage problem is public cut and these are often so serious that they compromise scheme viability. In this context, it should not be lost sight of that most of the period, since the later part of the year 1958, except for a short interregnum from the year 1972-75, the country was virtually under military rule, sometimes, open, sometimes, concealed and bureaucracy ruling supreme and the people or their representatives having no say in the planning or implementation of developmental programmes, specially those for controlling flood problems. Since, there is democratic Government from the year 1991, it is expected that people friendly developmental schemes, specially for controlling flood problem, would be under taken and implemented in accordance with the laws of the land. To formulate policy is the affairs and business of the Government and Court cannot have any say in the matter. Court can only see whether in the matter of implementation of any scheme, the laws of the land has been violated or not.

62. It is submitted from the side of the petitioners that the natural and ecological changes that would entail due to ‘FAP-20’ project will threaten and endanger two national archaeological resources namely, the “Attia Mosque” and the “Kadim Mamdani Mosque” which are in the list of archaeological resources and protected against misuse, destruction, damage, alteration, defacement, mutilation etc. under the Antiquities Act, 1968 in the spirit of Article 24 of the Constitution.

63. In reply, referring to the relevant paragraph of the affidavit-in-opposition, the learned Advocate for the respondents submitted that there is no chance of any damage to any archaeological resources in the project area due to implementation of physical intervention under the project.

64. Article 24 of the Constitution enshrines that state shall adopt measures for the protection against disfigurement, damage or removal of all monuments, objects or places of special artistic or historical importance or interest. The protection guaranteed under Article 24 of the Constitution to protect the said Attia Mosque and Kadim Hamdani Mosque must be ensured and no damage, whatsoever, must not be done to the said two historical Mosques.

65. It is vigorously canvassed from the side of the petitioners that 'FAP-20' project has raised severe obvious criticisms regarding its environmental and ecological soundness and also committed serious breaches of laws and the same cannot be described as a Developmental project. It is further urged that 'FAP-20' activities is detrimental to the life and property of lacs of people and would deprive the affected people of their "Right to Life" by destroying the natural habitat which are protected under Article 31 and 32 of the Constitution and the Government also got no right to conduct experiment on people's life, property and profession in the name of a project. The question is whether state has a right to conduct experiment on people's life, property and profession disregarding the existing laws of the land.

66. The right or power of a sovereign state to appropriate private property to particular use for the purpose of promoting the general welfare is called, in America, "Eminent Domain". State necessity or need for taking the particular property of a citizen is the very foundation for the exertion of the power of "Eminent Domain". The term "Eminent Domain" was coined by Hugo Grotius in his Treaties "De Jure Belliet Pacis" in 1625. Cooley in Constitutional Limitation Volume-II page 1110 states:

"The definition implies that the purpose for which it may be exercised must not be a mere private purpose. The right of Eminent Domain does not imply a right in the sovereign power to take the property of one citizen and transfer it to another even for a full compensation where the public interest will in no way be promoted by such a transfer".

The said doctrine was adopted in the famous "Declaration of Rights of Man" after the French Revolution that "the individual could be dispossessed of his property if the public interest so required. This declaration even speaks in precise terms of "the public need".

Law provides for paying just compensation for taking the property of a citizen for state necessity or need in the exercise of power of "Eminent Domain". In United States of America vs Iska W. Carmack 329 U.S. 230-248 (91 Law Edition) of United States Supreme Court Report page 209 it is clearly posited that the fifth Amendment postulates that private property cannot be taken for public use without just compensation. The Supreme Court of United States thus:

"The Fifth Amendment to the Constitution says "no shall private property be taken for public use, without just compensation". This is a tacit recognition of a pre-existing power to take private property for public use, rather than a grant of new power. It imposes on the Federal Government the obligation to pay just compensation when it takes another's property for public use in accordance with the federal sovereign power to appropriate

it. Accordingly, when the Federal Government thus takes for a federal public use the independently held and controlled property of a state or of a local subdivision, the Federal Government recognizes its obligation to pay just compensation for it and it is conceded in this case that the Federal Government must pay just compensation for the land condemned."

67. It must be borne in mind that the "Eminent Domain" is restricted or limited by the constitutional fiats like Fundamental Rights guaranteed under the Constitution. 'FAP-20' is an experimental project for controlling flood. In the event of undertaking of such experimental project, payment of adequate and Just compensation to all the persons affected directly or indirectly or casually, are to be ensured and all risks, damages, injuries etc. must be covered. Sufficient guarantee must be integrated with the project from the initial stage and genuine people's participation of the affected people must be ensured and that must not be a public show. "Eminent Domain" does not authorize the state to act in contravention of the laws of the land in planning and implementing the project. Strict adherence to the legal requirement must be ensured so that people within and outside the project area do not suffer unlawfully. No person shall be deprived of his property except under the law of the land; otherwise it would be subversive of the Fundamental principles of a democratic Government and also contrary to the provisions and spirit of the Constitution.

68. It is significant to note here that the project called "Jamuna Multipurpose Bridge Project" has drawn detailed procedure for re-settlement of the displaced and affected persons and perceived the same as a developmental programme from the inception of the project. "Jamuna Multipurpose Bridge Authority" had chalked out "Revised Re-settlement Action Plan", shortly, 'IRRAP'. But in 'FAP-20' project, no plan by the authority for re-settlement/re-housing of displaced and affected persons directly or indirectly or casually appears to have been undertaken. The people under the 'FAP-20' project got the fundamental right as enshrined under Article 31 of the Constitution to enjoy the equal protection of law and to be treated in accordance with law. It need be stated again that no property can be acquired and no people can be adversely affected in the name of developmental project, here the 'FAP-20' project, without taking adequate measures against the adverse consequences as well as the environmental and ecological damage.

69. The petitioners have alleged that environmental hazard, damage and ecological imbalance will be caused by the activities of 'FAP-20'. In the case of Dr. Mohiuddin Farooque vs. Bangladesh and others being Civil Appeal No. 24 of 1995 arising out of judgement and order dated 18.8.1994 passed by the High Court Division in Writ Petition No. 998 or 1994, 49 DLR (AD) 1-1997 BLD (AD) 1, A.T.M. Afzal, C.J. has dwelt at length on the growing concern and

global commitment to protect and conserve environment irrespective of the locality where it is threatened. In the same case B.B., Roy Chowdhury, J. observed:-

“Article 31 and 32 of our Constitution protect right to life as Fundamental Right. It encompasses within its ambit, the protection and preservation of environment, ecological balance, free from pollution of air and water, sanitation without which life can hardly be enjoyed. Any act or omission contrary there to will be violative of the said right of life”.

70. Life cannot be sustained without its basic necessities such as food and shelter and it cannot, also, be enjoyed fruitfully without all facilities of health care, education and cultural enjoyment and all the above requirements of life cannot be had without proper means of livelihood. In that context, the question arose whether right to life includes right to livelihood. In the advanced economically developed countries known as “Welfare State”, Government provides social security benefits to the citizens who have no means of livelihood due to unemployment and other reason. The concept of the Laissez faire of the Nineteenth century arose from a philosophy that general welfare is best promoted when the intervention of the State in economic and social matters is kept to the lowest possible minimum. The rise of the “Welfare State” proceeded from the political philosophy that the greater economic and social good of the greater number requires greater intervention of the Government and the adoption of public measures aimed at general economic and social welfare.

71. Article 21 of the constitution of India is similar to Article 32 of our Constitution. Article 21 of the Constitution of India enjoins: “No person shall be deprived of his life or personal liberty except according to procedure established by law”. The Indian Supreme Court in the case of Olga Tellis and others vs. Bombay Municipal Corporation and others, AIR 1986 SC 180, interpreted Article 21 of the Indian Constitution in the following terms:-

“The sweep of the right to life conferred by Art. 21 is wide and far-reaching. It does not mean merely that life cannot be extinguished or taken away as, for example, by the imposition and execution of the death sentence, except according to procedure established by law. That is but one aspect of the right to life. An equally important facet of that right is the right of livelihood because, no person can live without the means of living, that is, the means of livelihood. If the right to livelihood is not treated as a part of the constitutional right to life the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation. Such deprivation would not only denude the life of its effective content and meaningfulness but it would make life impossible to live. And yet, such deprivation would not have to be in accordance with the procedure established

by law, if the right to livelihood is not regarded as a part of the right to life. That, which alone makes it possible to live, leave aside what makes life livable, must be deemed to be an integral component of the right to life. Deprive a person of his right to livelihood and you shall have deprived him of his life”.

72. In our jurisdiction, this question as to the meaning of right to life was raised for the first time in the case of Dr. Mohiuddin Farooque vs. Bangladesh and others, 48 DLR HCD 438 to which one of us (Kazi Ebadul Hoque, J. was a party. In that case after discussing various decision of different jurisdictions specially of the Supreme Court of India it was held:

“Right to life is not only limited to the protection of life and limbs but extends to the protection of health and strength of workers, their means of livelihood, enjoyment of pollution-free, water and air, bare necessities of life, facilities for education, development of children, maternity benefit, free movement, maintenance and improvement of public health by creating and sustaining conditions congenial to good health and ensuring quality of life consistent with human dignity”.

73. In that case no question of deprivation of life for want of livelihood was involved. But in the instant cases before us, the question is whether right to life under Articles 31 and 32 of the Constitution would be adversely affected by the deprivation of livelihood of the citizens. It has already been noticed that section 28 of the Embankment and Drainage Act, 1952 provides for payment of compensation for injuriously affecting certain rights of inhabitants upon which their livelihood depends. This provision, thus, recognizes right to livelihood of the citizens of the country. In the facts and circumstances of these two cases, it is clear that livelihood of some inhabitants of ‘FAP-20’ project area dependant on fishing would be adversely affected. We, thus, find that life of those persons would, ultimately, be affected due to the deprivation of their such livelihood. So, we are of this view that right to life under Articles 31 and 32 of the Constitution also includes right to livelihood. Since the aforesaid provisions of law has provided for compensating such adverse affect to the livelihood of the inhabitants of the ‘FAP-20’ project area, there is no question of violation of Fundamental Right.

74. In a Pilot Project, although, positive targets are expected but that would not automatically over-rule the potential of negative consequences or even failure of the project. Admittedly, ‘FAP-20’ is an experimental project. In the case of Shehla Zia vs. WAPDA, PLD 1994 (SC) 693, referred to from the side of the petitioners, high tension electric wires and grid station near and over residences created possibilities of electromagnetic field injurious to human health. The Supreme Court of Pakistan held:

“In this background if we consider the problem faced by us in this case, it seems reasonable to

take preventive and pre-cautionary measures straight away instead of maintaining status-quo because there is no conclusive findings on the effects of electro-magnetic field on human life. One should not wait for conclusive finding as it may take ages to find out and therefore, measure should be taken to avoid any possible danger and for the reason one should not go to scrap the entire scheme but could make such adjustment, alterations or additions which may ensure safety and security or at least minimize the possible hazards (PP 710-711).”

The Compartmentalization Pilot Project, ‘FAP-20’, being an experimental project, precautionary measure are needed to be integrated into the project to ensure that no citizen suffers damage from an act of the authority save in accordance with law.

75. Turning now to the question how far the judiciary can intervene in such mater. In S.A.D.E. Smith’s “Constitutional and Administrative Law” Fourth Edition, Page 562 as referred to by Dr. Mohiuddin Farooque, it is stated:

“Action taken by a public authority not only runs the risk of being ultra vires in substance but may in certain cases be ultra vires in form: Certain powers are exercisable only subject to procedural safeguards enshrined in the enabling statute. The relevant Act may require that some person or organization be consulted before action is taken or an order made. Notice of intention to act may have to be given in a particular form or by a specified date. What happens if the procedure laid down is not complied with by the authority? First the courts will classify the procedural or formal requirement as mandatory or directory. If a requirement is merely directory then substantial compliance with the procedure laid down will suffice to validate the action’ and in some cases even total non-compliance will not affect the validity of what has been done. If a mandatory requirement is not observed, then the act or decision will be vitiated by the non-compliance with the statute. This does not mean that the act or decision has no legal effect and can be ignored or treated as void. The House of Lords has stressed that the use of such terms as void and voidable has little practical meaning in administrative law where the supervisory jurisdiction of the High Court operates to ensure the proper exercise of powers by public authorities. Non-compliance with a mandatory procedural requirement results in the act or decision being susceptible to being quashed by the High Court which will then make whatever order to the public authority if sees as appropriate to remedy the unlawful action taken”.

In this context, we like to quote a passage by his Lordship Mr. A.T.M. Afzal C.J. from a paper under the Heading “Country Statement-Bangladesh” presented at the Regional Symposium on the Role of Judicial in Promoting the Rule of Law in the Area of Sustainable Development, Colombo, Sri Lanka, 4-6 July 1997:

“It is worth noting that many sectoral laws explicitly contain provisions to inform local people about projects and to both invite and resolve objections raised. For example, the 1927 Forest Act requires the inquiry and settlement of all private claims when restrictions are to be imposed when the status of a public forest is changed through re-classifying as a Reserved or Protected Forest. The 1920 Agricultural and Sanitary Improvement Act and the 1952 Embankment and Drainage Act explicitly guarantee the rights of local populations and interest-holding parties in proposed project areas to examine and raise objections to the project being considered. Furthermore, neither legal rights nor interests can be extinguished without appropriate compensation. Many of the adverse local social and environmental impacts induced by development projects could be avoided or minimized if the procedures of law were followed. Some laws contain inter sectoral restrictions on development projects which are neither followed nor enforced. An example of this is the Conservation of Fish Act, 1950 which provides in the schedule a long list of rivers and their segments where no water control measure can be undertaken, so that natural spawning and feeding grounds of fish remain undisturbed. These examples prove that it is a tragedy when public agencies flout their own laws and then chase the people for violating the law to justify the failures of their so called development projects. In such situations, judicial review of administrative action would be effective in upholding rule of law”.

76. Judicial review of the administrative action should be made where there is necessity for judicial action and obligation. Such action must be taken in public interest. The purpose of Judicial review is to ensure that the citizen of the country receives protection of law and the administrative action comply with the norms of procedure set for it by laws of the land. Judicial Power is the “safest possible safeguard” against abuse of power by administrative authority and the judiciary cannot be deprived of the said power.

77. It has already been noticed that Article 31 of our Constitution gives the right to protection of law to the life, liberty, property etc., Article 32 ensures that no one can be deprived of life and liberty except in accordance with law and thus protects life from unlawful deprivation. Article 40 gives every citizen right to enter upon lawful profession or occupation and Article 42 protects right to property. The petitioner of each of the writ petitions alleges the violation of the Fundamental Rights guaranteed under Articles 31, 32 40 and 42 of the Constitution. All the above Fundamental Rights are subject to law involved in the matter. In the event of violation of Fundamental Right or even any violation of the law of the land, this Court under judicial review of the administrative action, can interfere with unlawful action taken by any administrative authority. It has, already, been noticed that ‘FAP-20’ activities have been undertaken by the respondents in accordance with

the law of the land regarding the adoption and approval of the scheme but violations of some provisions of the law of the land in implementing the project is found but the Fundamental Rights stated above do not appear to have been violated.

78. Now, the question is whether this Court will declare the activities and implementation of 'FAP-20' project to be without lawful authority for the alleged violation of some of the provisions of the aforesaid laws of the land.

79. From the materials on record it appears that 'FAP-20' project is a developmental project, although experimental, aimed at controlling flood which regularly brings miseries to the people of the flood prone areas of the district of Tangail specially during the rainy season of the year. A substantial amount appears to have been spent and the project work has been started long before and also partially, implemented. Success and not the failure of the project is expected. In the event of any interference into the 'FAP-20' activities, the country will be deprived of the benefits expected to be derived from the implementation of the scheme and also from getting foreign assistance in the development work of the country and, in future, donor countries will be apprehensive in coming up with foreign assistance in the wake of natural disaster. At the present stage of the implementation of the project, it will be unpractical to stop the work and to undo the same. But in implementing the project, the respondents, cannot with impunity, violate the provisions of laws of the land referred to and discussed above. We are of this considered view that 'FAP-20' project work should be executed complying with the aforesaid requirements of laws of the land.

80. In the facts and circumstances and having regard to the provisions of law, we propose to give some directions to the respondents for strict compliance of the same in the greater public interest:

The respondents, thus, are directed:

- (a) to comply with the provisions and procedures contained in section 28, 30, and 31 of The Embankment and Drainage Act, 1952 (East Bengal Act 1 of 1953).
- (b) to comply with the provisions contained in Article 11(1)(c) of Bangladesh Water and Power Development Boards Order, 1972 (President's Order No. 59 of 1972) for re-settlement and re-housing of persons actually displaced from their residences by the execution of the scheme, that is, implementation of 'FAP-20' Project.

- (c) to secure the archaeological structure (site) of the 'Attia Mosque' and 'Kadim Hamdani Mosque' falling within the 'FAP-20' Project area from any damage, disfigurement, defacement and injury by the project activities.

and

- (d) to ensure that no serious damage to the environment and ecology is caused by 'FAP-20' activities

81. Before parting with the matter, we are inclined to observe that the people of Bangladesh live with flood and fight with flood for centuries. The people of Bangladesh face the painful experience of flood causing colossal damage to crops and properties. Faced with the peculiar geographic and climatic situation, it becomes difficult task to control flood and other catastrophes that fall on the people of Bangladesh. Flood water come from outside, no action can be effective until the upstream flow can be checked and controlled. Under the International Law, the upstream states got a tremendous responsibility to play part in regulating and taking integrated approach in tackling flood related hazards and the burden of the load of flood cannot be placed on Bangladesh alone.

82. Before concluding, we express our deep appreciation to Dr. Mohiuddin Farooque and his Organization "Bangladesh Environmental Lawyers Association", "(BELA)" who are championing the cause of the public and the downtrodden people of the community, who as helpless citizens, cannot ventilate their grievances before the courts of law and, also, making efforts to protect and conserve the environment and ecology of the country and "BELA" is coming forward with Public Interest litigation (PIL) before the courts of law.

83. In the result, both the Rules are made absolute-in-part. The respondents are allowed to execute and implement the 'FAP-20' Project activities subject to the strict compliance with the directions made above.

84. Having regard to the facts and circumstances of the case, there will be no order as to costs.

KAZI EBADUL HOQUE, J:

I agree
F-6-FAP-JUD
C:\PETITION\FAP-JUD

DECISION NO. A86/99

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of three appeals under section 120 of the Act

BETWEEN **RAVENSDOWN FERTILISER CO-OPERATIVE LIMITED**
(RMA 506/94 and 935/95)

AND **GARY MELVYN SMITH**
(RMA 509/94)

Appellants

AND **OTAGO REGIONAL COUNCIL**
Respondent

BEFORE THE ENVIRONMENT COURT

His Honour Judge R J Bollard (presiding)

Environment Commissioner I G C Kerr

HEARING at **DUNEDIN** on 15, 16, 17, 18, 19, 22, 23 and 24 June; 21, 22, 23 and 24 September, 1998; 25, 26, 27, 28 and 29 January; 3,4 and 5 February; 14 and 15 April, 1999

APPEARANCES

N S Marquet and S J Anderson for Ravensdown Fertiliser Co-operative Limited

G M Smith, appellant in person

P J Page for Otago Regional Council

T Van Kampen for Ravensbourne Residents Association; and on his own behalf as a submitter

A R McKeown on behalf of B McKeown, a submitter

M J M Williams for West-Harbour Community Association Inc.

R Gibb on behalf of herself and other named submitters

A H Borick for Dunedin Ratepayers and Householders Association (leave to withdraw)

INTERIM DECISION

INTRODUCTION

In these proceedings Ravensdown Fertiliser Co-operative Limited (“Ravensdown” or “the Company”) seeks amendments to various conditions attached to coastal and discharge to air permits granted on applications lodged by it under the Resource Management Act 1991 (“the RMA” or “the Act”) with the Otago Regional Council (“ORC” or “the Council”) in respect of the company’s fertiliser works at Ravensbourne, near Dunedin (“the works”). The works lie adjacent to the Otago Harbour (“the Harbour”). The other appellant, Mr G M Smith, seeks to overturn or vary the Council’s decision in favour of Ravensdown as to discharges to air, on the basic grounds that, on the one hand, ORC’s decision was inadequate to protect his property and the residential environment of Ravensbourne generally, or, on the other, that the Company’s proposals, as framed, lack sufficient merit to warrant consent.

At the outset of the hearing, a set of conditions was submitted as to the coastal permits aspect agreed between Ravensdown and ORC. Mr Smith, supported by other objecting parties or their representatives, indicated that the main thrust in opposition was directed not to that aspect, but to the discharge to air aspect. Even so, it was contended that if the Court should conclude that the grant of the discharge to air permits should be upheld, with (say) more stringent conditions, any easing of the coastal permit conditions, in order to achieve appropriate levels or standards for the discharges to air, would be wrong in principle. In other words, it was said that the water-related effects needed to be of minimal significance in relation to the public use and enjoyment of the harbour, while at the same time the ambient air quality experienced by the appellant and other residents of Ravensbourne needed to be properly safeguarded, so as to avoid adverse effects upon those residents and their properties via the Company’s discharges to air. If fulfilment of either (or both) of these matters could not be reasonably assured, then, according to the appellant and the other objecting parties, the Company should be refused consent and effectively given to understand that the plant’s continuing operation would not accord with the Act’s purpose, and would be insufficient to meet modern environmental expectations.

Another matter was raised late in the hearing by Mr M J M Williams, appearing for West-Harbour Community Association Inc., by way of formal challenge to the Court’s ability to determine an important part of the Company’s case on the basis postulated in evidence adduced for the Company. For reasons later appearing, we do not consider that we are without jurisdiction to determine the case as presented on its merits. Indeed, it is desirable that these long-standing and protracted proceedings should be determined by this Court without further delay.

The total hearing time was lengthy - having comprised three main sitting phases, ranging by necessity over several

months, plus an extra short sitting to hear final submissions. In the course of the hearing phases the Court undertook two inspections of the works and the wider Ravensbourne area by arrangement with the parties. The submissions and evidence were predominantly focussed upon matters affecting the air quality issue – although some evidence was adduced, both for Ravensdown and the Council, for the purpose of demonstrating that upholding the coastal permits, on the terms proposed, was appropriate. For convenience, we will address the coastal permits aspect first, before passing to consider the critical discharges to air question. Before doing so, however, it will be helpful to commence with a brief historical outline, followed by a description of the current plant and its operation. In view of the large volume of material placed before us, both in oral and documentary form, we have endeavoured to identify and discuss those matters which, in our judgment, are the most prominent - without overlooking other matters alluded to by one or more of the parties during the hearing, but which we have been unable to elaborate on for the sake of containing within reasonable bounds an already complex and detailed decision.

HISTORICAL BACKGROUND

The fertiliser works have a long history. They were established originally for the purpose of manufacturing sulphuric acid and superphosphate, and for the storage and dispatch of superphosphate and other fertilisers to the farming areas of Otago and Southland. The undertaking was opened on 28 January 1931, at the instance of Dominion Fertiliser Co Ltd, founded in August 1929. Operations have continued at the site ever since, albeit with alterations and modifications – that is, for over 68 years. Ravensdown was formed in 1979 out of the fertiliser division of the former joint enterprise of Kempthorne Prosser and Dominion Fertiliser .

Expressed in dollars, the original capital cost of the factory was \$452,400. Allowing for significant upgrading and updating over the years, particularly in recent decades, the replacement cost of the buildings and plant currently existing amounts to approximately \$46,000,000 (assessed at 31 May 1998).

For reasons which involved general economic circumstances in the farming sector and closure of another manufacturing plant known as the Seadown Works, Ravensdown has, since the earlier part of 1986, supplied superphosphate and derivatives to many parts of the South Island, ranging from the mid-Canterbury district of Mayfield/Hinds to the extremes of Southland.

Residential occupation within the general area of Ravensbourne stretches back to before 1900. The area lies broadly to the north-east on the coastal slopes between Ravensbourne Road, (which runs generally near to the harbour shoreline), and the more elevated bush-clad areas behind, including Burns Park Scenic Reserve. Growth has occurred over time, with today’s population standing at around 1400. The closest residential properties to the

Company's site lie immediately across Ravensbourne Road, not more than 30m to 40m away boundary to boundary. Adjacent to the works at the eastern end lies a recreational reserve known as Moller Park.

Although residential activity preceded the works' establishment in 1931, virtually all of today's inhabitants have come to reside in the area with the works present. It is unlikely in our opinion that many of those inhabitants on arrival would have been unaware of there being a major continuing industrial operation at the relevant foreshore location, bearing in mind that the site has constantly been occupied by a significant complex of plant and buildings that have been actively maintained in use, and from time to time upgraded.

PRESENT PLANT AND OPERATIONS

Detailed evidence as to the present plant and operation was led from the Company's Group Technical Manager, Mr S A Clark, whose responsibilities embrace all engineering and technical aspects of Ravensdown's operations. In order to set the scene for our later discussion and evaluation of relevant issues, it will be helpful to describe the nature of the plant and operations in some detail, drawing mainly from Mr Clark's evidence.

The activities undertaken by Ravensdown are the manufacture, storage and sale of fertilisers. The major processes are the manufacture of sulphuric acid and the manufacture of superphosphate. Both processes require water for cooling and gas scrubbing respectively, and give rise to discharges to air and water.

Bulk Material Intake

All raw materials and imported fertilisers are transferred to the works by belt conveyor from the Ravensbourne wharf, or by road transport from other Ravensdown works. The materials discharged at the wharf include phosphate rock, sulphur, ammonium sulphate, diammonium and monoammonium phosphates, potassium chloride and various granulated fertilisers.

Sulphuric Acid Plant

The sulphuric acid plant was constructed by Lurgi Chemie of Germany. Production commenced in September 1967. The production rate is dependent on the demand for fertiliser and has varied accordingly between 40 and 200 tonnes per day. Current demand is relatively buoyant, so that the daily output is at or near the higher end of the range. The design parameters, emissions levels and acid plant siting were approved by the Health Department following extensive dispersion testing at the site.

Essentially, the process for manufacturing sulphuric acid comprises the combustion of sulphur to produce sulphur dioxide, oxidation of the sulphur dioxide to sulphur

trioxide, and absorption of the sulphur trioxide in water to produce sulphuric acid. The solid sulphur is recovered from a covered storage area by front-end loader and transported by belt conveyor to an above-ground melter, fitted with steam heated coils, and an agitator. The molten sulphur is filtered to remove solid impurities, then pumped to the sulphur furnace which operates at temperatures of up to 1,000 °C. The sulphur is sprayed into the furnace where it spontaneously ignites, providing a gas stream containing approximately 8.5% of sulphur dioxide by volume. The gas steam is cooled to 440 °C in a fire tube boiler which raises high pressure steam. The steam is used to generate up to 1.7 MW of electrical power that is supplied to the other plants within the works, with any excess sold to United Electricity.

The cooled gas then passes to a converter, where the sulphur dioxide is converted to sulphur trioxide over a vanadium pentoxide catalyst. The conversion releases significant quantities of heat, thus increasing the gas temperature. The conversion takes place in four stages, with cooling of the gas between each stage. The gas from the converter is further cooled, then contacted with 98.5% sulphuric acid in an absorbing tower. The sulphur trioxide is absorbed in the sulphuric acid, thus increasing its concentration. The concentration is restored to 98.5% by the addition of water, and by blending with less concentrated acid. These additions increase the volume of acid in the pump tank. The acid produced is transferred to the production tank and then pumped to storage. Three 500-tonne capacity storage tanks are located within the acid plant, with a further 2,000-tonne tank being located at the northern end of the works. The remaining gas, principally nitrogen and oxygen, is discharged to the atmosphere via a 55-metre high stack. The discharge also contains residual sulphur dioxide, traces of sulphur trioxide, and sulphuric acid mist.

Considerable quantities of heat are generated by the drying of the combustion air for the plant and the absorption of the sulphur trioxide. Temperature reduction is achieved by cooling the acid with seawater in a plant heat exchanger. After passing through the exchanger, the seawater is discharged into the harbour. The discharge also contains blow-down from the acid plant boiler, rinse water from the ion exchange plant, cooling water from various pumps, and stormwater from the acid plant buildings and yards. As earlier noted, the steam raised in the acid plant is used to generate electricity. At the exhaust of the turbine the steam is condensed and returned to the boiler. Seawater is used for cooling in the condenser. After passing through the condenser, the seawater is discharged into the harbour.

Phosphate Rock Grinding

The phosphate rock used to make superphosphate is typically a blend of two or more different phosphate rocks imported from Nauru, China and Morocco. The rocks are recovered from storage by front-end loader. They are

blended volumetrically and transported by conveyor-belt to feed bins. Two Bradley air-swept ring roller mills are used to grind the phosphate rock. A stream of air carries the ground rock from the mill where it is separated in a cyclone, the air being returned to the mill base. To control humidity, a proportion of air is withdrawn continuously, passed through a bag filter to remove rock dust particles, and discharged to the atmosphere. Screw conveyors transport the ground rock from the cyclone to the storage bins.

Superphosphate Plant

The production of superphosphate involves the reaction of sulphuric acid and phosphate rock to convert the insoluble phosphate in the rock to soluble phosphate which can be utilised by vegetation and thus enhance pasture growth.

The ground phosphate rock, sulphuric acid, scrubber effluent and/or water are all fed into a Broadfield mixer where the major proportion of the reaction takes place. The mix discharges as a slurry onto a slow-moving slat conveyor where the mix solidifies as the reaction continues. After a period of approximately 25 minutes the mix is cut out by a rotary cutter.

In the course of the reaction a number of volatile compounds develop. These include carbon dioxide, sulphur dioxide, water vapour, silicon tetrafluoride, hydrogen sulphide and various organic sulphur compounds. For reasons of occupational health, these gases are collected and scrubbed with fluosilicic acid, seawater and sodium hypochlorite, to discharge to the atmosphere through a 40-metre high stack known as the den stack.

The scrubber consists of three stages. In the first stage the gas is scrubbed with fluosilicic acid to absorb the silicon tetrafluoride. To control the concentration of the fluosilicic acid, fresh water is added continuously to the scrubber. This displaces an approximately equal volume of silicic acid, which is then used to dilute the sulphuric acid in the superphosphate plant. In the third stage, the gas is further scrubbed with seawater, which is discharged to the harbour via a 150mm diameter multi-port diffuser (known as Outfall 6a) laid on the seabed between the seawall abutting the works' site and the wharf. Sodium hydroxide and sodium hypochlorite are utilised in a fourth stage to remove organic sulphur compounds. At regular intervals, the contents of the fourth stage scrubber sump are pumped over to the third stage scrubber and discharged additionally through the multi-port diffuser into the harbour.

From its solidified state, the fresh superphosphate is granulated and then discharged from the granulating drum. The discharging superphosphate is screened to separate the desired size of particles, while the larger particles are broken up and returned to the granulation drum. The same

compounds evolved from the Broadfield mixer are also evolved from various plant items within the granulation plant. Again, for reasons of occupational health, these gases are collected and discharged directly to the atmosphere. The granulated superphosphate is conveyed to storage where it remains in heaps for a minimum of ten days. Chemical reactions occur spontaneously within the heaps as final "curing" takes place. Incidental gas given off within the storage area escapes via roof vents, again in the interests of occupational health.

Fertiliser Despatch Plants

Two despatch plants handle superphosphate and all imported fertilisers, either singly or blended to the client's requirements. All fertilisers are recovered from covered storage by front-end loader and transported to the despatch plant. The fertiliser is screened to remove any oversize material which is subsequently broken up and returned to the screen. The screened fertiliser is stored in bins prior to loading onto road vehicles or rail wagons.

General Site

On-site vehicle movements occur within sealed surface areas. Nevertheless, in transferring fertiliser from storage to the despatch plants by front-end loader, some spillage occurs which can contaminate stormwater during periods of rain. In order to reduce this potential, the sealed surfaces around the works site are swept. Stormwater from buildings and yards is discharged into the harbour from various points on the site. Prior to discharge, the stormwater passes through mud tanks to remove suspended solids. In wet weather, the wheels and chassis of trucks leaving the site are washed to reduce potential for fertiliser dust deposition on public roads. The water from truck washing is discharged into the harbour by way of an open drainage channel passing through the north-eastern end of the site.

NATURE AND CONTROL OF DISCHARGES

Bulk Intake Activities

Discharges to air consist, in part, of fugitive emissions of dust from phosphate rock and hydrogen sulphide from sulphur. Fugitive dust can be generated at a number of points in the intake system - for example, when air is displaced, or material is transferred from one conveyor to another. To limit the spread of fugitive dust, wind netting has been placed around the top portion of each hopper to reduce wind velocity over the hopper. The hopper conveyors are also enclosed with wind netting for three of the five hoppers.

While other efforts are taken to reduce generation of fugitive dust, including fitting of fabric covers on doorways and in the treatment or handling of materials, dust can still escape from under eaves and from roof vents.

Hydrogen sulphide may be present in bulk sulphur as the result of a reaction between the sulphur and the steel of the ship's hold. When the sulphur is unloaded, the hydrogen sulphide may be released to the atmosphere and give rise to a degree of odour. Ravensdown applied for and was granted a discharge to air consent in relation to the unloading operation. That application too was the subject of an appeal to this Court, but those proceedings were settled – refer Decision No. C38/99 recording the basis of determination and outcome.

Sulphuric Acid Plant

The principal discharge from the sulphuric acid plant comprises rates of up to 28,434 m³/hr. The discharge rate varies depending on the plant load. The temperature is typically about 65 °C. The exhaust may contain up to 8.2 gm/m³ of sulphur dioxide, and up to 0.035 gm/m³ of sulphur trioxide and sulphuric acid mist. According to Mr Clark, these emissions from the acid plant are controlled primarily by careful application of process parameters.

The discharge of sulphur dioxide is controlled by ensuring that the temperature of the gas stream entering each catalyst bed is within the optimal range. On each occasion that the catalyst is screened, a sample of the catalyst is sent to the manufacturer for testing for activity, mechanical strength and chemical composition. We were informed that the sulphur dioxide concentration in the gas discharge from the plant is monitored continuously with an infra-red spectrophotometer; and it is also analysed and calculated manually by the works' laboratory at weekly intervals.

The discharge of sulphur trioxide is controlled by ensuring that the concentration and temperature of the absorbing acid are within the optimal range. Both the temperature and concentration are recorded continuously and monitored by an operator, whose responsibility it is to take corrective action in case of any deviation from the optimal conditions. The works' laboratory also routinely checks the acid concentration.

Sulphuric acid mist is formed in the plant when moisture in the gas stream reacts with sulphur trioxide. Typically, the acid mist particles are smaller than 10 micrometers. Candle filters have been installed to remove acid mist from the gas stream prior to discharge. The removal efficiency is approximately 100% for particles larger than 3 micrometers, and ranges from 92% to 99.95% for smaller particles. According to Mr Clark, the gas discharged from the plant is essentially free of acid mist. Steam vented from the molten sulphur tanks is not controlled in any way at present, because it is regarded as a relatively minor source of hydrogen sulphide. It was stated, however, that this is intended to be the subject of future review.

At intervals during the year, and for plant start-up, a 146 kW boiler is operated. The boiler is fired with a heavy fuel oil containing 2% sulphur. In total, the boiler operates for

approximately 330 hours per annum. The combustion products are discharged into the atmosphere through a 19.4-meter high stack. Safety valves on the boiler, the de-aerator and the low-pressure steam system, may lift from time to time, thereby discharging a cloud of steam to the atmosphere.

Phosphate Rock Grinding

The only discharge from the phosphate rock grinding plant is the moist air vented from each of the two mills to control humidity of the air circulating through the mills. Phosphate rock suspended in the air vented from the mills is removed in reverse pulse jet bag filters. The removal efficiency is 100% for particles larger than 5 microns, and typically 95% to 99% (plus) for particles smaller than 5 microns.

According to Mr Clark, recent measurements on the dust concentration in the air discharged from the bag filters averaged 35 and 37 mg/m³ respectively for the nos. 1 and 2 mills, with upper ranges of 73 and 75 mg/m³ respectively. These results fall well within the company's clean air licence limit of 500 mg/m³. We observe that the company's licence granted under the former Clean Air Act 1972 remains current pending the outcome of these proceedings under s.124(1) of the RMA, the Company having applied to the Council for the permits now at issue 6 months before expiry of the licence.

Superphosphate Plant

The principal discharge from the superphosphate plant consists of air vented from the Broadfield mixer containing steam, carbon dioxide, fluoride as silicon tetrafluoride, hydrogen sulphide, sulphide, sulphur dioxide, and traces of reduced sulphur compounds.

As earlier indicated, the air vented from the Broadfield mixer is scrubbed prior to discharge to the atmosphere. Fluosilicic acid is used to remove the silicon tetrafluoride in the first two stages of the scrubber, followed by a third stage using seawater. A mixture of sodium hydroxide and sodium hypochlorite is then used to remove the hydrogen sulphide and reduce sulphur compounds in a two-stage scrubber. The fluosilicic acid from the first two stages of the fluoride scrubber is cooled and re-used to dilute the sulphuric acid in the superphosphate plant. Effluent from the third stage of the fluoride scrubber and from the two stages of the odour scrubber is discharged to the harbour.

The major contaminant of the effluent is fluoride (as fluosilicic acid saturated with silica). It is milky white in appearance due to the presence of precipitated silica. On one day each week the effluent is sampled continuously throughout the entire period of operation of the superphosphate plant and analysed for fluoride, pH, dissolved phosphorous and suspended solids. Every six months the sample is analysed for zinc, cadmium, chromium and copper.

Two secondary discharges vent to air from various points around the granulation plant. These discharges contain primarily steam with traces of silicon tetrafluoride and reduced sulphur compounds. The fugitive discharge from stockpiled superphosphate decreases with time as the chemical reactions proceed more and more slowly and ultimately cease. Since superphosphate is produced on up to six days per week, the storage buildings contain product of varying ages, all evolving gases at varying rates. Emissions through the roof vents in the storage areas are dispersed by airflow over the exterior of the building which is influenced by prevailing wind conditions.

Fertiliser Despatch

The principal discharge to air from the despatch process is fertiliser dust. Sources of fugitive dust include plant feeder bins, conveyor transfer points, vibratory screening, and the tipping points from the final conveyors. During the loading of trucks, the fertiliser is discharged into each receptor vehicle via an extending chute. The chute is lowered to the floor of the tray of the truck prior to loading commencing and slowly raised as the fertiliser gathers in volume within the tray. Truck loading occurs within the despatch plant buildings to contain dust generation.

General Site

Vehicle movements on the site are conducted on sealed surfaces. Nevertheless, in the course of fertiliser transfer from storage areas to the despatch plants by front-end loader, some spillage occurs which is liable to be ground to dust by vehicle wheels. The passage of large vehicles and wind can suspend the dust, thus facilitating emanation beyond the immediate area. To limit the potential for spreading of wind-blown dust, a vacuum road sweeper is employed to sweep the sealed areas around the site. We were informed that the Company has in place a comprehensive on-site management programme designed to ensure that high standards are maintained in controlling dust generation. There was some doubt, however, whether the loaded trays of trucks leaving the site are always covered. Given the works' location, it is plainly important that departing loaded vehicles are properly covered as a matter of uniform procedure.

Site Outfalls

Stormwater and wash-water is discharged from a number of outfall points, including the open drain at the northern end of the site. More particularly, they are as follows:

Outfalls 1 and 2

Outfall 1 is a 910mm diameter concrete pipe carrying the following discharges:

- Seawater outflow from the acid coolers, turbine oil coolers and the alternate air cooler.

- Blow-down from the acid plant boiler.
- Freshwater from the gland cooling on the boiler feed-water pumps, condensate pumps and turbine condenser vacuum pumps.
- Rinse water from the ion exchange columns in the boiler water treatment plant.
- Stormwater from Ravensbourne Road and hill catchment areas.
- Stormwater from the sulphuric acid tank bunding, plant buildings and adjacent paved areas.

The discharge from Outfall 1 is primarily cooling water from the acid coolers. The cooling water is taken from the harbour and, in turn, discharged continuously at up to 218m³ per hour.

The pH of the discharge is typically 8.1 to 8.3, but can be lower because of either intermittent discharge of rinse water from the ion exchange column, intermittent discharge of stormwater from the acid tanks bunding, or leaks in the sulphuric acid coolers and piping. The discharge pH is continuously monitored and recorded on a data logger. An alarm sounds if the pH drops below 4.

During 1997, the original acid coolers, which had been prone to leaks, were replaced. We were informed by Mr Clark that since that time there have been no discharges of acid to the harbour, either from the plate heat exchanger that was introduced, or from associated acid piping.

The sulphuric acid storage tanks in the acid plant are bunded to contain any spills or leaks from the tanks and associated piping. Rainwater also collects in the bunded area and needs to be periodically discharged to Outfall 1. The rainwater may be acidic, in which case it is neutralised with caustic soda prior to discharge.

Sulphuric acid is loaded into road tankers adjacent to the acid storage tanks. Stormwater drains run through this area but are plugged prior to loading to avoid spilling being discharged through Outfall 1. The standing area where the tankers are loaded is also bunded to contain any spillage.

Stormwater flows from the acid plant yards and buildings are variable depending on the intensity and duration of the rainfall event. These flows have not been measured, nor is there any control exercised on the quality of the stormwater. However, according to Mr Clark, there are no bulk solids handled in the acid plant, and in his view there is little potential to contaminate stormwater.

Outfall 2 is a 200 mm diameter steel pipe discharging the cooling water from the turbine condenser. The cooling water is taken from the harbour and, in turn, discharged continuously at up to 341m³ per hour. The only effect upon the receiving water relates to the elevated temperature of the water returned to the harbour. There is no chemical treatment of the cooling water, nor is there any contact with any process fluid.

Other outfalls

Outfall 3 is a 200mm diameter PVC pipe carrying the following discharges:

- blow-down from the auxiliary boiler;
- wash-water from washing down yard areas;
- stormwater from the southern end of the works buildings, entrance ramp and adjacent paved areas;
- stormwater from Ravensbourne Road and hill catchment areas;
- water from an underground stream which emerges from a bank below Ravensbourne Road.

The auxiliary boiler is operated continuously during the acid plant annual shut down and start-up. Once a month it is brought up to pressure which takes up to 12 hours. Typically the boiler might be operated continuously on eight days each year during the shutdown and start-up. The boiler is blown each day, discharging 234 litres of water at each blow-down. The water contains up to 1,000 ppm of dissolved solids, consisting of salts naturally present in the water plus treatment chemicals added to the boiler water. The temperature of the blow-down is approximately 185 °C. The stormwater contains varying amounts of dissolved and suspended fertilisers, but the quality of the stormwater has not been monitored. Flows are variable depending on the intensity and duration of a rainfall event. All of the discharges through Outfall 3 pass through a mud tank to allow suspended solids to settle out. The tank is inspected weekly and cleaned out as necessary. Each inspection and any action arising from it is recorded, with details available to ORC on request.

Outfall 4 is a 300mm diameter pipe discharging wash-water from the yard adjacent to the sulphur melter and stormwater from buildings and other yard area nearby. The total volume of water used in washing down the yard is estimated at 2m³. Although the stormwater contains varying amounts of suspended sulphur, the quality of the stormwater has not been monitored. The flow is variable depending on the intensity of a rainfall event and also has not been measured. Both the wash-water and the stormwater pass through two mud tanks to allow suspended solids to settle out. The first tank is inspected weekly and cleaned out as necessary. The inspection and any action arising from it is recorded, with details available to the Council.

No consent is sought in respect to any outfall numbered 5.

Outfall 6 is a 300mm diameter pipe carrying stormwater from the superphosphate plant building and from the main rail siding and adjacent roads. The discharge via the outfall passes through a suspended solids settlement tank. Inspection occurs weekly with cleaning out as required. Records of inspections and resulting actions are recorded and available to the Council.

Outfall 6a has earlier been mentioned. The 150mm

diameter diffuser associated with the outfall lies 100m off-shore. The diffuser is designed to provide over 500:1 initial dilution by jet mixing (verified by testing) and further dilution by eddy diffusion in the receiving water. A 50m limit on either side of the diffuser has been adopted by ORC as the basis for defining the area in which initial jet mixing occurs, and therefore the appropriate boundary at which to determine whether compliance with permitted contaminant levels of discharge are met. The remaining boundaries comprise the seawall and a parallel line 250m off-shore.

Outfall 7 is a 300mm diameter pipe carrying stormwater from the bag store and the acid tank bund. Stormwater which accumulates in the acid tank bund may be contaminated with sulphuric acid. The accumulation is checked weekly. The pH is first checked and neutralised with caustic soda if necessary. The stormwater from the bag store roof is relatively clean and is not treated. Stormwater flows are variable depending on the intensity and duration of a rainfall event and have not been measured. Each inspection and any action arising from it is again recorded, with details available to the Council.

A truck washing facility is provided at the exit from the works. It is used during wet weather to prevent muddy water from the yards being conveyed onto public roads by trucks leaving the works site. The water from the truck wash is discharged directly into the open drainage channel running across the north-eastern end of the site. The discharge contains suspended fertiliser material picked up in tyre treads and on the chassis of trucks as they drive through the site. Apart from the truck washing, the facility has recently been employed to wash two front-end loaders at the end of each day. In the period 15 November to 23 November 1994, 10.4m³ of water was used and discharged from the former loader wash. Volumes currently used are believed to be similar. The wash-water contains suspended fertiliser material. Stormwater from the yards and buildings at the northern end of the site also discharges into the open drain.

Stormwater from Outfalls 3, 4, 6 and 7 is proposed to be pumped to a weir within the open drain. The initial volume of run-off (up to 200m³) that accumulates on any occasion after a dry weather period of 72 hours or more is to be pumped to be collected and reused on-site, with any additional run-off being discharged to the harbour via the drain after entrapment and retention of solids in a mudtank. Existing Outfalls 3, 4, 6 and 7 are proposed to be retained to cope with run-off generated by extraordinary rainfall events.

COASTAL PERMIT APPLICATIONS

Ravensdown applied to the Council for seventeen coastal permits in all, basically to replace multiple existing consents. Various applications related to the continued occupation of the foreshore by the outfall pipes above-

listed and described. Another application (numbered 94676) related to the taking of up to 541,000 cubic metres of seawater per month at a rate of up to 17,500 cubic metres per day from the Harbour for use in cooling and gas scrubbing. The remaining applications (which effectively are the ones of concern for present purposes) related to proposed discharges to the Harbour. Those discharges in the quantities upheld by the Council are as follows:

Application 94677 (Outfall 1)

To discharge 218,000 litres per hour of cooling water from acid coolers in the sulphuric acid plant, plus an indeterminate quantity of stormwater into the Harbour, for the purpose of disposal of cooling water from minor plant, rinse water from the ion exchange plant, cooling water from acid coolers, boiler blowdown, plus stormwater from yards and buildings.

Application 94678 (Outfall 2)

To discharge 8184 cubic metres per day at a rate of up to 95 litres per second into the Harbour of cooling water from a steam turbine condenser.

Application 94679 (Outfall 3)

To discharge an indeterminate quantity of water into Otago Harbour for the purpose of disposal of auxiliary boiler blowdown, springwater and stormwater from Ravensborne Road, yards and buildings, and yard washings.

Application 94680 (Outfall 4)

To discharge an indeterminate quantity of stormwater to the Harbour from yards, buildings and yard washings.

Application 94681 (Outfall 6)

To discharge an indeterminate quantity of stormwater to the Harbour from yards and buildings.

Application 94682 (Outfall 6a)

To discharge up to 816 cubic metres per day at a rate of up to 14.2 litres per second of gas scrubber effluent into the Harbour for the purpose of disposal of superphosphate, plant fluoride and odour scrubber effluent via a multi-point diffuser.

Application 94683 (Outfall 7)

To discharge an indeterminate quantity of stormwater to the Harbour from the roof of the bag store, yard and from the acid storage tank bund.

Application 94684 (Open drain to the north of the site)

To discharge to the Harbour 5,000 litres per day, plus an indeterminate quantity of stormwater, for the purpose of disposal of truck and loader

washings and stormwater from yards and buildings.

The last application represented a request for a new consent in respect to a discharge that had been occurring without consent.

The principal evidence in support of the Council's decision to grant the various coastal permits authorising discharges into the Harbour, was led from ORC's Senior Pollution Control Officer, Mr J S Milburn, and from its Director Resource Management, Mr A J Avery. Their evidence was given in reference to a set of consent conditions agreed as between ORC and Ravensdown – such set being attached to this decision as Appendix A. It will be convenient first to discuss Mr Avery's evidence. He helpfully surveyed the planning framework for managing discharges into the coastal marine area. In so doing, he considered and discussed relevant parts of the New Zealand Coastal Policy Statement (NZCPS), the Proposed Regional Policy Statement for Otago (PRPS), the Proposed Regional Plan: Coast for Otago (PRPC) and the Regional Coastal Plan, deemed to be constituted as such by s.370 of the RMA and commonly referred to as the Transitional Regional Coastal Plan (TRCP).

The TRCP took effect from 1 October 1991, being the date of the Act's introduction. The NZCPS has been in effect since 5 May 1994. The PRPS was publicly notified on 1 October 1993. Hearings were held in the early months of 1995, and decisions released by mid-September that year. No outstanding appeals affect the present permit applications. The PRPC was notified on 1 July 1994. Submissions were heard during September-October 1996, and decisions released in mid-May 1997. One appeal of relevance for present purposes is outstanding, namely, an appeal by the Department of Conservation (DOC). That appellant seeks to alter the categorisation of coastal discharge activities from discretionary to non-complying.

In terms of the TRCP, the discharge of stormwater is permitted by way of a general authorisation, provided that "the discharge is substantially free of waste". Given the likelihood of a degree of contamination of stormwater from the plant, the company duly applied for consent. Under rule 10.5.5.1 of the PRPC, the discharge of stormwater from industrial or trade premises is a controlled activity. The remaining discharges were not permitted under the TRCP. Consent was also required under rule 10.5.8.2 of the PRPC, being the rule that is subject to DOC's appeal. Whether the proposed discharges are considered on a discretionary or non-complying footing, however, one must have regard to relevant objectives and policies of the PRPC.

Mr Avery spoke of four policies that he considered relevant in the NZCPS, three objectives and three policies relevant in the PRPS, and seven objectives and eleven policies relevant within the PRPC. As regards the TRCP, he noted that this deemed plan contains various provisions in the

form of general authorisations and bylaws. The only one of relevance for present purposes is General Authorisation No. 10 Stormwater/Drainage Discharges. As already noted, the company accepted the need to apply for consent in the circumstances.

Given the lack of any evidence from a counterpart planner challenging Mr Avery's assessment of relevant provisions of the various planning instruments as mentioned, we do not consider it necessary to reproduce and discuss at length the various provisions to which he directed our attention. Suffice it to say, we have had due regard to all of them and regard his evaluation as persuasive, to the point where we are content to adopt all he had to say within the realm of his expertise. He made it plain, however, that his views were dependent upon our acceptance of the evidence of Mr Milburn, inasmuch as the latter's expertise falls into the area of assessing water quality and the effect of the proposed discharges on the harbour ecology.

Before passing to Mr Milburn's evidence, we would quote the following passage from the concluding part of Mr Avery's brief:

"The objectives and policies of the NZCPS, Proposed Regional Policy Statement and Regional Coastal Plan variously seek to preserve, protect, maintain and enhance the natural character of the coastal environment, including the coastal marine area. These provisions reflect that the preservation of the natural character is a s.6(a) matter of national importance under the Resource Management Act 1991. The NZCPS makes it a national priority to protect the natural character of the coastal environment in term of "natural water quality", and the Proposed Regional Policy Statement and the Regional Coastal Plan require that water quality is maintained or enhanced.

The Regional Coastal Plan does not identify any significant natural features that could be adversely affected by the discharges. The plan does identify the waterbody surrounding the outer margin of the mixing zones as a Coastal Recreation Area. Therefore any adverse effect from the discharges would most likely be on natural water quality, which is important to recreational uses of the harbour. Poor water quality may adversely affect any human use values associated with the upper harbour".

And further:

"While the Regional Coastal Plan does not identify the upper harbour as a Coastal Protection Area with natural values of regional or greater importance, all of the coastal marine area does have some natural character that must be taken account of when considering an application to discharge into the coastal marine area. It has been noted in this evidence and will be demonstrated in Mr Milburn's evidence that there has been a significant improvement in the quality of the

discharges. This improvement in the discharges will be reflected in enhanced water quality in the Coastal Marine Area near Ravensbourne. The proposed conditions of consent require monitoring that is intended to demonstrate what are the effects of the discharges. The monitoring should reflect the improved quality of the discharges and provide a clear understanding of the suitability of the conditions of consent".

Mr Avery reminded us that "it is important that the overall discharges applied for by the applicant are considered as a whole". He noted that the PRPS provides for the integrated management of the region's resources. And he noted that

—
"The provisions of The Proposed Regional Policy Statement need to be read as a whole. Although the discharge to air and the discharge to the coastal marine area are dealt with in separate regional plans the Otago Regional Council's approach is to consider, in cases such as this, all the discharges together".

We bear this passage in mind in approaching our final evaluation later on.

Turning to Mr Milburn's evidence, mention was made of "extensive technical documentation" having been presented before and during the first instance hearing in early July 1995. Subsequent to the release of ORC's decision, further extensive negotiation and consultation was undertaken, resulting in a modified set of consent conditions being agreed to between Ravensdown, ORC and DOC. As noted, those agreed conditions are attached as Appendix A.

Mr Milburn proceeded to give his expert views and commentary upon each application by reference to the proposed consent conditions as above. The thrust of his evidence was that, in each instance, the relevant discharge will not have a significant effect upon the receiving waters consequent upon reasonable mixing and that the consent conditions would provide an appropriate framework of control to meet relevant standards, including, particularly the following provisions from the PRPC adverted to in Mr Smith's notice of appeal:

"Objective 10.3.1

To seek to maintain existing water quality within Otago's coastal marine area and to seek to achieve water quality within the coastal marine area that is, at a minimum, suitable for contact recreation and the eating of shellfish within 10 years of the date of approval of this plan.

Objective 10.3.2

Taking into account community, cultural and biological values associated with Otago's coastal marine area when considering the discharge of contaminants into Otago's coastal waters.

Policy 10.4.3

To restrict the discharge of contaminants into Otago's coastal marine areas where that discharge would result in a lowering of the existing water quality and receiving waters after reasonable mixing and after disregarding any natural processes that may affect the receiving water.

Policy 10.4.4

To require an effective mixing zone for discharges which takes into account the sensitivity of the receiving environment, the nature of the discharge, the physical processes being in the area of the discharge, the community use and values in the area affected by the discharge, and ecological values in the area".

In relation to the application pertinent to Outfall 6A, (namely, to discharge gas scrubber effluent into the Harbour for the purpose of disposal of superphosphate plant fluoride and odour scrubber effluent via a multi-point diffuser, that being in substance the principal consent sought), Mr Milburn commented:

“(a) The proposed consent conditions represent a significant and substantial improvement in effluent quality from the previous consent. Key factors of this are:

- A 33% reduction in allowable maximum flow.
- A 2pH unit increase in minimum allowable pH.
- An 80% reduction in allowable maximum fluoride concentration.
- A 95% reduction in allowable maximum total phosphorus concentration.
- A 20% reduction in allowable maximum total suspended solids concentration.

(b) Other key changes of proposed conditions with respect to existing conditions are the introduction of whole effluent toxicity testing, a significant reduction in the size of the mixing zone and a halving of the allowable fluoride level at the boundary of this mixing zone, introduction of weekly receiving water monitoring, substantial refining of the two year biological and sediment monitoring programme, and the introduction of a s.128 review clause to enable the Otago Regional Council to review consent conditions if the required environmental outcomes are not being achieved.

Whole effluent toxicity testing

A scientifically established and defined procedure for assessing the effect of an effluent stream on the biota of the receiving waters. Test samples are prepared from representative samples of effluent mixed with representative samples of receiving water at a range of dilutions. The toxicity of these samples to marine organisms found in the receiving environment (in this case a marine bacteria, a marine algae and a marine invertebrate)

is assessed under controlled laboratory conditions to establish whether the effluent is toxic to these organisms and if so at what level of dilution this toxic effect does not occur. In this way the validity of effluent conditions (to prevent adverse environmental effects) can be scientifically verified and the effect on the total effluent stream (rather than individual constituents of the effluent) on the receiving biota can be measured.

Size of the mixing zone

The mixing zone for existing consent (3469) is an area defined by 2 lines at right angles to the shoreline located 350 metres on each side of Outfall 6A and a line parallel to the shoreline and located 250 metres offshore (ie 175,000m²). The mixing zone proposed for the new consent (94682) is an area defined by 2 lines at right angles to the shoreline located 50 metres each side of Outfall 6A and by a line parallel to the shoreline and located 250 metres offshore (ie 50,000m²).

This represents a 70% reduction in the size of the mixing zone

The diffuser discharge of Outfall 6A is 100 metres offshore. This diffuser is designed to provide 512:1 initial dilution by jet mixing (which has been verified by testing) and further dilution by eddy diffusion in the receiving water. The outfall pipeline extends out perpendicular to the seawall and discharge is made on either side of the diffuser (at 100 metres offshore) parallel with the seawall. The tidal current direction in this area (ebb and flood) is also parallel to the seawall. The 50 metre distance on either side of the diffuser has been determined to be the area in which initial jet mixing occurs and therefore the appropriate boundary at which to determine if the required environmental contaminant levels have been reached. As pointed out above this is 300 metres on either side closer to the outfall than the present mixing zone and further dilution of effluent with receiving water occurs outside this initial dilution zone. Current patterns and dispersion of effluent are parallel with the seawall and effects perpendicular from the seawall are of lesser importance. It is therefore considered appropriate to leave the seaward boundary of the mixing zone 250 metres offshore (as is the case with the present mixing zone) which is some 150 metres seaward of the diffuser.

Mr Milburn listed what he termed “key features” of the harbour monitoring data in the Ravensbourne area derived from permit conditions applicable hitherto to Ravensdown. After commenting on matters of temperature, pH, total suspended solids, fluoride concentration, water clarity, nitrate and phosphate concentrations, chlorophyll A, and trace metals, he concluded:

“Within the Upper Harbour generally and in the vicinity of the Ravensbourne works, water quality is generally good in terms of its ability to support a normal harbour ecosystem. Obvious visible changes in colour and clarity occur during periods

of high stormwater inflow and during periods of wave action where fine sediment is resuspended from shallow seabed area.

With the generally good quality of Upper Harbour water at present and limited effect present Ravensdown effluent has on this, the substantial and significant improvements in terms of effluent quality, effluent management, monitoring and review outlined in ... my evidence will clearly achieve the required objectives of maintaining and enhancing the water quality in this area as required by the Resource Management Act, the National Coastal Policy Statement and the Regional Plan: Coast.”

Mr Milburn was confident that the water quality criteria for protection of marine ecosystems and to maintain SG (shellfish gathering) and CR (contact recreation) standards, (as required by the Third Schedule of the RMA and as stipulated in the PRPC), would be met at the boundaries of the mixing zones proposed under the suggested conditions of consent. He noted that the relevant zones would cover a “substantially smaller area of the receiving water than the mixing zone for the current permits”; and, in addition, he considered that further improvement (by dilution and dispersion) in monitored levels would occur beyond the mixing zones. He added:

“These proposed relevant conditions will also ensure that the requirements of s.107 of the Resource Management Act 1991 (relating to effects in receiving waters that may not be caused by discharges of contaminants into water after reasonable mixing) are complied with”.

On the issue of monitoring, Mr Milburn noted that two broad categories would be involved – effluent monitoring and receiving environment monitoring. His overall view was expressed thus:

“Proposed effluent quality conditions have been set to achieve water quality within the Otago Harbour receiving waters of a high standard suitable for beneficial uses (maintenance of marine ecosystems, contact recreational standards, shellfish gathering standards) and consistent with policy and plan requirements to maintain and enhance this water quality.

Proposed monitoring conditions have been designed to ensure these effluent and receiving water standards are being achieved and a review mechanism is provided in the consents (RMA s.128) to review the conditions of the consents should these environmental objectives not be met”.

And to conclude his evidence-in-chief he stated:

“The proposed consent conditions have been developed as a result of the review of a number of extensive technical reports provided before and during the Hearing on these applications by the

applicant, submitters and the Otago Regional Council and from considerable and prolonged consultation and negotiations subsequent to this Hearing. It is also of note that Professor Mladenov, Associate Professor of Marine Science at the University of Otago was a member of this Hearing Panel. These proposed conditions are therefore considered to represent a well researched, technically and scientifically valid set of criteria under which to manage these discharge consents in a sustainable way”.

Neither Mr Avery’s nor Mr Milburn’s evidence was undermined by cross-examination in any significant respect in our view. We see no good reason not to accept and rely upon their evidence in support of the coastal permit applications being upheld on the terms in Appendix A. Further reference will be made to these consents, however, in our final evaluation.

Discharge to Air Permit Applications

Ravensdown applied to the Council for discharge to air consents from various vents within the plant. The vents in question are known as Vent A (acid plant), Vent C (steam vent), Vent D (storage tank venting), Vent E (sulphur melter), Vent F (den scrubber stack), Vents G and H (granulation plant hygiene ventilation), and Vent I (Bradley Mills Nos. 1 & 2).

In relation to these vents, the consents sought were as follows:

- (a) Discharge (from Vent A) of up to 25,299 m³/hr of dry air from sulphuric acid plant containing up to 2,000 kg/day (or at a maximum of 83 kg/hr of SO₂, SO₃ and acid aerosol.
- (b) Discharge (from Vent C) of up to 16,000 m³/hr of high pressure steam (when steam turbine is not working).
- (c) Discharge (from Vent D) of up to 150 g/hr of H₂S from dirty sulphur storage tank.
- (d) Discharge (from Vent E) of up to 7,000 ms/hr of steam and up to 150 g/hr of H₂S from sulphur melter.
- (e) Discharge (from Vent F) of up to 30,000 m³/hr of air and up to 0.75 kg/hr of SiF₄ and up to 1 kg/hr of ‘reduced sulphur compounds’ from superphosphate manufacturing plant.
- (f) Discharge (from Vent G) of up to 12,000 m³/hr of moist air and up to 0.5 kg/hr of SiF₄ and traces of ‘reduced sulphur compounds’ from granulation screen hygiene vent.
- (g) Discharge (from Vent H) of up to 30,000 m³/hr of moist air and up to 0.5 kg/hr of SiF₄ and traces of ‘reduced sulphur compounds’ from the granulation plant hygiene vent.
- (h) Discharge (from Vent I) of up to 24,000 m³/hr of moist air and up to 2.5 kg/hr of rock phosphate dust from No. 1 Bradley mill.
- (i) Discharge (from Vent I) of up to 25,700 m³/hr of

moist air and up to 2.5 kg/hr of phosphate rock from No. 2 Bradley mill.

A further consent was sought in reference to (1) fugitive dust and fluoride from product storage and despatch facilities; (2) combustion products from diesel-fired heaters and an oil-fired boiler; and (3) various gases and vapours from a laboratory fume cupboard.

Consent was granted on all aspects by ORC for a term similar to the coastal permit consents, namely, until 31 August 2004. The term to that date is accepted by Ravensdown, albeit that half has elapsed since ORC's decision.

In the course of the appeal hearing, various versions of proposed conditions were presented, largely agreed initially as between ORC and Ravensdown and later fully agreed. The conditions underwent alteration and refinement as the hearing unfolded – in particular with reference to instrumental monitoring being undertaken at Mr Smith's property (109 Ravensbourne Road) directly opposite the works. Mr Smith expressly indicated his agreement with this course towards the end of the hearing, but without prejudice to other matters raised by him and by supporting submitters.

It will here be convenient to record the conditions as finally agreed between ORC and Ravensdown, because that will assist in relating various aspects of later discussion to particular conditions proposed; also, in assessing the overall framework of control suggested by the two parties concerned, in the event of the consents being upheld.

Conditions (as proposed by ORC and Ravensdown)

1. The consent holder shall control the discharges from the processes to meet the standards and conditions according to Schedule 2 to this consent.
2. The consent holder shall notify the Council of intended cold start or heat down operations in the sulphuric acid plant. In the instance of a restart after more than eight hours shut down, the Council must be advised of the time when sulphur will be ignited and the name of the person in charge of the procedure.
3. The consent holder shall notify the consent authority as soon as practicable of any plant malfunction or breakdown that results in an abnormal discharge. The consent holder shall ensure that any acid leaks are remedied and the effects mitigated as soon as possible.
4. The consent holder shall advise the consent authority of any changes to plant or process that may change the nature or quantity of the discharge of any contaminants to such an extent that they have an effect on the environment.
5. The consent holder shall undertake a study aimed at estimating the quantity of fluoride

discharged as a fugitive emission from product storage. The methods used shall be presented to the consent authority prior to undertaking the study and shall be sufficient to obtain as accurate an estimate as is practicable. The results of the study are to be reported to the consent authority within 15 months of the date of commencement of this consent.

6. The consent holder shall monitor sulphur dioxide, fluoride, odour and vegetation in the surrounding environment in accordance with Schedule 1 of this consent.
7. (a) The consent holder shall present the results of the ambient air and discharge monitoring required in Schedules 1 and 2 to the consent authority at least once per month.
- (b) The consent holder shall produce a report at least every two years on all the discharge monitoring and ambient air monitoring described in this consent. The report shall include an analysis of the monitoring data. The first report shall be presented to the consent authority within six months of commencement of this consent.
8. In accordance with section 128 of the Resource Management Act 1991, the conditions of this consent may be reviewed on and in the period within three months upon the anniversary of the date of this consent, or within three months upon receipt of any monitoring information, if the consent authority finds that monitoring of the exercise of the consent has revealed that there is or is likely to be an adverse effect on the environment.
9. The conditions of this consent may be reviewed in the period within six months of the second anniversary of the date of this consent for the specific purpose of reviewing the sulphur dioxide monitoring method described in 1(b) of Schedule 1, and to set limits on odour emissions from the premises.
10. The conditions in Schedule 2 may be reviewed by the consent authority upon receipt of monitoring results in Schedule 1 which indicate that ambient air levels of contaminants exceed the following:
 - (a) SO₂ greater than 125 ug/m³ over a 24-hour mean.
 - (b) Fluoride greater than 1.7 ug F/m³ air over a seven-day average.

SCHEDULE 1

1. Sulphur Dioxide
 - (a) Sulphur dioxide monitoring in ambient air shall be carried out at sites located at 18 Matai Street, 46 Adderley Terrace, and 115 Ravensbourne Road so long as there shall remain consent from the property owners. In the event that any one or combination of the property owners withdraws their consent for monitoring sites on their property, alternative sites shall be determined in consultation with the consent authority. As far as practicable

- there shall be no less than three monitoring sites at any time.
- (b) At all three sites the method used shall be AS3580.3.1 – 1990 (Method 3.1: Determination of acid gases titrimetric method) or an alternative method satisfactory to the consent authority using a 24-hour sampling period.
 - (c) Ten minute and one hour average concentrations of sulphur dioxide in ambient air shall be measured by instrumental monitoring for a period of 12 consecutive months at 109 Ravensbourne Road or at an adjoining property. The method of measurement shall be in accordance with AS3580.4.1. – 1990 (Method 4.1: Determination of sulphur dioxide – Direct reading instrumental method) or an alternative method satisfactory to the consent authority.
2. Fluoride
- (a) Fluoride monitoring in ambient air shall be carried out at sites located at 18 Matai Street, 46 Adderley Terrace, and 115 Ravensbourne Road so long as there shall remain consent from the property owners. In the event that any one or combination of the property owners withdraws their consent for monitoring sites on their property, alternative sites shall be determined in consultation with the consent authority. As far as practicable there shall be no less than three monitoring sites at any time.
 - (b) At all three sites seven-day average concentrations of fluoride shall be measured once each calendar month. The method of measurement shall be in accordance with AS3580.13.2 – 1991 (Method 13.2: Determination of fluorides – Gaseous and acid soluble particulate fluorides – Manual, double filter paper sampling) or an alternative method satisfactory to the consent authority.
3. Odour
- (a) The consent holder shall carry out a community odour assessment survey at least once every two years. The survey shall consult a random selection of people residing within the suburbs of Ravensbourne and Maia. Such survey shall be carried out by an organisation or individual satisfactory to the consent authority as being experienced in undertaking community surveys. The design and extent of the survey shall comply with recognised good practice for community surveys and be to the satisfaction of the consent authority. Results of the odour survey shall be reported to the Otago Regional Council prior to 30 June in the year the work was undertaken.
4. Vegetation
- (a) The consent holder shall undertake a monitoring programme to determine if there are any adverse effects of fluoride on vegetation in the vicinity of the works. Monitoring is to take place at least once every two years, and the first assessment shall be completed within 12 months of commencement of this consent. Any assessment shall be carried out by an organisation or individual satisfactory to the consent authority

- and experienced in determining the effects of fluoride on vegetation. The results of such monitoring shall be presented to the consent authority within two months of completing the monitoring.
- (b) In the event that the monitoring described in condition 4(a) above shows any significant adverse effects on vegetation, the consent authority may, in accordance with section 128 of the Resource Management Act 1991, serve notice on the consent holder of its intention to review conditions 4(b), (c), and 5(b) of Schedule 2 for the purpose of determining whether these conditions are adequate to protect against any adverse effect on the environment caused by the discharge of fluoride arising from the exercise of the consent. Such notice shall be given within two months of receiving the monitoring results described in condition 4(a) of Schedule 1.

SCHEDULE 2 – PROCESS VENTS STANDARDS

1. Vent A (Acid Plant Primary Discharge)
- (a) The discharge from the sulphuric acid production process shall not exceed 2 tonnes mass of SO₂, SO₃ and H₂SO₄ per day, expressed as SO₂.
 - (b) The discharge of sulphur compounds SO₂, SO₃ and H₂SO₄ from the sulphuric acid production process shall not exceed 86 kilograms mass per hour, expressed as SO₂ and measured as a one hour average.
 - (c) A dedicated instrument shall monitor SO₂ continuously in the acid plant stack and the concentration shall not exceed 3,000 ppm by volume as a maximum, nor a 24-hour average of 1,500 ppm by volume. The method of measurement shall be ISO7935: 1992 (E) (Stationary source emissions – Determination of the mass concentration of sulphur dioxide – performance characteristics of automated measuring methods) or an alternative method satisfactory to the consent authority.
 - (d) SO₂, SO₃ and H₂SO₄ shall be measured once per week by USEPA Method 8 (Determination of sulphuric acid mist and sulphur dioxide emissions from stationary sources) or an alternative method satisfactory to the consent authority.
 - (e) During plant start up from cold, or restart under hot plant conditions a visible white plume of acid mist is permitted, but the normal operational condition of a clear stack discharge shall apply within one hour of igniting sulphur.
2. Vent D – Storage Tank Vents and Vent E – Sulphur Melter
- (a) The combined discharge to air of hydrogen sulphide from the sulphur melter and sulphur storage tank vents shall not exceed 150 g/hr, measured under actual discharge conditions of temperature and pressure.
 - (b) The combined discharge from the sulphur melter and sulphur storage tank vents shall not be discernible by the presence of odour attributable to H₂S beyond the biological filter.

3. Vent F – Den Scrubber Stack
 - (a) The consent holder shall measure the emission of fluoride, F, from the den scrubber stack using wet chemistry methods over a one hour sampling period at least once per week. The measurement is to be carried out during superphosphate manufacture and no test may commence within one hour of starting acidulation. The method of measurements shall be USEPA Method 13B (Total fluoride specific ion electrode) or an alternative method satisfactory to the consent authority.
 - (b) The discharge of fluorine compounds from the den scrubber stack shall not exceed 0.75 kg/hr expressed as fluoride, F, and on a one hour average basis.
 - (c) In any period of 12 consecutive months no more than 10% of test results shall exceed 0.5 kg/hr expressed as fluoride, F, and on a one hour average basis.
 - (d) The consent holder shall measure the emission of reduced sulphides in the den scrubber stack over a one hour sampling period at least once per week. The discharge of total reduced sulphides shall not exceed 1 kg/hr.
4. Vents G and H – Granulation Plant Hygiene Ventilation
 - (a) The consent holder shall measure the emission of fluoride, F, from the granulation plant hygiene vents using wet chemistry methods over a one hour sampling period at least once per week. The measurement is to be carried out during superphosphate manufacture and no test may commence within one hour of starting acidulation. The method of measurements shall be USEPA Method 13B (Total fluoride specific ion electrode) or an alternative method satisfactory to the consent authority.
 - (b) The total discharge of fluorine compounds from the two granulation plant hygiene vents G and H shall not exceed 0.5 kg/hr expressed as fluoride, F, and on a one hour average basis.
5. Vents I – Bradley Mills Nos. 1 & 2
 - (i) Discharge of phosphate rock dust shall be less than 2.5 kg/hr. The consent holder shall demonstrate to the consent authority at not more than 6 monthly intervals, that these levels are not being exceeded.

It will be recalled from the description of the plant and operations earlier given, that two significant activities within the works involve discharges to air, namely, the acid plant and the superphosphate manufacturing plant. Discharges from the acid plant include sulphur dioxide, sulphur trioxide, acid mist and hydrogen sulphide. Those from the superphosphate plant include fluoride, dust and a range of reduced sulphur compounds. The two air pollution control experts who gave evidence, Dr T J Brady, a consultant in private practice called for Ravensdown, and Mr P E Millichamp, Senior Air Resource Officer for ORC, were in agreement that the foregoing represent the principal contaminants in the discharges to air from the works. While other contaminants are liable to be discharged, including some hazardous chemicals such as formaldehyde, benzene,

toluene, and heavy metal traces such as cadmium, it was common ground between the two experts that there is no likelihood of these being discharged in quantities that would have a potential to cause adverse effects off-site, either as individual contaminants or in combination. In other words, it was indicated that if discharges of the principal contaminants are suitably monitored and controlled, with levels being set whereby no significant adverse effect would be likely to occur off-site, then the presence of other contaminants could reasonably be regarded as of minimal import and of no off-site concern.

Acid Plant Discharges and ORC's Position

In granting consent at first instance, ORC limited the total daily discharge of sulphur dioxide, sulphur trioxide and acid mist to two tonnes per day. The peak discharge was limited to 86kg per hour; and a limit was placed on the concentration of sulphur dioxide in the acid plant stack. The relevant limits are incorporated in the revised conditions cited above.

Apart from the major SO₂ discharge component, discharges from the acid plant include comparatively small amounts of sulphur trioxide and sulphuric acid aerosols. There are also discharges of hydrogen sulphide which are addressed later under the head of "odour". Although sulphur trioxide is gaseous in form, it typically hydrates with water molecules in the atmosphere and oxidises so as to form sulphuric acid. During normal operation, the quantity of acid mist is negligible by comparison with the SO₂ discharge. However, in start-up situations, more substantial amounts of acid mist are liable to be released, resulting in a visible plume. ORC considered that such a plume should not be allowed to remain visible beyond one hour following start-up in order to avoid any significant off-site effects. The requirement for non-visibility to be attained within such a period was regarded as sufficient to ensure that any off-site effect from start-ups would be of relatively short duration and of minor consequence – bearing in mind the constant peak discharge limit of 86 kg per hour of SO₂, SO₃ and acid mist (expressed collectively as SO₂).

On the issue of on-site monitoring, the Council considered two types of discharge monitoring to be necessary – continuous instrumental monitoring of sulphur dioxide and weekly manual measurements of both sulphur dioxide and acid mist. For the latter, an international standard measurement technique (USEPA) Method 8 was specified as an appropriate means of measurement for activities of the present nature. As to the former, continuous measurement of sulphur dioxide was stipulated because, in quantity, that contaminant is the most significant item of discharge.

Downwind ambient air monitoring for sulphur dioxide was also required at three named sites. The monitoring method comprises what Mr Millichamp described as "a relatively simple wet chemistry technique". It is capable of measuring

24-hour average concentrations only. That gave rise to concern on Mr Millichamp's part about the accuracy and suitability of the monitoring regime. In stressing the importance of ambient air monitoring as the "most reliable method of determining any potential for downwind effects on human health", he went on to recommend introduction of continuous ambient air monitoring by instrumental methods. He considered that "at least one instrumental monitoring site ... downwind of the acid plant" should be provided. We refer to and discuss his evidence bearing on this aspect below. Suffice it to say here, Ravensdown is agreeable to the introduction of instrumental monitoring equipment at Mr Smith's property (or at an adjoining property) for 12 months as recorded in proposed condition 1(c) of Schedule One above.

Under proposed condition 1(e) of Schedule Two, a one hour limit is intended to be placed on the presence of a visible plume during acid plant re-starts, having regard to the discussion above. As noted, when such starts occur, the plant has the potential to discharge larger quantities of acid mist contaminants than normal. Although this may bring about a visible plume, both Dr Brady and Mr Millichamp were of the view that the one hour limitation in the condition would be suitably restrictive, and, taken in conjunction with other limiting conditions, would serve to minimise any potential for adverse effects off-site.

Disputation emerged during the hearing over the acid plant's "single absorption" capability. As explained in Mr Clark's evidence (see earlier), in order to produce sulphuric acid, heat is applied to sulphur. In the combustion process sulphur dioxide gas is produced which, in turn, is converted through oxidation to sulphur trioxide in a catalyst tower. The proportion of SO₂ oxidised to SO₃ is known as conversion efficiency. When converted, the SO₃ is absorbable in sulphuric acid solution, thus facilitating further acid production by increased absorber acid concentration. It is common ground that a single absorption plant will generally display a lower conversion efficiency than one featuring double absorption units. Conversion efficiencies of 99.7% and higher are achievable in double absorption plants, whereas, for single absorption plants, the efficiencies range from 95% to 98%. Hence, as Mr Millichamp put it, "sulphur dioxide discharges from single absorption plants are higher when compared on a production rate basis".

To convert the present plant would involve provision of an extra absorption tower, two additional heat exchangers and an additional acid cooler. A cost of the order of \$3m was indicated. As matters stand, with the application of careful management, a typical conversion rate of 98.5% has been attained at Ravensdown. Against that standard of performance, ORC decided to impose discharge limits that could realistically be complied with by the company, given the acid plant's single absorption capability. At a full production rate of the order of 200 tonnes per day of

sulphuric acid, the discharge limits imposed by the Council were viewed as reasonable and realistically attainable. The question now is whether those limits are such that residents within Ravensbourne may reasonably be assured that no adverse effect of any significance will be caused to them, or their properties, through the acid plant's continued operation as a single absorption facility. Lower discharge limits would effectively mean that the acid plant would either have to be altered at considerable cost or operate below maximum capacity.

Alternative methods have been considered for the purpose of achieving an additional slight margin of mitigation. Possible options would involve replacement of the present converter catalyst with a more reactive type, such as a caesium-promoted catalyst, or modulation of the sulphur feed to catalyst mass and installation of in-stack control equipment. ORC accepted the company's evidence that such alternatives would be similarly expensive. Because of the high cost of attaining any further reduction in sulphur dioxide discharges, coupled with evidence on behalf of the company that adverse effects downwind from the discharges were unlikely, it was concluded that the limit of 86 kg/hr was supportable against the background of relevant considerations under the Act.

According to atmospheric dispersion modelling results presented for Ravensdown at the original hearing, a discharge of 86 kg/hr was anticipated to produce maximum downwind concentrations (beyond the works) below 290 micrograms (mg) per cubic metre for 1-hour averages and below 60 mg/m³ for 24-hour averages. Those predictions were below the Ambient Air Quality Guidelines (AAQG) published by the Ministry for the Environment (MfE) in July 1994. It thus appeared to the Council that SO₂ discharges below 86 kg/hr would not cause adverse effects downwind of the plant. Nevertheless, as Mr Millichamp pointed out, local meteorological data were not available at the time. Moreover, it was appreciated that the Ravensbourne area was difficult to model, given the nature of the terrain. The Council therefore decided to impose a requirement for ambient air monitoring downwind so that model predictions could be checked against actual measurements. That approach was certainly desirable, indeed essential. With the benefit of the considerable volume of evidence presented on appeal, against the background of modifications agreed to between Ravensdown and ORC under the set of conditions above-quoted, this Court's judgment must be applied to determining whether the consents should be upheld by adoption of the said conditions, or whether (if upheld) the conditions should be made more stringent or comprehensive.

Atmospheric Dispersion Modelling

Both Dr Brady and Mr Millichamp gave evidence of modelling results using AUSPLUME, a model commonly used in New Zealand and Australia and comparable to the

USEPA ISCST (Industrial Source Complex for Short Times) model. Dr Brady also used the USEPA model SCREEN 3 to investigate potential effects due to inversion fumigation (later referred to); and Mr Millichamp, for his part, ran the screening version of the CTDMPLUS (Complex Terrain Dispersion) model known as CTSCREEN.

For Dr Brady's initial modelling work, data from Dunedin Airport consisting of hourly observations of wind speed, wind direction, temperature, cloud cover and relevant weather, were utilised. However, an automatic weather station has since been installed by Ravensdown at the end of the wharf ancillary to the works. That station was sited in the light of advice obtained by the Company from a meteorologist of repute. While that person was not called as a witness, Dr Brady expressed the firm view that the location was appropriate - despite reservations of a witness called by the appellant, Dr M Legge, a Senior Lecturer in Biochemistry with the University of Otago. The latter witness questioned the reliability of meteorological data gathered from the wharf-end station for incorporation in modelling work designed to predict effects upon Ravensbourne. On the other hand, Dr Brady regarded the location as more suitable than an alternative location pointed to by various submitters within the residential area of Ravensbourne itself - that site being described as "the Morrison site" after its owner, Mr R Morrison, who had made wind and weather recordings as a layperson. Dr Brady's view was that the wharf-end station was well located to obtain good representative sampling of weather conditions throughout the year in the vicinity of the works themselves. Consequently, in his view, the modelling could be expected, with the use of such data, to give a reasonably accurate picture of likely effects upon residential properties within Ravensbourne, making due and proper allowance for complexities of the area's terrain.

Mr Millichamp stated that meteorological data, suitable for use with the AUSPLUME model, were made available to the Council for the period May 1994 to April 1995. He considered the data gave "a reasonable representation of wind and stability conditions for this location". The data were used to estimate downwind concentrations of sulphur dioxide resulting from the acid plant discharge at seventy-six elevated locations in the Ravensbourne area. His evidence continued:

"Initial modelling results compared poorly with monitoring data, particularly on the steeper terrain, so the modelling was adjusted to give a better fit. This was achieved by allowing for a small amount of wind deflection caused by the steepest part of the hill. This is a common occurrence, particularly during stable atmospheric conditions, which happen to be when the highest concentrations occur. AUSPLUME is not capable of modelling this effect, so an artificial wind shift of 20° was input into the model to account for plume deflection around the upper slopes of the Signal

Hill Ridge. Predictions on the isolated and very steep parts of the hill were also ignored as the plume is likely to be deflected away from these areas.

With this adjustment, the model gives more accurate results but remains conservative".

After comparing the ten highest model predictions with the ten highest monitoring results for monitoring years 1995, 1996 and 1997, the model was said to have under-predicted at Ravensbourne Road, slightly over-predicted at Adderley Terrace and significantly over-predicted at Matai Street (being the three locations where ambient air monitoring was undertaken with the consent of relevant property owners). Against that background, Mr Millichamp continued:

"The apparently low predictions at Ravensbourne Road are most likely explained by the presence of other sources at low elevations causing high monitoring results. In particular, it is possible that diesel traffic travelling along Ravensbourne Road contributes a significant amount to local sulphur dioxide concentrations. Council monitoring at a site near Anzac Avenue, a road carrying essentially the same traffic as Ravensbourne Road, found background concentrations of sulphur dioxide average between 10 and 18 mg/m³. When this background is added to the Ravensbourne Road predictions, there is much better agreement between the model and monitoring. Hydrogen fluoride discharges from the manufacturing process may also be affecting the monitoring results at this site.

The over-predictions at Matai Street, are probably caused by AUSPLUME's limited ability to deal with very complex terrain. At these high elevations the adjusted model is very conservative and over-predicts by a factor of 1.4 to 4".

After tendering a summary of the results for the seventy-six downwind receptor points using the adjusted model, Mr Millichamp noted that both the maximum and the 99.9 percentile model predictions exceeded the AAQG for all averaging times except the annual average. (The 99.9 percentile represents the 9th highest prediction from a year of hourly meteorological data, and is commonly used as a more reliable and preferred indicator than the maximum.) Mr Millichamp continued:

"This means there may be a potential for acute effects on human health at those locations where the guidelines are exceeded. However, two points must be made when interpreting these results.

Firstly, all of the worst predictions occur high on the terrain, or at least 100m above sea level. This is where the model may be over-predicting by a factor of 1.4 to 4. It is possible to use a less conservative adjustment for the terrain than what I have used to give lower predictions. One way of doing this is to alter the Egan half-height co-efficients for

stable conditions in the Model. These co-efficients are used AUSPLUME to protect how much a plume is deflected over the terrain. If the Egan co-efficients are adjusted so the plume is deflected over the hill at a slightly greater rate than is normally assumed, it gives predictions that are below the guidelines for all receptors modelled. This is the approach taken by Woodward-Clyde in their modelling. Secondly, the model predicts that the highest concentrations will occur on parts of the terrain where nobody is likely to go. The higher steeper parts of the hill are covered in dense bush and forest. At these locations we are more concerned about potential effects on vegetation than human health. Predictions on the areas where there is reasonable access to people are significantly lower, with the 99.9 percentile values for 10-minute and 1-hour averages all being below their respective guidelines. On this basis there is unlikely to be any adverse effects on human health”.

Dr Brady’s confidence in results obtained from use of the AUSPLUME model was greater than that evinced by Mr Millichamp. Dr Brady spoke of a reliability spectrum for the model’s predictions of between 0.5 to 2. In other words, the range of under-predictability/over-predictability was said to lie between one-half to a multiplying factor of two. Like Mr Millichamp, he confirmed that due consideration needed to be given to the effect of topography. As he put it:

“The manner in which the terrain affects the dispersion characteristics is complex where there is elevated terrain. In this case the terrain is complex if one considers the whole of the harbour and for elevations up to Signal Hill (about 330 metres). However terrain between the works and the Ravensbourne residential area can best be described as rolling. The terrain was gridded from local maps for the AUSPLUME model”.

Dr Brady maintained throughout his evidence that a good co-relation between modelling results using AUSPLUME and monitoring data had been obtained – such that he felt able to declare with conviction that no significant adverse effect would be caused to residents and their properties within Ravensbourne on the basis of the proposed conditions agreed as between ORC and the Company. He considered there to be “essentially only two discharges which are of concern in this application” – namely, sulphur dioxide and fluoride. In his view, the model predictions obtained through the work of his firm (Woodward-Clyde) agreed “very well with the monitoring results for both sulphur dioxide and fluoride”.

In support of the AUSPLUME model, Dr Brady had this to say:

“One feature of the AUSPLUME model is that it is able to account for the manner in which a plume is affected by the rising terrain as it approaches a hill. The model user is allowed to vary the amount of the plume which impacts directly on the hill

and the amount of the plume which is allowed to rise up over the hill. These two quantities are controlled by a parameter called the Egan Half Height which is normally set at 0.7 for stable conditions. However this is not appropriate for the situation where the plume is travelling along the side of the hill and encountering rolling terrain as in this case. To overcome this problem I re-set the half height parameter to 0.5 on the advice of Dr Bruce Egan who developed the parameter for the AUSPLUME model and the USEPA”.

Strong concerns were voiced by the appellant and others as to the unpredictability of weather conditions in and about Ravensbourne, including “inversion layer” phenomena. Consequently, Dr Brady was pressed in cross-examination over his confidence in the modelling results, with the suggestion being put that the meteorological data and the AUSPLUME model were inaccurate and unreliable, both individually and in combination. In the event, he remained firm throughout in maintaining his opinion to the contrary. On the issue of inversion fumigation he had this to say:

“In addition to the so called normal behaviour of plumes some other phenomena occur which are not easy to predict using the common dispersion models. The most notable of these is the so called inversion fumigation which relates to the way in which an elevated plume is rapidly brought down to ground level during the early to mid-morning hours. This happens when the plume is trapped either above or below an inversion layer (if stability is typical of cold frosty nights with little or no wind) during the night which is then broken up by the action of the sunlight on the ground in the morning. This causes the air mass to be rapidly rolled over bringing the plume down to ground. The only model capable of simulating this phenomenon is the USEPA SCREEN 3 model which is recognised as a screening model only and gives significant over-estimates of predicted ground level concentrations (some times up to 10 times those found in practice). This information was not included in the original Assessment. The maximum 1-hour predicted concentration during inversion break-up fumigation was 270 mg/m³ at about 3km from the main stack. It is not possible to say with any certainty where this would occur, but the most likely places would be either up or down the harbour and would only last for about 15 minutes or so. I do not consider this to be significant given the conservatism built into the SCREEN model”.

In discussing the “complex terrain” issue, Mr Millichamp spoke of the AUSPLUME model as having limited ability to take proper account of such terrain. He pointed to CTDMPLUS as a better means of approach. Unfortunately, it was not practicable to use that model in the absence of more refined input data. However, it was possible to run the screening version of the model (CTSCREEN), in terms of which results similar to the highest AUSPLUME results were obtained, the maximum 1-hour average being 1,494 mg/m³. According to Mr Millichamp:

“This appears to suggest that AUSPLUME is working well, but the CTSCREEN predictions are likely to be even more conservative than AUSPLUME because this model assumes theoretical worst-case conditions can occur. The worst-case conditions are very stable atmospheres when the wind blows towards the hill and the Company’s meteorological data confirms that these conditions are unlikely. It is not possible to input more realistic conditions into the model. I therefore believe that the CTSCREEN modelling is less accurate than the above AUSPLUME modelling for this location”.

Mr Millichamp summarised his conclusions from the modelling work he undertook as follows:

”In summary, the recent modelling confirms that the discharge limit imposed by the Council in 1994 is appropriate. Careful interpretation of the results indicates that a discharge of 86 kg/hr of sulphur dioxide is unlikely to cause any adverse health effects downwind. However, it does indicate that the New Zealand guidelines could sometimes be exceeded at locations on the steep bush-clad parts of the hill.

Furthermore, a high level of uncertainty in the model remains, despite the availability of new meteorological and monitoring information. In particular, we have relief on the monitoring information to calibrate the model to give more realistic predictions, but I believe the monitoring method employed by the Company may not be sufficiently reliable for this. If this monitoring were upgraded, we would have more certainty about the level of protection against adverse effects”.

Downwind SO₂ Effects and Measurements

Sulphur dioxide is a colourless gas with a pungent and irritating odour – the odour threshold being from some 1300 to 10,000 mg/m³ in the ambient air. Nevertheless, it is important to note that public health effects may occur at lower concentrations with no detectable odour. Such odour as occurs in the vicinity of the works is normally associated with reduced sulphur compounds rather than sulphur dioxide. Effects on human health from exposure to sulphur dioxide are primarily related to the upper respiratory tract. Groups more susceptible to risk include asthmatics and elderly people, particularly those with respiratory or circulatory problems.

The AAQG is based on 1987 World Health Organisation (WHO) guidelines under which the following guideline limits are specified:

500 mg/m ³	10-minute average
350 mg/m ³	1-hour average
125 mg/m ³	24-hour average
50 mg/m ³	Annual average

Compliance with these limits is designed to avoid health effects for combined exposure to sulphur dioxide and particulate matter. In the current instance, particulate matter is without doubt present, with domestic fuel heaters and motor vehicles assuming a material role. In fact, Mr Millichamp expressed the view that the majority of particulate matter in the area originates from the last two sources. He pointed out that the main road through Ravensbourne “carries a large volume of traffic and a significant proportion of this is diesel traffic travelling to and from the port at Port Chalmers”.

The 1987 WHO guidelines are under review. Indeed, Dr Legge produced an updated set derived from the Internet. Significantly, that latest information appears to retain the sulphur dioxide levels above-cited. However, it is worthy of note that the combined presence of particulates is viewed in the AAQG and other literature as a matter of particular consideration and concern warranting a correspondingly careful approach overall. Mr Millichamp stated that recent WHO research has indicated that most health effects from exposure to sulphur dioxide alone appear to relate to short-term exposures (less than 1-hour). Where health effects are experienced with longer-term exposures, combined exposure to other contaminants, such as particulate matter, is usually the case. Plainly, as Mr Millichamp stressed, it is very important that short-term or peak concentrations of sulphur dioxide are maintained within acceptable levels. Mr Millichamp also noted that effects on vegetation from sulphur dioxide may occur in time periods ranging over months. He spoke of a 20 mg/m³ limit for annual average concentration having been recommended in research literature for “forest and natural vegetation”.

Mr Millichamp was critical of the current monitoring programme, inasmuch as 24-hour averages have alone been measured, with no information on 1-hour or 10-minute average concentrations. In his view:

“This is a significant drawback because I believe the shorter time periods are more important for determining the potential for acute health effects.

Furthermore, while most of the monitoring results are below the 24-hour guideline, I believe there is a significant number of 24-hour readings that indicate there is at least a potential for 1-hour and 10-minute concentrations to exceed the respective guidelines”.

Mr Millichamp went on to explain his reasoning for the above view, not only in relation to information obtained from another sulphuric acid plant operated by the Company at Hornby, Christchurch, but by reference to research work undertaken by the USEPA and from careful consideration of the modelling results. In his opinion, both the modelling results and the Company’s 24-hour monitoring results “suggest that downwind concentrations of sulphur dioxide

are high enough to justify a monitoring programme that includes 10-minute and 1-hour average measurements". Concern was expressed as to the accuracy of the current monitoring method for SO₂, in that "other gases can affect the measurement including nitrogen dioxide, carbon dioxide, and hydrogen fluoride (discharged from the manufacturing process)". Reference was also made to the difficulty of accurately determining whether a monitoring site is actually measuring the impact from a given source for consent compliance purposes. As Mr Millichamp observed:

"The wind can change direction many times during a 24-hour period. If an individual source can be assessed, it is necessary to continuously measure 10-minute averages at least at one site and relate these to simultaneous wind direction measurements".

We have weighed Mr Millichamp's evidence against views expressed by witnesses for the Company, particularly Dr Brady and Mr Clark; also against other evidence - particularly that of Dr Legge - remembering his particular ambit of expertise and the extent of his knowledge and understanding of detailed chemistry and other relevant factors. In our judgment the Company's agreement to introduce instrumental monitoring at Mr Smith's property (or at an adjoining property) for a 12-month period is entirely appropriate; and, if consent is upheld, we would hold that a second instrumental monitor should be installed for the term of the consent, or such reduced period as ORC may agree to in writing after not less than one year, at a more elevated location within the Ravensbourne residential area - the specific site to be selected by the Company with the assistance of its consultant advisors and approved by the Council.

Superphosphate Manufacturing Plant Discharges

As earlier mentioned, discharges from this part of the works include fluoride, dust and a range of reduced sulphur compounds. Fluoride is emitted in several forms, the predominant forms being hydrofluoric acid and silicon tetrafluoride. A small portion of the fluoride contained in the rock under process is emitted, with the majority of fluoride being retained in the fertilizer product itself. The Company has learnt from experience that rock imported from certain sources is less ideal for processing than that from other sources. It need hardly be emphasised that every care must be taken in ordering and importing suitable rock for the plant's purposes from overseas if the consents granted by ORC are to be upheld and attendant conditions complied with.

Much of the fluoride discharge derives from the Broadfield mixer from whence it is withdrawn and transmitted via ventilation equipment to the scrubber plant. The scrubber process has previously been explained. It will also be recalled that fluoride continues to evolve during the granulation process, and in the course of storage while

"curing" occurs; further, that the granulator features a ventilation system which discharges directly to the atmosphere, while diffuse fugitive emissions occur from the storage areas via various roof vents.

In coming to its original decision, ORC was well aware of the potential of fluoride to affect plants and grazing animals. As to human beings, it is generally acknowledged that health effects are quite unlikely in the absence of injury to vegetation. In other words, evidence of injury to vegetation is expected to be apparent well before a level is reached affecting human health. Fluoride can affect plants by damaging leaves, inducing change in metabolism, decreasing growth and ultimately causing death. As one would suppose, certain plant species are more sensitive than others, with grapes, stone fruit and rhododendrums being particularly sensitive. Again, grazing animals that consume high fluoride vegetation can suffer skeletal and dental fluorosis. High exposures can also cause bone lesions, mineralisation of tendons, lameness, loss of appetite and low milk production. In general, for humans, however, these effects are comparatively unlikely because of limited quantity consumption as part of a total diet intake derived from a range of sources.

Under the AAQG, limits are set in relation to effects on vegetation as follows:

3.7 mg/m ³	12-hr average
2.9 mg/m ³	24-hr average
1.7 mg/m ³	7-day average
0.84 mg/m ³	30-day average
0.5 mg/m ³	90-day average

These limits of concentration are applicable to general land use. More stringent levels are specified for specialised land uses such as areas containing vineyards. Again, there is a conservative 90-day average goal level indicated of 0.1 mg/m³HF(hydrogen fluoride)/m³ for ecosystems of important conservation value such as national parks, wilderness or other significant areas. Various reserve or open space areas exist as part of the wider backdrop of Ravensbourne. It may be arguable, however, whether any areas of sufficient proximity for present purposes qualify under the high conservation category above. Even so, the AAQG goal level for significant areas of natural character is noteworthy.

While some plants can be affected at lower concentrations than those specified above for general land use, it was Mr Millichamp's opinion that, provided ambient air concentrations fall within such levels, "any effects are likely to be small in terms of damage to local vegetation, including residential gardens". We were also referred to limits recommended by the Australian and New Zealand Environmental Council (ANZEC) as to levels of fluoride in forage for preventing adverse effects on grazing animals, namely:

40 mg/g of dry tissue	12-month average
60 mg/g of dry tissue	2-month average
80 mg/g of dry tissue	1-month sample

In Mr Millichamp's view, compliance with the AAQG levels "should ensure fluoride in forage remains below (the ANZEC) concentrations".

In its original decision the Council limited the discharge of fluoride from the den stack to 0.5 kg/hr. At that stage, the scrubber produced a very low discharge to air (0.02 to 0.14 kg/hr). On the other hand, with the use of seawater as a scrubber medium, comparatively large quantities of fluoride were discharged into the harbour. The relevant consent, however, was made more restrictive under the new coastal permit affecting Outfall 6a (refer Appendix A). The Company appealed and sought modification of the discharge to air limit.

In early 1997 an improved scrubber was installed, thus reducing the total mass discharge of fluoride into the environment. Under the upgraded system fluoride-contaminated water is recycled by utilising a cooling pond system (later referred to), with a greater proportion of fluoride being retained in the product. Hence, as Mr Millichamp stated:

"This system achieves a reduction in total fluoride discharges to the local environment of approximately 90%, but gives rise to a higher discharge to air. Consequently the Company requested to change the discharge limit to 0.75 kg/hr, and allowing up to 1.0 kg/hr for less than 10% of the time".

The conditions controlling fluoride emissions from the den stack as finally agreed between the Council and Ravensdown are numbered 3(a) to (d) under Schedule 2 of the proposed set of conditions earlier cited. We return to the issue of possible fluoride conditions after discussing the issues of effects on human health and on vegetation and animals under separate heads.

The absence of specific quantification of fluoride discharges from the granulation and storage areas was strenuously pursued by Mr Smith and others during the hearing. According to Mr Millichamp, the Council overlooked imposing any condition as regards the granulation plant hygiene vents discharge in its original decision. The conditions now proposed between ORC and the Company include a requirement for weekly measurements over a one hour sampling period of emission of fluoride from the granulation plant, with a total discharge limit from the relevant vents of 0.5 kg/hr. Evidence for the Company was to the effect that fugitive emissions from the storage areas are in all likelihood of minor significance, having regard to available ambient air monitoring results coupled with predictions gained from modelling work undertaken. Be this as it may, the Company is willing to undertake a study of the matter (proposed condition 5).

If consent is upheld, three monitoring sites are intended to be employed at all times as far as practicable (as per present arrangements) - the existing sites being at 18 Matai Street, 46 Adderley Terrace and 115 Ravensbourne Road. One seven-day average measurement is to be taken per calendar month as at present. Mr Millichamp stated that he was satisfied with the accuracy of recent fluoride monitoring results via the three sites in question. However, we consider that ambient fluoride levels should also be monitored at the further site to be selected for instrumental monitoring of SO₂ concentrations.

We have reflected upon the evidence of fluoride monitoring to date, as well as that in reference to modelling - all against the criticisms advanced by those in opposition. In the process, careful consideration has been devoted to the evidence of Dr Doley and Dr Kelly, whose evidence we address shortly under separate headings. We also bear in mind Mr Millichamp's observation that there are no significant sources of fluoride in the area apart from the works. Even if one accepts that relevant modelling predictions appear to "fit" well with current monitoring data, the provision of additional evidence of ambient air fluoride levels via the total monitoring process over the next 12 months in particular will be of prime confirmatory significance.

The phosphate rock grinding process has earlier been described. Dust is discharged from the Bradley Mills through the rock crushing process and from sources such as vehicle movements over yard areas and product handling. Potential dust distribution from the Bradley Mills is controlled by bag filter equipment. The Council imposed a 2.5 kg/hr limit on discharges from the mills - which condition is repeated in the latest agreed set (see Schedule 2, condition 5). Mr Millichamp commented:

"This limit reflects the very high control efficiency expected from bag-filtration equipment and will easily ensure there are no adverse effects from these sources".

As to the discharge of reduced sulphur compounds from the superphosphate manufacturing process, or the den stack in particular, we reserve our discussion for the next two headings.

Effects on Human Health

Evidence was adduced for Ravensdown from Dr F Kelly, a private consultant specialising in Public Health Medicine. In discussing the effects of human exposure to sulphur dioxide she stated:

"The degree of exposure to sulphur dioxide that is associated with bronchitis or asthma in humans has been extensively studied both experimentally, for example by measured exposures in a laboratory, and epidemiologically, by looking at the effects on populations who live in polluted cities. Both types of evidence have been reviewed in the process of establishing health based ambient air quality guidelines.

Effects of concern to the health of existing asthmatics have been demonstrated during experimental exposure to short-term sulphur dioxide levels of 1000 mg/m³. Evident bronchospasm (a definite asthma attack) occurred at concentrations of 2600-2700 mg/m³. Exercise increases susceptibility to the atmospheric exposure, through movement of air through the mouth, bypassing the protective mechanism of the nose, and increasing respiratory volumes. The 10-minute guideline levels recommended by the Ministry for the Environment (1994) and World Health Organisation (1987) are set at half this level of effect, based on the cited experiments.

For effects from exposure which is ongoing through the day, both guideline reviews concluded that the minimum level of sulphur dioxide likely to produce health effects was a 24-hour mean (average) exposure of 250 mg/m³. Both air quality guidelines are recommended at 125 mg/m³, which provides a protective factor of two”.

After citing the AAQG recommended guidelines, Dr Kelly pointed to the Council’s Proposed Regional Plan: Air for Otago (PRPA) under which a 2-tier system of air quality has been adopted. The first tier comprises the AAQG levels that are designed to protect the health of the population generally. The second tier levels are viewed as appropriate goals for Otago, because (as the PRPA states) much of the region’s air quality is well within national guidelines. For short-term exposures, the PRPA goal levels are set at 66% of the AAQG levels, the latter being presented as “alert levels”. Hence, under the PRPA, the following guideline limits are specified:

330 mg/m ³	10-minute average
230 mg/m ³	hourly average of 10-minute means
80 mg/m ³	24-hour average

In advancing her opinion that discharges of SO₂ from the works will not have adverse effects on the health of residents, (including children and people with respiratory problems), Dr Kelly made it plain that her evidence was based on her acceptance of Dr Brady’s evidence of predicted levels for 10-minute and hourly averages; also on annual average figures supplied by Dr Brady from monitoring at Ravensbourne Road, Matai Street and Adderley Terrace, for which figures were cited of 0.2 mg/m³, 11 mg/m³ and 7.4 mg/m³ respectively.

From his modelling predictions, Dr Brady concluded that, save for occasional instances, the PRPA guidelines would be achieved, with the AAQG being achieved constantly. While respecting Dr Brady’s expertise and experience, we found Mr Millichamp’s evidence compelling on the issue of instrumental monitoring – having regard, inter alia, to difficulties pointed to in the modelling work based on the irregular terrain and wind variability factors. In this context we bear in mind that the prevailing winds were shown to lie broadly up and down the Harbour, that is, down the Harbour towards Port Chalmers, and, to a somewhat lesser

extent, up the Harbour towards Dunedin City – with a particular potential in the former case for downwind dispersal over various residential slopes of Ravensbourne.

As to sulphur trioxide and acid aerosols, Dr Kelly had this to say:

“Sulphur trioxide releases acidity within the airways when inhaled, with similar types of adverse effects to those associated with sulphur dioxide. However, the concentration associated with such effects is less.

The Ministry for the Environment (1994) refer to experimental findings that exposure to 350-500 mg/m³ of sulphuric acid was associated with increased respiratory rate and decreased maximal flow, with a lowest effect during exercise at 100 mg/m³ in adolescents with asthma. The World Health Organisation (1987) guidelines conclude that “situations that would be of concern for monitoring purposes would be those where humans were exposed repeatedly to concentrations at or above 10 mg/m³ for sulphuric acid or equivalent acidity of aerosol.

The amounts of sulphur trioxide aerosols present among the Ravensbourne discharges are at approximately 1:1200 the concentration of sulphur dioxide. At these amounts, the adverse effect additional to that from the sulphur dioxide will be minor.”

In discussing the effects of exposure to particulates, Dr Kelly again relied on evidence of Dr Brady as to the likelihood of suspended respirable particulate matter being emitted in conjunction with particulate of larger size ranges; also on the evidence of Mr Clark as to overall measures adopted as part of the works’ management in the control of dust emanation from the site. On the basis of those witnesses’ evidence, Dr Kelly perceived no likely health problem to residents of Ravensbourne. She also referred to evidence of low levels of inorganic material obtained by the Company from dust deposition gauges located at 115 Ravensbourne Road and 46 Adderley Terrace. By contrast, a gauge located at a site in the vicinity of a quarry within the wider industrial area preceding the works, (as one approaches Ravensbourne), was said to have indicated variable and sometimes high deposition rates of inorganic material.

We accept that the two main sources of inhalable dust via the works are, first, the Bradley Mills on account of the rock grinding process, and secondly, fugitive dust generated by on-site activity associated with truck loading and truck movements - largely at the southern part of the site. Dr Brady indicated that 25% of windblown particulates from the Bradley Mills would be expected to be 10 microns (mm) or less (that is, within the category commonly referred to as PM₁₀); also, that predicted ambient 24-hour average exposure levels within 100 metres of the works lay at no more than 1 to 10 mg/m³. In this context,

the important interrelationship with the control of dust generation from truck movements and other general on-site activities must be borne in mind – those matters being dependent upon good staff management, as Dr Brady pointed out and Mr Clark acknowledged.

According to Dr Kelly, the main health effects of rock phosphate dust would be general irritation of the respiratory tract, the potential for those effects being dependent on the degree of exposure. In general terms, she stated—

“... dust exposure, or particulate, is of concern as a possible cause of aggravator of lung diseases. To produce effects on the human lung particulate must be of a small enough size (less than 7 to 10 mm) to pass the protective barrier of the upper respiratory tract. The deposition pattern for fine particles (less than 2.5 mm) within the lungs depends on whether the person is exercising, or breathing through the mouth versus the nose.”

Total suspended particulate PM₁₀ levels specified in the AAQG for 24-hour and annual averages are 120 mg/m³ and 40 mg/m³ respectively. The PRPA, however, has reflected increased international concern over the health effects of PM₁₀ by providing a 24-hour goal level of 50 mg/m³.

Dr Kelly discussed a particular concern of some objecting parties in relation to cadmium presence in phosphate rock and potential health effects. She acknowledged that cadmium is present as a trace element in the rock and hence minutely in the dust from the process. However, from her own knowledge and researches she was unable to identify any significant risk of harmful cadmium exposure through inhalation of wind-borne phosphate dust. Dr Legge referred to a report in which it was stated that “the absorption of cadmium by inhalation is of obvious significance for humans in the industrial environment”. But we accept Dr Kelly’s evidence in rebuttal that, having consulted with the author, the statement in question was not related to phosphate dust. Neither did the report conclude that fertiliser workers were unduly exposed to cadmium as a working sector group. Dr Kelly stated that the main human health interest in the presence of cadmium in rock phosphate lies in the element’s subsequent uptake from soils into the food chain. Yet she made no suggestion, neither was there any other cogent expert evidence to indicate, that there would be any likelihood of an adverse effect from such a source, given the framework of consent conditions proposed by the Council and accepted by Ravensdown.

In referring to effects from discharges of reduced sulphur compounds, Dr Kelly referred to types of injuries that can occur to humans from various substances. For instance, dimethyl sulphide and dimethyl disulphide were said to have been reported as skin and eye irritants “in animal experiments at doses more than a thousand fold above odour thresholds”. Again, research has indicated that

methyl mercaptan will “produce eye and mucus membrane irritation, headache, dizziness, nausea and vomiting in humans following exposure to concentrations of 4 ppm (8000 mg/m³) for several hours”. For present purposes we accept the evidence for the Company that physical effects of the kinds mentioned would not arise unless emission levels were greatly higher than intended, with little or no controls in place. In practical terms, it is the prevalence and degree of odour which is the important “test factor”, because different compounds have relatively low odour thresholds at levels far removed from actual physical injury of the kinds mentioned. However, the matter does not rest there. Odour in itself may, depending on the circumstances, including its nature and degree plus the characteristics of the individual recipient, be annoying or irritating in some cases to the point of causing actual physical effects in others such as nausea, retching and sweating. As Dr Kelly observed:

“Unpleasant symptoms are a result of sensory stimulation and perception and therefore may vary with each person. The severity of symptoms is not necessarily related to the actual concentration of the odour stimulant. Complaints of odour effects can be more frequent in situations where variable presence of low concentrations produces intermittent odour”.

We address the issue of odour under the next head.

On the question of health effects from fluoride discharges, Dr Kelly observed that, under the AAQG, guidelines are specified that are designed to avoid adverse effects upon vegetation. Because plants are much more sensitive to fluoride than humans, Dr Kelly’s straightforward view was that, if the guidelines applicable to plants are met, then human health effects would not be an issue. This view was challenged by various opposing parties as over-simplistic. It was contended that evidence for the Company failed adequately to address the issue of potential effects on humans from the consumption of food containing fluoride. The general proposition that effects on humans are unlikely because of a variety of food intake origin was said to involve an assumption that ought not to be made for those inhabitants of the Ravensbourne area who place high store upon their vegetable gardens. Put another way, it was suggested that the evidence of Dr Kelly, in combination with that of Dr Doley (shortly to be discussed), failed to acknowledge the importance of home-grown food to various inhabitants of Ravensbourne. As to suggestions made to Dr Kelly that animals could well be adversely affected by fluoride intake from digested pasture, she responded that if any animal owner were to entertain a concern for his or her animal’s welfare, a urine test could easily be sought through a veterinary adviser. But she also disclaimed any likelihood of adverse effects being caused to animals on account of fluoride discharges from the works at contemplated levels of control. We return to discuss the question of fluoride effects on animals and humans shortly.

Odour

Sources of odour include the superphosphate manufacturing process, sulphur-handling operations, sulphur melting, and fugitive emissions from superphosphate storage and handling. In fact, all parts of the works that emit reduced sulphur compounds are potential odour creators. Nevertheless, viewed realistically, we agree with Mr Millichamp that the principal source of odour is very likely the den stack.

Despite extensive research and trial work, there is no current technical solution available to achieve 100% odour reductions. However, there are means available to achieve notable reduction. With the use of alkaline hypochlorite solution, the Company achieves around 85% reduction efficiency. With the plant as it exists with its current scrubber system, that approach appears to be the most practicable option. Mention has earlier been made of the new scrubber that was installed in 1997, thus facilitating an obvious improvement in efficiency levels. Any significant improvement beyond present conditions could only be achieved at major additional cost with installation of a still better system.

Whether an odour is offensive and adversely affects the environment is subjective and not easily assessed. The MfE publication, *Odour Management under the Resource Management Act* (June 1995), is a worthwhile source of initial reference. In that document, detection and recognition thresholds are pointed to as factors in appraising an odour - the detection threshold for odour being the lowest concentration at which 50% of the population can detect the smell. A critiqued review of odour threshold units published by the American Industrial Hygiene Association is cited by the MfE as another useful source.

When odour is experienced off-site from Ravensdown, a major cause is doubtless attributable to hydrogen sulphide. Nevertheless, as Mr Millichamp pointed out, other reduced sulphur compounds such as methyl mercaptan and dimethyl sulphide may at times be more significant than hydrogen sulphide in causing odour effects. The extremely odorous nature of these various chemicals is well-known. As Mr Millichamp commented:

“Odour effects occur at concentrations well below those that cause any other effect on the environment. For example, hydrogen sulphide has an odour threshold that ranges from 0.7 to 10 mg/m³ and safe health exposure concentration (workplace exposure standards) of 10,000 to 14,000 mg/m³. Methyl mercaptan has an odour threshold of 0.04 to 80 mg/m³ compared to workplace exposure standards of 980 to 1000 mg/m³. This shows that major odour problems will occur long before any physical health risk. The NZAAQG for hydrogen sulphide is 7 mg/m³ and this is based on odour effects”.

In past cases, hydrogen sulphide has been used as a prime indicator for odour assessment purposes. Yet despite its likely presence as a predominant chemical, co-relation difficulties have been experienced with odour monitoring. Since the time of ORC's first instance decision in the present proceedings (as long ago as 30 August 1994), developments have occurred in the field of olfactometry that have aided assessment of odour impacts from industrial processes. Those developments were summarised by Mr Millichamp as follows:

- Ministry for the Environment's Guidelines for Odour Management in 1995, after producing a discussion document in July 1994.
- Two dynamic dilution olfactometry systems established to comply with strict European standards.
- Odour dose-response studies undertaken near major odour sources, including the Tasman Pulp Mill near Kwarau in early 1996. These used olfactometry measurements at source and community odour survey techniques borrowed from Dutch researchers.
- Lincoln Environmental produced Guidelines for Community Odour Assessment for the Ministry for the Environment in early 1997”.

We accept that in ensuing years since the ORC hearing an improved understanding of odour and odour assessment techniques has come about. Even so, there are still significant difficulties in measuring ambient air concentrations for odour effects. In fact, as Mr Millichamp noted, downwind odour remains assessable on an indirect basis only – either by utilising an indicator chemical approach for monitoring purposes such as hydrogen sulphide, or by undertaking well organised scientific surveys to gauge levels of annoyance in the local population. We accept Mr Millichamp's evidence that ambient hydrogen sulphide monitoring would be unlikely to provide a reliable indicator of odour effects for present purposes. Rather, if consent should be upheld, statistically accurate random surveys, employing sound protocols, would need to be carried out at reasonable intervals at the consent-holder's expense. The conditions of consent proposed as between the Company and ORC contain a provision that would allow for the foregoing on a two-yearly basis.

After weighing all the evidence bearing on the odour issue, including the anecdotal evidence of various opposing parties or their representatives, we find ourselves broadly in agreement with Mr Millichamp's evaluation and conclusions. Additional to the survey requirements, discharge monitoring for hydrogen sulphide will serve as a useful basis for indicating odour discharge potential, as Mr Millichamp noted. He also recommended that occasional olfactometry measurements of odour discharges be undertaken to complement those measurements. However, the agreed conditions between the Company and

ORC do not contain such a requirement - bearing in mind the obligation otherwise resting on the Company to commission an independently reliable community survey every two years. While we consider the survey approach to be reasonable, if results from the procedure should point to any significant level of community annoyance or concern, we would expect ORC expeditiously to consider the introduction of amended conditions under s.128 of the Act, including possible specification of olfactometry measurements.

As we have noted, it is not possible for the Company to achieve a position with the currently existing plant whereby no off-site odour will ever be detected. In other words, there will be a continuing situation of occasional odour detectable beyond the works. Even so, we accept the evidence for the Company and ORC regarding appropriate measures to meet the legitimate concern of ensuring that off-site odour effects will not be so noticeable and unpleasant that a significant adverse effect could reasonably be said to exist as regards Ravensbourne residents. We would add, however, that if results of the intended surveys should prove contrary to expectations, then the Company, for its part, may have to face up to installing enhanced scrubber equipment at commensurate expense if operations are to continue at the site unabated.

Before leaving this head, mention should be made of an odour survey undertaken in 1994 by Lincoln Ventures Limited, known as the Tipler Report after its main author. Mr Millichamp had this to say in reference to that report:

“This was primarily aimed at estimating emission rate from the works by back calculating from downwind odour observations with the use of a model. The work is now out of date, partly because the Company has since increased the height of the den chimney. Furthermore, direct measurements undertaken in 1996 appear to show that those estimated by Lincoln Ventures Limited were not correct. In any case, the Lincoln study did not use methods that are now considered necessary for a statistically reliable community survey”.

Considerable mention was made of the Tipler Report during the hearing. While pointed to and relied on by various opposing parties as evidencing a significant “odour problem” associated with the works, it was criticised as to its methodology and conclusions by Dr Brady and Mr Millichamp. All in all, we were left unsatisfied that the Tipler Report could be treated as a worthwhile source of information in the absence of more recent survey results employing recognised assessment techniques.

Effects on Vegetation, Animals and Humans

In addressing the question of effects on vegetation, evidence was led for Ravensdown from Dr D Doley, Chairperson of the Board of Studies in Environmental

Science at the University of Queensland. Previously he was Head of the Department of Botany at that University. His research interests in the area of air pollution were outlined as follows:

- “The physiological and morphological effects of gaseous pollutants, especially fluorides, on plants;
- The plant and environmental factors affecting fluoride uptake by leaves and its redistribution in plants;
- The influence of pollutants on plant growth and ecological processes;
- The development and application of air quality guidelines, especially for fluoride and sulphur dioxide, to protect Australian vegetation;
- The biological monitoring of atmospheric pollutants using plants, and the application of plant physiological and ecological principles to the management of vegetation in industrial environment.”

On 14 and 15 January 1998, Dr Doley undertook a survey of vegetation in the Ravensbourne area. The survey embraced a number of representative sites, namely, the Moller Park Bowling Club grounds, Black Jacks Point, 117 Ravensbourne Road, Adderley Terrace at its western end, Mr Morrison’s property at the corner of Matai Street and Junction Road, and several other sites in the Ravensbourne town area which were examined comparatively briefly. Under cross-examination, Dr Doley indicated that he had looked at the vegetation around Moller Park and on the Company’s own land.

The survey was stated to be a visual survey using “sensitive indicators” - that is to say, a visual appraisal of various leaves or items of foliage from species particularly susceptible to fluoride injury as located within different areas examined. No material was gathered for chemical analysis because that was deemed unnecessary, given the apparent lack of any significantly widespread effect on vegetation on visual examination. At each inspection site, the number of trees inspected varied between one to ten. At least twenty leaves were examined on each tree investigated, with data being gathered from between fifty to seventy locations overall. In selecting species for examination, Dr Doley relied on his expert knowledge and experience. Regard was had to the sensitivity of species and their relative prevalence.

Dr Doley summarised his conclusions as follows (paragraph nos. omitted):

“Visible effects of fluoride or other atmospheric stresses associated with the operation of the fertiliser works could be detected clearly within the site, and much less pronounced symptoms could be detected away from the site.

Injury to a sensitive individual of *Pinus radiata* at 117 Ravensbourne Road was attributed to fluoride. The extent of this injury was designated as Category 3 at the time of inspection, but before the commencement of the current season’s growth,

the injury category would have been 4. This represents a substantial and adverse effect. However, an adjacent individual of the same species was free from visible injury, and other trees at about the same distance from the fertiliser works were free from injury (Category 0), or showed limited injury consistent with Category 1.

Garden plants in premises inspected at 117 Ravensbourne Road and at the corner of Matai Street and Junction Road were considered to be free from fluoride injury. The garden at 117 Ravensbourne Road had been tended carefully, and all plants appeared to be healthy. The garden at Matai Street was more exposed to wind injury, and this would also have contributed to injury attributed to water deficits at some period during the summer.

The occurrence of injury attributable to fluoride could be masked in some situations by the injury caused by wind. However, the area in which wind injury was most prominent was the Ravensdown site itself and the roadway on the eastern shoulder of Black Jack's Point, which is immediately adjacent to the works.

It is concluded that, with the exception of one *Pinus radiata* tree at 117 Ravensbourne Road, there were no examples of adverse effects of fluoride emissions from the Ravensdown works on vegetation outside the works perimeter".

In explaining what was meant by "adverse" Dr Doley indicated that for "normal purposes" anything within Category 3 or above (in a range of 1 to 6 for *Pinus radiata* and 7 for *Coprosma* species) could be regarded as adverse. More specifically, Category 4 was said to be representative of the least severe symptoms that would be apparent to a casual observer and could reasonably be judged "offensive or objectionable to such an extent that it has an adverse effect on the environment". The average home gardener would be likely to be offended by these conditions in horticultural specimens. Category 3 injury, on the other hand, might be "offensive to a dedicated home gardener". Again, if one were talking of a horticultural/nursery activity, a plant injury falling within Category 1 might be deemed adverse.

While there was no evidence to indicate the presence of any significant horticultural or nursery activities in Ravensbourne, there was nevertheless evidence indicating that various landowners take a pride in their individual outdoor areas, whether comprising gardens within residential sites or more extensively within lifestyle blocks. There is also the presence of Moller Park, Black Jacks Point, and areas of bush reserve on the higher slopes of Ravensbourne.

Dr Doley was asked in questions raised by the Court to indicate what he considered appropriate by way of a monitoring programme for the purpose of the conditions

proposed by ORC and Ravensdown regarding vegetation. His response was:

"An inspection programme could be as detailed as you wish to make it but if one of the considerations is reasonable economy then I suggest that the type of inspection that was carried out for this hearing would be appropriate".

A little later he advanced what he termed two principal reasons for this view – one being the scale and terms of geographic extent and the relatively limited degree of potential impact; the other that "more quantitative study such as physiological or ecological studies would be enormously expensive and probably no more conclusive than the survey that was conducted for this hearing". As to potential effects of fluoride upon grazing animals, it was noted that animals observed at 117 Ravensbourne Road appeared not to be "commercial in their orientation". However, it was conceded that—

"... if those animals are living continuously on pasture in that location then it is possible there may be effects on such animals (and) whether that constitutes a sufficient justification for a fluoride monitoring programme in pastures is something that would need to be considered".

Another question raised by the Court was whether a monitoring programme should be aimed at investigating potential adverse effects of sulphur dioxide on vegetation as well as fluoride. In answer he stated:

"Ideally yes, but the difficulty is when both of these agents are present at levels at or below the air quality guidelines for separation of effects in either visible or functional terms is very difficult".

We are bound to say that evidence of the survey conducted by Dr Doley fell short in convincing us that the effects of fluoride from the works upon vegetation in Ravensbourne have been fully identified and assessed. As Dr Doley himself acknowledged, a single observation of vegetation may not provide a sensitive temporal description of exposure to a fluoride source with varying rates of emission, although a knowledge of the seasonal pattern of vegetative growth and the pattern of foliar injury can assist in the identification of periods of greater or lesser fluoride exposure. Dr Legge, for his part, expressed concern at the absence of long-term monitoring of the effects of discharges from Ravensdown to prove whether or not there have been any significant long-lasting effects on vegetation in the Ravensbourne area. In his view, surveys of the kind undertaken by Dr Doley serve only to demonstrate the absence of immediate to short-term effects, without elucidating the position as to long-term cumulative effects. In response, Dr Doley asserted that plant response to pollutant exposure is not simply a function of pollutant concentration. Furthermore, visual injury symptoms in plants may be caused by more than one agent, and the distinction between those agents at any site is rarely

straightforward. It was pointed out that long-term effects of sulphur dioxide depend upon the concentrations occurring over the relevant term. In Dr Doley's opinion, a restricted geographic source with significant rates of pollution emission spanning some 60 years would be expected to be associated with a pattern of distribution of effects consistent with the nature of the source and the factors influencing pollutant dispersion. No such pattern was discernible in the Ravensbourne area from his inspection and investigation.

The issue of actual and potential effects on vegetation is far from straightforward. The basic difficulty is that the pursuit of significant additional information would involve major expense, coupled with an attendant risk that in the end no positively worthwhile conclusions could be drawn. Hence, having anxiously considered all the criticisms raised by or on behalf of the various opposing parties and the evidence given by them or on their behalf, we feel driven to conclude that the approach proposed in the conditions tendered by ORC and Ravensdown as regards vegetation would represent the best practicable option at this point, provided other conditions controlling discharges of fluoride and SO₂ are consistently met. In other words, applying our best judgment at this stage, we are prepared to uphold the relevant conditions if consent is granted, but on the basis that the Company's performance as revealed in the instrumental monitoring results proves to be generally to a standard contemplated by the PRPA goal levels. Should that level of general performance be lacking, then we would expect ORC to give consideration to its powers of action under s.128, against the background of the Act's purpose and relevant regional planning policies and objectives (shortly to be discussed).

Evidence as to potential effects on animals was not of such clear and apparent concern in our view, when assessed overall, as to demand an approach to vegetation monitoring beyond that contemplated by the Council – provided, of course, that the survey work is responsibly carried out by a person duly skilled and qualified. On this score, we recall the strongly-held convictions of Ms Gibb in the presentation of her case, but also observe that no one was called with a veterinary background to testify that any grazing animal in the Ravensbourne area was actually ailing from excessive fluoride intake. Finally, we accept the basic thrust of Dr Kelly's evidence that potential effects on humans would not be of such significance as to raise concern over matters relating to health, provided that the instrumental monitoring results confirm the level of performance in complying with relevant discharge limits predicted by Dr Brady on behalf of the Company. We also note Dr Doley's evidence that there would not be a need for residents to pre-wash home-grown produce more extensively than would normally be appropriate for ordinary purposes of hygiene. As he observed, the critical issue is the quantity of fluoride ingested in the course of a day as part of a healthy diet. If an area were subjected to elevated fluoride emissions, (exceeding those which would

be permissible under the conditions proposed between ORC and the Company), it was Dr Doley's evidence that half a kilogram of say silver beet would need to be consumed "in order to get one milligram of fluoride per day which is the normal healthy human dose".

Effects on Property

Considerable concern was raised by Mr Smith and other opposing parties over actual and potential effects to property via discharges from the works, including corrosion or other deterioration of roof surfaces (including undersides), car bodies and etching of windows. Concern was also expressed at excessive presence of dust. From an inspection of Mr Smith's and a neighbour's properties, carried out by consensus in the course of the hearing phases, it did appear that there was evidence of some adverse effect to roofing materials and window surfaces. A dust film was also noted on electronic equipment within Mr Smith's premises. Yet the Company has consistently disclaimed responsibility and pointed to a lack of sufficient evidence to prove causation. Mr Smith gave evidence of his having sought the assistance of a scientist from the University of Otago to investigate the cause of perceived corrosion damage on his behalf. However, a causative link was not satisfactorily established in our opinion, the person concerned not being called to give evidence.

We appreciate that Mr Smith and others are quite convinced that chemical discharges from the works, particularly the acid plant, have produced and are continuing to produce adverse effects upon their properties. We also acknowledge the sincerity of their views. Viewed objectively, we consider there are at least grounds for suspicion of an inter-connecting linkage via past levels of discharge. On the basis of performance that would be anticipated if consent should be upheld, any effects on property ought not to be of significance or concern. This, nevertheless, is subject to remarks later recorded in reference to the Company's scrubber effluent cooling ponds. On the dust issue, we have earlier emphasized the need for high standards in controlling dust generation as a matter of good on-site management, and for the covering of loaded trucks exiting the works. Essentially, these are factors going to responsibility in land use. We come to discuss the issue of monitoring for particulates later on.

Relevant Planning Provisions

We have earlier referred to the evidence of ORC's Director Resource Management, Mr A J Avery, in reference to the coastal permits. His evidence also embraced a comprehensive summary of the planning framework for managing Otago's air resource. This involved consideration and discussion of relevant contents of the PRPS. He noted that there are no outstanding appeals liable to affect the present discharge to air applications. Again, we were referred to the Transitional Regional Plan (TRP), constituted by s.368 of the Act and operative since the Act's

inception. That plan underwent alteration by TRP Change 1: Air Discharges which was publicly notified in October 1994. The third relevant planning instrument alluded to was the Proposed Regional Plan: Air for Otago (PRPA) which was publicly notified on 28 February 1998.

Obviously, the planning framework in existence when the Council heard Ravensdown's applications five years ago has undergone notable change and development, in that the TRP Change 1: Air Discharges was promulgated not long after the Council made its decision re Ravensdown, and later became operative in 1996; furthermore, the PRPA was promulgated in February last year. Not surprisingly, the various instruments contain a range of objectives and policies relevant for present purposes. In terms of consent requirements for the proposed activities, rule 3.5.2.1 of the TRP Change 1 classifies the relevant discharges on a discretionary activity footing. Rule 16.3.5.7 of the PRPA makes similar provision.

Mr Avery identified one objective and two policies in the PRPS, one objective and two policies in the TRP, and two objectives and three policies in the PRPA of particular relevance. He attached a complete list of the various plan provisions referred to in the course of his evidence as an appendix. We have had regard to all that material along with those provisions set out in the body of his brief.

It will be convenient to mention Mr Avery's identified objectives and policies before proceeding further. In the PRPS, Objective 7.4.1 reads:

"To maintain and enhance Otago's existing air quality, including visual appearance and odour".

Policies 7.5.2 and 7.5.3, in turn, state:

"To avoid, remedy or mitigate any discharges which have adverse effects on the air resource including effects on human health, the environment, visual impacts and odour".

And secondly —

"To promote and encourage improvements to existing discharges in order to reduce the amount and toxicity of contaminants released".

Under the TRP, objective 3.3.1 requires the Council—

"To maintain and enhance Otago's existing air quality".

And under policies 3.4.1 and 3.4.2 the following appears:

"To maintain Clean Air Act requirements while alternatives are fully investigated".

And—

"To control the effects of discharges to air through

the consents process and enforcement action to avoid, remedy or mitigate adverse effects on the environment".

In terms of the PRPA, Mr Avery cited objective 6.1.1:

"To maintain ambient air quality in parts of Otago that have high air quality and enhance ambient air quality in places where it has been degraded".

Also objective 6.1.2:

"To maintain a standard of local air quality which avoids adverse effects on —
(a) Human health;
(b) Cultural and amenity values;
(c) Ecosystems and the plants and animals within them; and
(d) The life supporting capacity of air".

As Mr Avery noted, both objectives seek that air quality be maintained; and, in the case of areas of poor air quality, that that quality be enhanced. The following policies from the PRPA were also cited:

Policy 8.1.2:

"To have regard to the Regional Ambient Air Quality Guidelines in Schedule 1.1 in managing the region's air resource".

Policy 8.1.3:

"When considering the effects of any discharge of contaminants into air when preparing an application or making a decision on an application, particular regard will be had to the following effects:

- (a) Any actual or potential effects of the discharge on values of significance to Kai Tahu;
- (b) Any cumulative effects;
- (c) Any adverse effects from hazardous contaminants identified in Schedule 1.3; and
- (d) The sensitivity of the local environment, including any actual or potential effects on the health and functioning of ecosystems, plants and animals, cultural and amenity values, and on human health".

Another policy mentioned was policy 11.1.1 reading:

"To avoid or mitigate any adverse effects on human health or amenity values resulting from the discharge of offensive or objectionable odour through employing:

- (a) Good management practices (including the use of Codes of Practice) and process technology that has an inherently low odour potential to ensure that the amount of odorous contaminants generated by a process or activity is minimised;
- (b) Appropriate control technologies to reduce the emission of odorous contaminants;
- (c) Buffer zones, site planning mechanisms and other land use management techniques to reduce the potential for adverse off-site effects; and

- (d) Tools and techniques that provide an objective assessment of odour, such as olfactometry, odour dose response assessments and community surveys”.

We have earlier referred to the PRPA ambient air quality guideline or goal levels contained in Schedule 1.1 of the Plan. Those levels equate to 66% of the AAQG levels, except in relation to particulates (PM_{10}) where an even lower guideline level has been adopted in order to reflect increased international concern over the health effects of PM_{10} . The 66% level has been adopted to reflect “alert” levels advocated by the MfE under a publication *Environmental Performance Indicators: Proposals for Air, Fresh Water and Land, 1997*.

When one has regard to the various objective and policy provisions above-cited, a clear intent emerges that the good air quality of the region is to be protected and maintained; and in areas where the quality is less satisfactory than the norm, the aim is to seek that that deteriorated quality be improved. In the present instance, there exists a substantial and long-standing industrial operation alongside the Harbour, and a local residential community on the hinterland slopes nearby, also of long-standing. The manufacturing operation cannot function without consent under the Act to discharge contaminants to air, with dispersion occurring over a wide area that inevitably includes the airspace above the residential area concerned. That being so, having regard to the size and nature of that operation, its location in relation to the residential area of Ravensbourne, and relevant considerations under the RMA as later discussed, the Company must accept responsibility for achieving a high standard of mitigation of off-site effects - and the conditions of any consent must, in turn, reflect that.

It is, we think, significant that the PRPA contains goal levels in the form of guidelines that are more stringent than the AAQG, and which are designed to encourage good environmental outcomes appropriate to the Otago region. In coming to assess discharge to air applications such as those now in issue, the various planning provisions, looked at in combination, envisage (where avoidance is not possible) a level of mitigation based on quality performance, both in terms of technology employed and management systems.

For present purposes, we consider that the regional goal levels should be looked to for guidance in reference to SO_2 and fluoride levels in the grant of any consent, rather than the AAQG where cited levels are more in the nature of “trigger points”. (By that we mean that beyond those points, effects upon ambient air quality are likely to be viewed as unsatisfactory from a general public health standpoint.) For the Otago region the PRPA envisages a higher standard than simple compliance with the AAQG. And, in the circumstances of this case, it is the PRPA standard which warrants attention in deciding whether the

framework of consent conditions proposed by ORC and Ravensdown would be satisfactory.

We do not overlook that the regional levels are expressed as goals, in the sense of being desirable levels to aim at achieving. Counsel for the Company and ORC both urged us not to adopt the regional levels as a fixed benchmark whereby occasional exceedances would place Ravensdown in a position of breach, despite such exceedances being within the AAQG limits. We accept that the regional guideline levels ought not to be resorted to on an inflexible basis as though they were absolute limits requiring continuous compliance. Rather, it is their spirit and intent that is important. On that footing, we conclude that a very respectable level of compliance ought reasonably to be expected in the context of any consent. More specifically, while 100% compliance with the regional levels is unrealistic, we are tentatively of the view that achievement ought reasonably to be expected at a 97% or 98% minimum level of compliance for 24-hour mean results for SO_2 , and for 7-day fluoride averages, with the AAQG levels being complied with constantly. It is noted that such a general standard of performance for SO_2 is consistent with the predictions of Dr Brady proffered on behalf of the Company. We invite submissions on the basis stipulated in the final evaluation head below as to whether compliance percentages should be specified for other time period averages, and if so, at what figures; also as to the percentage level to apply in the circumstances above.

The time averages and compliance percentage levels that should apply for fluoride monitoring are matters upon which we do not have a firm view. Whatever the basis adopted, we anticipate that fugitive fluoride discharges from the storage areas (whatever their total volume) will be reliably “captured” by the monitoring off-site aimed at identifying total levels of fluoride in the ambient air. We again invite submissions on the basis indicated in our concluding evaluation; also as to the practicalities and implications of the instrumental monitoring for SO_2 concentrations at the additional site to be selected embracing the recording of ambient temperatures, wind speeds and direction.

No condition is included in the suggested conditions of ORC and the Company directed to ambient air measurement of PM_{10} levels. It will be recalled that Dr Brady predicted maximum 24-hour downwind concentrations of PM_{10} material at between 1 and 10mg/m³ within 100 metres of the works. That represented a minimal range of predicted effect, bearing in mind the PRPA’s 24-hour goal level of 50 mg/m³. We observe that consent is sought in relation to particulate discharges from the vents associated with the Bradley Mills as well as fugitive dust from product storage and dispatch facilities. On the basis of the maximum hourly discharge limit proposed from the Bradley Mills (2.5kg/hr), ORC is satisfied that there will be no off-site effect of significance.

No compelling evidence was adduced, in our view, to show that adequate measures had not been introduced to guard against any significant off-site effect from the relevant vents.

According to Dr Brady, the only source of fine solid particulate material, (excluding fugitive and wind-blown material which, in Dr Brady’s opinion, is mostly of coarse nature), that has a potential to produce excessive rates of deposition or cause health effects, relates to the Bradley Mills. But that proposition is reliant on the premise that on-site activities are consistently managed on a basis that avoids off-site generation of fine particulates irrespective of the Bradley Mills. All in all, on the issue of dust generation, we are not wholly convinced, despite the Company’s assurances of careful management, that fugitive dust emissions incidental to general on-site activities have not caused, or at least contributed to causing, an off-site effect at Mr Smith’s property. In the circumstances, we are of the tentative view that monitoring at Mr Smith’s property over the next 12 months should include a regime for the monitoring of particulates. Submissions are invited on that possibility and the suggested form of an appropriate condition.

As previously noted, the area of operational activity involving mass handling of raw or manufactured materials relates basically to responsible land use. If the monitoring results should give rise for any concern, then ORC, possibly in conjunction with Dunedin City Council, would need to consider what steps should be taken by reference to the various planning instruments, and to s.128 and perhaps s.17 of the Act. An obvious difficulty would, of course, be to identify the level of particulates originating from the works themselves and to assess their cumulative effect in relation to other ambient sources.

Legal Considerations and Relevant Cases

Various background matters warrant recall before turning to discuss relevant legal aspects. They include the environmental interests and concerns of the Ravensbourne residential community, the dual long-standing nature of the residential area and the industrial activity comprising the works, the significant financial investment in the works and their contribution to the community and wider region. Uses within Ravensbourne include small-scale horticultural and agricultural ventures, residential activities (including home-gardening), and the fertiliser plant. We have also referred earlier to areas of bush reserve and to Moller Park.

Though familiar, it will be as well to record the Act’s purpose under s.5(1) of promoting the sustainable management of natural and physical resources; also s.5(2) which explains that “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 wide meaning of “environment” as defined in s.2 bears remembrance as well:

“ ‘Environment’ includes—

- (a) Ecosystems and their constituent parts, including people and communities; and
- (b) All natural and physical resources; and
- (c) Amenity values; and
- (d) The social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) of this definition or which are affected by those matters.”

The section also defines the term “amenity values” used in the meaning given to “environment”, and in s.7(c) of the Act, as follows:

“ ‘Amenity values’ means those natural or physical qualities and characteristics of an area that contribute to people’s appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes.”

The wide definition of “effect” under s.3 is also pertinent:

“In this Act, unless the context otherwise requires, the term “effect” includes –

- (a) Any positive or adverse effect; and
- (b) Any temporary or permanent effect; and
- (c) Any past, present, or future effect; and
- (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.”

Not surprisingly, various shades of viewpoint or emphasis have emerged over time in reference to relevant aspects of section 5 - all in pursuit of the common aim of conforming to the Act’s purpose in a vast range of fact situations. In some instances it has been thought that the section essentially demands a balancing exercise, with socio-economic aspirations being considered in conjunction with environmental outcomes, nevertheless giving appropriate recognition to paras (a) to (c) of subs.(2). Again, the Act’s single purpose has been pointed to, the fulfilment of which requires a broad judgment to be made involving assessment

of conflicting considerations, the scale or degree of them, and their relative significance or proportion in the final outcome. In other cases, it has been stressed that integral to the Act's purpose is the securing of environmental outcomes meeting the "bottom line" dictates of the three paragraphs mentioned.

The first part of s.5(2) is commonly referred to as "enabling" in terms of the provision intended to be made for the social, economic, and cultural wellbeing of people and communities. Even so, the wording incorporates directional factors bearing on management and protection of resources and provision for health and safety. Those factors are clothed with openness (to use the expression of Greig J in *New Zealand Rail v Marlborough District Council* [1994] NZRMA 70, 86), in that the connecting words "in a way, or at a rate" afford wide scope for individual judgment. Nevertheless, that scope is channelled by the subsection's succeeding paras (a) to (c) in that considerations relevant under those paragraphs must be duly weighed and heeded. Whatever might be the result from balancing different aspects under the first part of the subsection, the end result must be one that reflects due application of the qualifying paragraphs - even to the point of refusal of an otherwise promising proposal. As was stated by the Planning Tribunal (as this Court was formerly named) in *Campbell v Southland District Council* (Decision W114/94), s.5 does not seek that a balance be achieved between benefits occurring from an activity and the activity's adverse effects upon the environment. The definition in subs.(2) specifically requires adverse effects to be avoided, remedied or mitigated irrespective of the benefits that may accrue.

Inevitably, in a case such as the present, many factors fall to be weighed in the overall mix of relevant considerations. In that process, as was observed in *Mangakahia Maori Komiti v Northland Regional Council* [1996] NZRMA 193, each of the lettered paragraphs of s.5(2) must be afforded full significance and applied according to the circumstances of the particular case, so that promotion of the Act's purpose is effectively achieved (p.215). But as Grieg J made plain in *New Zealand Rail* (supra), in determining how and on what basis the Act's purpose may be suitably promoted in the individual case, a broadly-based informed judgment is necessary, commensurate with the openness of the language used to express the purpose and principles. As was stated by this Court (differently constituted) in *North Shore City Council v Auckland Regional Council* [1997] NZRMA 59, 93:

"A way of managing of natural and physical resources which fails to sustain, to safeguard, and to avoid, mitigate, or remedy the matters stated in paras (a), (b) and (c) thereby also restricts the extent to which that way of managing the resources enables a community to provide for its wellbeing. Where (as in this case) there are a number of issues to be considered in deciding whether a proposal would promote the sustainable management of

natural and physical resources as defined, it is our understanding that the duty entrusted to those making decisions under the Act cannot be performed by simply deciding that on a single issue one or more of the goals in paras (a), (b) and (c) is not attained."

Furthermore, as Williamson J pointed out in *Elderslie Park Ltd v Timaru District Council* [1995] NZRMA 433, 444:

"To ignore real benefits that an activity for which consent is sought would bring necessarily an artificial and unbalanced picture of the real effect of the activity. In determining whether an effect is minor it is appropriate to evaluate all matters which relate to the effect. These matters would include counterbalancing benefits and possible conditions."

In summary, the Act's purpose is not about exploring the limits of the environment in the interests of development and growth, but is concerned with seeing the environment maintained and protected, both now and in the future, by appropriate management. The Act supplies its own formula as to what is appropriate in this context by stipulating that the use, development, and protection of natural and physical resources is required to be managed in accordance with the concept of sustainability predicated in s.5(2). That, indeed, is the Act's cornerstone. And so the question that falls to be asked is not so much "What are the levels of impact that the environment can withstand in accommodating today's growth and development demand?"; but rather, "How can the sustainable management of natural and physical resources be promoted for the benefit of present and future generations as change occurs?"

Economic effects have a bearing on sustainability, inasmuch as economic considerations constitute part of the wider meaning of "environment". Section 5(2) also refers to economic wellbeing of people and communities. As will be seen, it has been held that all aspects of efficiency in terms of s.7(b) contain an economic element. Probably the most far-reaching analyses essayed by this Court to date in reference to this area have been in *Marlborough Ridge Limited v Marlborough District Council* [1998] NZRMA 73; 3 ELRNZ 483 (involving consideration of a proposed plan change to permit development of an integrated tourist resort), *Boon v Marlborough District Council* [1998] NZRMA 305 (another plan change case where an altered zoning was proposed from rural to industrial activity (forestry processing)), and *Baker Boys Limited v Christchurch City Council* [1998] NZRMA 433; 4 ELRNZ 297 (a supermarket case).

In the context of the efficient use and development of natural and physical resources under s.7(b), it was indicated in *Baker Boys* that a possible mode of interpretation of the efficiency element is one bearing on utility rather than wealth or value (p.464). Nevertheless, difficulties in such a perspective were noted on account of the absence of

means of measuring utility “beyond the criteria set out in ss.5-8 and/or market value”. Further, it was noted that “there is nothing in the Act which suggests that should be the criterion of efficiency whereas there are the provisions that suggest economic efficiency (defined shortly as maximising value) is to be had regard to.” (ibid)

In *Carter Holt Harvey Forests Limited and Another v Tasman District Council* 4 ELRNZ 93, another panel of this Court explicitly declared that: “We do not accept that economic efficiency is not part of sustainable management.” *Marlborough Ridge* was referred to as supporting the view that all aspects of efficiency are economic by definition. Hence, it was suggested that the role of s.7(b) in assessing the efficiency of methods leading to efficient use of a resource (in that case water) “might make it a particularly powerful tool”. And further: “The provision qualifies the more general direction in s.5(2) of the Act which requires managing the use, development and protection of the water resource to achieve among other matters economic wellbeing”. (p.141)

In *Boon* it was held that the proposed zone should not be upheld for a variety of reasons stemming (inter alia) from perceived cost-related inefficiencies, including allocative inefficiency “by preventing markets reflecting the true social opportunity cost of the Kaituna land”, and increased transaction costs “by increasing costs of complying activities who chose to locate elsewhere and increasing costs of non-complying activities which would otherwise use the Kaituna land more efficiently than a wood processor.” (supra, 334)

For present purposes, one cannot ignore the fact that the activity is in being and that the works represent a substantial and long-standing physical resource. So it is not a matter of choice of land use and provision of establishment opportunity as was the case in the plan change cases of *Boon* and *Marlborough Ridge*. Again, it is not a case with a background obviously similar to the well known *Te Aroha Air Quality Protection Appeal Group (No.2)* case where the applicants sought to establish a new beef by-products rendering plant near an existing export beef plant at Te Aroha. In that case it was found on the merits that odour from the proposed rendering plant was potentially offensive and that occupiers of nearby properties and other people having business in the Rural zones neighbouring the site should not have to experience an introduced effect of that kind. In the present case the works are well established and fully operative. Whether they are less efficient on account of their age and upgrading modifications over the years than would be the case were the same capital invested in the development of a new complex elsewhere is a matter of debate. Be that as it may, the works certainly represent a substantial and continuing operation in the face of other competition in the region and elsewhere. They play a notable role in the manufacture and supply of fertilizer to the farming community of the region and to a degree beyond. They also enjoy the advantage of the wharf facility

for the purpose of importing raw materials. Nevertheless, those factors relating to economic efficiency of land use and economic wellbeing are assessable in the light of the qualifying dictate of observing and applying those considerations that are relevant under s.5(2)(a) to (c).

Paragraph (c) speaks of avoiding, remedying or mitigating adverse effects, thus giving rise to the need for a value judgment on how the Act’s purpose ought to be fulfilled by invoking one or more of those stated means for dealing with adverse effects in the particular case. Here, as in the *Eden Park Trust Board* case (Decision A 130/97), (which concerned lighting for the well known and long-standing rugby/cricket facility in Auckland), and in the *Hornby* case referred to below, it is plain that mitigation must practicably be applied if consent is to be granted. In such event, however, the degree or level of mitigation must equally plainly be significant, given the total circumstances and background of the works, including their nature and location. In this connection, we bear in mind all aspects of s.5(2)(a) to (c), including the importance of safeguarding the life-supporting capacity of air soil and water. We also take cognizance of and apply relevant provisions within sections 6 and 7 on the basis required under each section, including aspects bearing on the coastal environment, amenity values and the quality of the environment. Against the background of those considerations, the various plan provisions drawn to our attention in evidence earlier discussed, and our evaluation of effects both actual and potential, (including within the context of an effect, as defined, past effects upon the residential area in earlier decades when more recent environmental improvements were not available), the mitigatory requirements incorporated in any consent must be designed confidently to produce a sustainedly good environmental outcome for the residential area of Ravensbourne, and to avoid any significant actual or potential adverse effects upon the area.

In determining suitable conditions in the event of consent, s.108(8) is important. That provision states:

“Before deciding to grant a discharge permit or a coastal permit to do something that would otherwise contravene section 15 (relating to the discharge of contaminants) [or 15B] subject to a condition described in subsection [(2)(e)], the consent authority shall be satisfied that, in the particular circumstances and having regard to -

- (a) The nature of the discharge and the receiving environment; and
- (b) Other alternatives, including any condition requiring the observance of minimum standards of quality of the receiving environment -the inclusion of that condition is the most efficient and effective means of preventing or minimising any actual or likely adverse effect on the environment.”

Section 108(2)(e), in turn, provides:

A resource consent may include any one or more of the following conditions:

...

- (e) Subject to subsection (8), in respect of a discharge permit or a coastal permit to do something that would otherwise contravene section 15 (relating to the discharge of contaminants) or section 15B, a condition requiring the holder to adopt the best practicable option to prevent or minimise any actual or likely adverse effect on the environment of the discharge and other discharges (if any) made by the person from the same site or source.”

“Best practicable option” is defined in s.2(1) in relation to a discharge of a contaminant as –

“...the best method for preventing or minimising the adverse effects on the environment having regard, among other things, to –

- (a) The nature of the discharge or emission and the sensitivity of the receiving environment to adverse effects; and
 (b) The financial implications, and the effects on the environment, of that option when compared with other options; and
 (c) The current state of technical knowledge and the likelihood that the option can be successfully applied:

By decision delivered on 15 November 1994 regarding Ravensdown’s fertiliser works at Hornby near Christchurch (*The Medical Officer of Health v Canterbury Regional Council* (Decision W109/94)), it was pointed out that in view of the Act’s extended definition of “environment” –

“...it is clearly more than just the receiving air which must be considered in the context of s.108. It is also relevant to the facts of this case that it is amenity values and the social, economic aesthetic and cultural conditions of the people of the surrounding area which must be borne in mind. That is particularly relevant in the case of odour from the factory although it is not a danger to health in any way. Clearly it is capable of adversely affecting the amenity values of the district and the social, economic, aesthetic and cultural activities which take place there. Our duty is to ensure that suitable conditions are imposed which require the applicant to adopt the best practicable option for preventing or minimising the dissemination of that odour into the surrounding community.” (p.26)

And later:

“...s.108...expressly enjoins the consent authority to consider conditions which require a consent holder to adopt the best practicable option to prevent or minimise any actual or likely adverse effects on the environment of the discharge The legislature clearly contemplates that there must be circumstances where the best practicable option will only be to minimise the adverse effects on the environment. It will not obviate them entirely.

In our view the proper approach is for the consent authority to consider all of the relevant evidence and relevant statutory criteria and to decide whether or not to grant the application.” (p.28)

In our view, these passages are helpful and relevant for present purposes, and we adopt them accordingly.

Final Evaluation and Determination

At a relatively late stage of the hearing, shortly before conclusion of the hearing phase in the second week of February this year, Mr Williams presented a submission that ORC had acted unlawfully by purporting to grant Ravensdown a discharge to air permit in respect of the den stack. It was submitted that the Company’s application was based on the den stack being at a height of 15 metres and that jurisdiction was lacking for ORC, and in turn this Court, to grant a consent based on a higher stack.

The following statement in the Assessment of Effects submitted with the application in 1994, (having been compiled by the Company’s consultants, Woodward-Clyde in 1992), was pointed to under the heading “Increase Stack Heights”:

“The Ravensbourne Works is located in complex terrain (not flat) and the maximum levels experienced at ground level are often high because of the effect of the plume impinging on the side of a hill. ... Raising the acid plant stack height would merely shift the spatial distribution by only a small amount. It would have little effect in Ravensbourne unless it were raised to a height of some 200 metres. This is clearly not practical. For the manufacture (den) stack, the low height of the stack actually causes maximum concentrations to occur close to the works. If raised, it is likely that ground level concentrations further away from the plant would increase.”

The last sentence of this passage was said to conflict with Ravensdown’s case presented to us based on a 40-metre high stack – that being the height pertaining for most of the time between the first instance and appeal hearings. Evidence for the Company indicated that in the latter part of 1994 and in early 1995 the den stack height was increased to 30 metres and then to 40 metres. That was done because those increases were believed appropriate to enhance the degree of mitigation of off-site effects. ORC was informed of the situation on each occasion and raised no opposition. As Mr Clark stated -

“... the height of the den scrubber stack was increased from 15 to 40 metres, to improve the dispersion of the odours sulphur compounds. Modelling of the effect of increasing the stack height demonstrated a reduction in the maximum predicted ground level concentration from 110 to 15.7mg/m³.”

Because the company’s case on appeal was based on the den stack being 40 metres in height when the height at the

time the consent application was lodged was 15 metres, Mr Williams suggested that the proceedings should be adjourned for 6 or 12 months, on the basis of the Court ordering Ravensdown to fund an updated environmental impact report from an independent firm of consultants not previously engaged. It was claimed by Mr Williams (and indeed by others appearing) that previous consultants' work and impartiality could not be relied on; further, that the Company could not be trusted to provide accurate information and data. ORC was also subjected to criticism for its performance at different times – to the point that it was contended that the Council had a mind-set favourable to the Company and biased against residents' complaints and interests. Having listened carefully to all that was said on all sides over many sitting days, we consider these various criticisms to be excessive. We were not left with an impression that Dr Brady, or his firm (until recently) Woodward-Clyde, had acted unprofessionally at any stage. Rather, as regards the stack height aspect, we accept that in the early 1990s it was genuinely thought that a 15-metre high stack was the best option, but that experience and understanding of effects gained since has revealed otherwise. As to the Company's trust-worthiness, we consider that the view of Mr Williams and others of like mind is reflective of personal attitudes stemming from dealings with the Company or its staff over past years in differing circumstances. We recognize that some people within Ravensbourne resent Ravensdown's operational discharges, but we do not find that the Company has intended to create ill-will in the past, let alone provide wrong information. There was a particular incident drawn to our attention where incorrect monitoring data was supplied to ORC, but we were satisfied after hearing from the Company's relevant employee that she was a capable and dedicated person who had made a genuine error and was remorseful in consequence.

While we acquit the Company of having in the past set out to instigate dissension or complaints, we underline the need to foster and maintain a good community liaison. If any causes for community concern should arise in future, it will be important to see that they are responded to expeditiously, effectively, and on a "user-friendly" footing, so that the polarisation that has apparently occurred in some quarters hitherto can be avoided. We do not insist upon constitution of a set group of representatives to act as a liaison body as a resource consent condition in the absence of prior agreement to that end, but invite the Company and ORC to consider whether an informal group incorporating local resident, Company, ORC and perhaps Dunedin City Council representation might usefully be established to assist better community relations.

As regards ORC, we do not find that there has been an intention to "take sides" without reasonably considering and inquiring into concerns raised by residents. In fact it is advantageous that an officer of Mr Millichamp's qualification, skill and practical background has been and is available to assist as need be.

We have earlier noted that, pending resolution of the appeal proceedings, Ravensdown is continuing to operate in reliance upon its licence granted under the former Clean Air legislation pursuant to s.124(1) of the RMA. No restriction as to the stack height is contained in that licence. Counsel for ORC submitted that this Court does not have the power to order a further assessment of effects as such. Rather, so it was contended, our function is to determine whether there is sufficient evidence before the Court to determine the appeals. If the answer to that question is yes, then that is the end of the matter. On the other hand, if we should consider that assistance would be gained by receiving further information, then the proceedings may be adjourned for that purpose. We accept Mr Page's summation. Nevertheless, the question of jurisdiction, (against the background of the original 15-metre stack height which gave rise to the statement quoted above in Woodward-Clyde's assessment of effects), requires further consideration.

On observing to counsel for Ravensdown and ORC that the case presented on appeal (based on a 40-metre high stack) appeared at least to raise an issue of conflict and concern, given the way the den stack height issue was viewed when the application was originally lodged, leave was sought to call further evidence to demonstrate that the off-site dispersal effects would not expose additional residents of Ravensdown to effects that those residents would not have experienced via the lower stack height. It was claimed that the evidence would show that the raising of the height to 40 metres was essentially a mitigatory measure whereby any off-site effects would be reduced for the benefit of residents within Ravensbourne, without placing anyone in the position of receiving new or increased effects. Leave was granted in the circumstances, bearing in mind the late point in the hearing that Mr Williams raised the whole issue. Mr Millichamp consequently gave evidence confirming that, in his view, the increased stack height was a beneficial option, resulting in a decrease in ambient concentrations at any given point down-wind of the stack. We accept his evidence and note the absence of any convincing expert evidence to the contrary – that is, to the effect that raising the stack was other than mitigatory and that adverse effects were created that might have led other people within Ravensbourne to lodge a submission originally.

In the light of Mr Millichamp's assessment, we agree with counsel for ORC that the matter of the stack height effectively becomes a land use and building consent issue. Nothing was drawn to our attention indicating that the den stack was in breach of any planning or regulatory requirements of the Dunedin City Council. We apprehend that, in the event of our upholding consent, conditions might be imposed restricting any further alteration of the den stack (or the acid plant stack for that matter). The case presented for Ravensdown and supported by ORC was based on the heights of both stacks (40m and 55m respectively) being well chosen for their respective

purposes. We accept that the respective heights are optimal on weighing the expert evidence. Hence, if a variation in height should later be sought, Ravensdown would be expected to show how and why the need for that has arisen having regard to our present findings.

Another issue pointed to by Mr Williams and various others related to the scrubber effluent cooling ponds adjacent to the premises of Ravensbourne Rugby Club on Moller Park. The ponds were installed by the company as part of the scrubber plant upgrade, the main purpose being to enable the “scrubber liquor” to be recycled, with fluoride being returned to the manufactured product.

In delivering his final submissions for ORC, Mr Page stated that—

“On becoming aware of the existence of the ponds the Council’s officers formed the view that discharges to the atmosphere from those ponds were likely to be *de minimus*. The ponds have not been an issue until recently, when two complaints have been received, one by Mr Williams and one by an associate of his. In response to those complaints the Regional Council has required the company to determine the nature and extent of contaminants evolved to the atmosphere from those ponds. If the Council’s assessment that discharges are likely to be *de minimus* turn out to be mistaken then appropriate action will be taken.”

In view of the above, Mr Page was requested to file and serve a memorandum setting out ORC’s position in relation to discharges to air from the cooling ponds following further investigation. By memorandum dated 10 June 1999, it was indicated that a preliminary assessment of the fluoride discharges from the cooling ponds by Mr Millichamp had led to the following conclusions:

- “(a) That the principal contaminants evolved from the surface of the cooling ponds are silicon tetrafluoride (SiF₄) and hydrofluoric acid. These contaminants are also found in the discharges from the den stack and the hygiene vents.
- (b) Human health effects as a consequence of the discharge are very unlikely.
- (c) Council staff have been unable to detect odour from the discharge at a distance greater than 25 metres from the ponds.
- (d) Vegetation damage as a consequence of the discharge is unlikely beyond 60 metres from the ponds.
- (e) There appears to be little sensitive vegetation in the area.
- (f) Glass windows in the adjacent rugby club building may have suffered from etching caused by the discharge from the ponds.
- (g) Fluoride discharged from the ponds will not add to the downwind impact of fluoride from other sources from the applicant’s activity. The original assessments undertaken by both the company (Woodward-Clyde) and the

- Regional Council are therefore not affected by not taking into account this discharge.
- (h) There is no need for urgent action to mitigate any potential effect from the ponds and no party would be prejudiced by waiting for the company to apply for consent as soon as a full assessment of effects is complete.”

The memorandum went on to state that a consent application with an appropriate assessment of effects is to be lodged on behalf of Ravensdown by the end of August 1999. While ORC would have preferred an earlier filing of the application, in view of Mr Millichamp’s conclusions from his preliminary assessment, insufficient cause was believed to exist for taking enforcement action in the meantime.

After careful reflection, we consider that there is enough evidence before us to determine the present appeals, notwithstanding that the discharge from the ponds is yet to be considered by ORC. From our own inspection of the rugby clubroom windows, the preliminary conclusion drawn by Mr Millichamp under (f) above does not surprise us. Whether on fuller inquiry a nexus is found to exist between apparent etching of the windows and the nearby cooling ponds will be a matter for ORC on hearing and determining Ravensdown’s further application. We perceive no need to say more about the cooling ponds for present purposes, seeing that the company has agreed to seek consent for the relevant discharge.

Turning once again to the coastal permit applications, it will be recalled that evidence was received from two ORC officers, Mr Milburn and Mr Avery. We have had regard to the nature of the relevant discharges and the receiving environment in the light of their evidence and to possible alternatives. On the latter aspect, Mr Avery noted:

“The most obvious alternative method of discharging is to use the reticulated sewerage system, which I understand is unable to take the discharges. Consideration was also given to discharging to land but was not considered a viable alternative. It is therefore considered appropriate to use the coastal marine area provided the discharges are consistent with the policy framework for coastal management and there are appropriate mechanisms to control and monitor the effects of the discharges.”

Taking the evidence of both witnesses in conjunction, we confirm the view earlier expressed that that evidence was appropriate to warrant our upholding the coastal permits as sought on the basis of the conditions agreed between Ravensdown and ORC. We are satisfied that the requirements of s.107 of the Act are met, and having applied other relevant provisions and given Part II of the Act due primacy, we find that the relevant consents, on the conditions proposed, will accord with the Act’s purpose and maintain the water quality of the Harbour. Those consents are upheld on the terms proposed accordingly.

Returning to the discharge to air applications, we are likewise of the view, on weighing all the evidence, that consent should be upheld on ORC's and the company's agreed terms, but with modifications indicated in the course of this decision bearing on (1) a second instrumental monitor for SO₂ concentrations (p.41); (2) further monitoring for fluoride (pp.44-45); (3) significant compliance with regional goal levels in reference to SO₂ and fluoride (pp.63-64); (4) suggested monitoring for particulates (p.64); and (5) limitation on acid plant and den stack heights (p.76). Counsel for ORC and the Company are to file and serve memoranda within 14 days, dealing with matters on which submissions are invited and setting forth proposed modified conditions of consent. The other parties may file and serve any comments in response within a further 14 days, with ORC and the Company having a similar period beyond that in which to lodge submissions in final reply. Following consideration of the various memoranda, the proceedings will be finally determined.

As with the coastal permits, we have accorded Part II of the Act due primacy in our overall assessment, and satisfied ourselves that the framework of conditions will be appropriate in controlling the discharges to air for which consent was sought as to conform with the Act's purpose. We consider that the conditions as formulated (with some changes as indicated) will represent a combination of the best practicable options for mitigating the various actual and potential effects that have earlier been discussed and evaluated in detail. In particular, the actual and potential effects upon amenity values of the surrounding area and the quality of the environment will be suitably heeded. At the same time the substantial plant and resource represented by the works will be able to be efficiently utilised.

In the course of our deliberations, we have directed our attention to and applied relevant matters under the Act as alluded to in the evidence of ORC's Resource Management Director, Mr Avery, and are satisfied that, as in the *Hornby* case, there will not be a danger to health via the discharges from the works given the raft of applicable conditions; further, that by reference to those conditions, due regard has been paid to the nature and character of the surrounding environment. In so concluding, we have accepted, by and large, the views of the company's and ORC's expert witnesses, but imported, nevertheless, various revised or extra aspects in the course of our overall appraisal, against the background of evidence and submissions of others, and assisted by the two on-site and neighbouring area visits that were undertaken. Both the discharge to air and water consents have been considered individually and collectively, and we are satisfied on the evidence that they represent a realistic and satisfactory basis of approach to sustainable management.

We have not overlooked that, apart from the air quality effect aspect, the discharges will involve visual effects within the coastal environment. We consider, however, that those effects have been recognised and provided for by

the intended consent conditions, given the limiting and controlling nature of the conditions. In short, the visual effect aspect will not reflect an inappropriate use in the circumstances, bearing in mind the works long history at their location.

Another matter on which our attention has focused is the potential for gas leaks or other unforeseen difficulties with the plant, given its longstanding nature and its continual pattern of modification and adaption to modern needs and demands. The evidence of Mr Clark satisfied us that the company has in place a well-organised system for detecting leaks or other deficiencies, and for acting properly in response including advising ORC. An important aid in the process has been the installation of a computerised system designed to identify untoward signs or variations within critical areas of the plant. Obviously, it is essential that the high standards on which the company's case was based are maintained, including a thorough on-going procedure of plant inspection, maintenance and replacement.

As a final comment, if the results of impending monitoring, instrumental and otherwise, should point to a need for further plant modifications and upgrading, despite our present judgment on the evidence before us, then the company will have to make its own commercial judgment on whether to outlay the additional capital required to maintain full production levels while meeting required environmental standards, or whether to reduce production in order to achieve those standards. ORC, for its part, may be expected to devote careful consideration in such circumstances to what review of the consent conditions should be introduced in the light of the instrumental monitoring data.

In case any aspect stemming from this interim decision requires further explanation or elaboration in the interests of clarity or practical effect, leave is reserved to apply.

Costs

At the request of counsel for Ravensdown and ORC, costs are reserved. Our tentative view is that costs should lie where they fall, particularly in view of the long period between ORC's original decision and the hearing on appeal, coupled with the additional background and altered circumstances occurring over the interim period, including alteration of the approach to the den stack height. If notwithstanding, costs should be sought either by the company or ORC, memoranda may be filed and served within 28 days of issue of the final decision, the party or parties from whom costs are sought having a similar period in which to reply.

DATED at AUCKLAND this day of 1999.

R J Bollard
Environment Judge

2

***Police Power and
Compulsory Acquisition
in Environmental
Management***

56 WIS.2D 7

Ronald JUST and Kathryn L. Just,
His wife, Appellants,

v.

MARINETTE COUNTY, Respondent,
State of Wisconsin, Impleaded Respondent,

MARINETTE COUNTY, Respondent,

v.

Ronald JUST and Kathryn L. Just,
His wife, Appellants,
State of Wisconsin, Impleaded Respondent,

Nos. 106, 107.

Supreme Court of Wisconsin

Oct. 21, 1972

Consolidated actions wherein landowners sought a declaratory judgement that shoreland zoning ordinance of county was unconstitutional and county sought a mandatory injunction to restrain landowners from placing fill material on their property without first obtaining a conditional use permit as required by ordinance. The Circuit Court, Marinette County, James E. Martineau, J., entered judgements that were in favour of county, and landowners appealed and state intervened on appeal as a party respondent because of constitutional issue. The Supreme Court, Hallows, C.J., held that shoreland zoning ordinance of Marinette County which prevents with exception of special permit situations changing of natural character of land within 1,000 feet of a navigable lake and 300 feet of a navigable river because of land's interrelation to contiguous water is not unconstitutional as being confiscatory or unreasonable. It was further held that where trial court dismissed action commenced by landowners, though they sought a declaratory judgement and though their rights were declared, dismissal was in conflict with procedure which Supreme Court had made clear should be followed, namely, that a complaint should not be dismissed when contrary to plaintiffs' contention, but rather judgement should set forth declaratory adjudication.

Modified and, as modified, affirmed.

1. APPEAL AND ERROR / 326

On appeal from judgement entered on findings in consolidated actions that shoreland zoning ordinance of county was valid and that property owners had violated ordinance by placing fill material on their property without first obtaining a conditional use permit as required by ordinance, state could properly intervene as a party-respondent on issue of constitutionality, where state considered appeal to be a challenge to underlying statutes as well as its comprehensive program to protect navigable waters through shoreland regulation. W.S.A. 59.971, 144.26, 274.12(6)

2. ZONING / 231

Purpose of shoreland zoning ordinance of Marinette County, which is designed to meet standards and criteria for shoreland regulation which legislature required to be promulgated by Department of Natural Resources, is to protect navigable waters and public rights therein from degradation and deterioration which results from uncontrolled use and development of shorelands. W.S.A. 59.971, 144.26, 274.12(6).

3. CONSTITUTIONAL LAW / 81

Protection of public rights may be accomplished by exercise of police power unless damage to property owner is too great and amounts to a confiscation.

4. EMINENT DOMAIN / 1

Securing or taking of a benefit not presently enjoyed by public for its use is obtained by government through its power of eminent domain.

5. EMINENT DOMAIN / 2(1)

Distinction between exercise of police power and condemnation is the matter of degree of damage to property owner.

6. EMINENT DOMAIN / 2(1)

In the valid exercise of police power reasonably restricting use of property, damage suffered by owner is incidental, but where restriction is so great that landowner ought not to bear such a burden for public good, restriction amounts to constructive taking, even though actual use or forbidden use has not been transferred to government so as to be a taking in traditional sense.

7. EMINENT DOMAIN / 2(1)

Whether a taking has occurred depends on whether restriction practically or substantially renders land useless for all reasonable purposes.

8. EMINENT DOMAIN / 2(1)

If damage is such as to be suffered by many similarly situated and is in nature of a restriction on use to which land may be put and ought to be borne by individual as a member of society for good of public safety, health or general welfare, it is a reasonable exercise of police power, but if damage is so great to individual that he ought not to bear it under contemporary standards, courts are inclined to treat it as a taking of property or an unreasonable exercise of police power.

9. EMINENT DOMAIN / 2(1)

Necessity for monetary compensation for loss suffered to an owner by a police power restriction arises when restrictions are placed on property in order to create a public benefit rather than to prevent a public harm.

10. NAVIGABLE WATERS / 35

State of Wisconsin under trust doctrine has a duty to eradicate present pollution and to prevent further pollution in its navigable waters.

11. ZONING / 101

Exercise of police power in zoning must be reasonable.

12. ZONING / 110

It is not an unreasonable exercise of police power in zoning to prevent harm to public rights by limiting use of private property to its natural uses.

13. HEALTH AND ENVIRONMENT / 25.5

Changing of wetlands and swamps to damage of general public by upsetting natural environment and natural relationship is not a reasonable use of that land which is protected from police power regulation. W.S.A. 30.11, 30.12, 30.19, 30.195, 30.05, 59.971, 59.971(1, 6), 144.26.

14. NAVIGABLE WATERS / 3

Laws and regulations to prevent pollution and to protect waters of state from degradation are valid police-power enactments, W.S.A. 30.11, 30.12, 30.19, 30.195, 30.05, 59.971, 59.971(1, 6), 144.26.

**15. CONSTITUTIONAL LAW / 63(1)
NAVIGABLE WATERS / 29**

Active public trust duty of state ion respect to navigable waters requires state to promote navigation as well as to protect and preserve those waters for fishing, recreation, and scenic beauty; to further this duty, legislature may delegate authority to local units of government. W.S.A. 30.11, 30.12, 30.19, 30.195, 30.05, 59.971, 59.971(1, 6), 144.26.

**16. NAVIGABLE WATERS / 33
TAXATION / 24
ZONING / 11**

Lands adjacent to or near navigable waters exist in a special relationship to state, and are subject to special taxation, public trust powers of state, and special zoning ordinances for restrictive conservancy purposes. W.S.A. 30.11, 30.12, 30.19, 30.195, 30.05, 59.971, 59.971(1, 6), 144.26.

17. ZONING / 110

Shoreland zoning ordinance of Marinette County which prevents with exception of special permit situations changing of natural character of land within 1,000 feet of a navigable lake and 300 feet of a navigable river because of land's interrelation to contiguous water is not unconstitutional as being confiscatory or unreasonable. W.S.A. 30.11, 30.12, 30.19, 30.195, 30.05, 59.971, 59.971(1, 6), 144.26.

18. ZONING / 101, 371

Use of special permits is a means of control in accomplishing purpose of a zoning ordinance, as

distinguished from old concept of provided for variances, and is of some significance in considering whether a particular zoning ordinance is reasonable.

19. EMINENT DOMAIN / 2(1)

While loss of value is to be considered in determining whether a restriction is a constructive taking, value based on changing character of land at expense of harm to public rights is not an essential factor or controlling.

20. DECLARATORY JUDGEMENT / 389

Where trial court dismissed action commenced b landowners, though they sought a declaratory judgement that shoreland zoning ordinance of county was unconstitutional, and though rights of landowners were declared in action, dismissal was in conflict with procedure which Supreme Court has made clear should be followed, namely, that a complaint should not be dismissed when contrary to plaintiffs' contention, but rather judgement should set forth declaratory adjudication.

21. CONSTITUTIONAL LAW / 45

Practice of assuming constitutionally of an enactment, until contrary is decided by an appellate court, is no longer necessary or workable, and, when a constitutional issue is presented to a trial court, it is better practice for that court to recognize its importance, have issue thoroughly briefed and fully presented, and to decide issue as any other important issue with due consideration.

22. CONSTITUTIONAL LAW / 48(1)

A regularly enacted statute is presumed to be constitutional and party attacking statute must meet burden of proof of showing unconstitutionally beyond a reasonable doubt.

These two cases were consolidated for trial and argued together on appeal. In case number 106, Ronald Just and Kathryn L., Just, his wife (Justs), sought a declaratory judgement staging: (1) The shoreland zoning ordinance of the respondent Marinette County (Marinette) was unconstitutional, (2) their property was not "wetlands" as defined in the ordinance, and (3) the prohibition against the filling of wetlands was unconstitutional. In case number 107, Marinette county sought a mandatory injunction to restrain the Justs from placing fill material on their property without first obtaining a conditional-use permit as required by the ordinance and also a forfeiture for their violation of the ordinance in having placed fill on their lands without a permit. The trial court held the ordinance and valid, the Justs' property was "wetlands," the Justs had violated the ordinance and they were subject to a forfeiture of \$100. From the judgements, the Justs appeal.

[1] On this appeal the state of Wisconsin has intervened as a party-respondent pursuant to sec. 274.12(6), Stats., because of the issue of constitutionality. The state considers the appeal to be a challenge to the underlying secs. 59.971 and 144.26, Stats., and a challenge to the state's comprehensive program to protect navigable waters through shoreland regulation.

Evrard, Evrard, Duffy, Holman, Faulds & Peterson, Wayne R. Peterson, Green Bay, for appellants.

James E. Murphy, Corp. Counsel, Marinette, for Marinette County.

Robert W. Warren, Atty. Gen., Steven M. Schur, Asst. Atty. Gen., Madison, for impleaded respondent.

McBurney, Musolf & Whipple, Carlyle H. Whippie, Madison, amici curiae.

HALLOWS, Chief Justice.

Marinette County's Shoreland Zoning Ordinance Number 24 was adopted September 19, 1967, became effective October 9, 1967, and follows a model ordinance published by the Wisconsin Department of Resource Development in July of 1967. See Kusler, *Water Quality Protection For Inland Lakes in Wisconsin: A Comprehensive Approach to Water Pollution*, 1970 Wis. L. Rev. 35, 62-63. The ordinance was designed to meet standards and criteria for shoreland regulation which the legislature required to be promulgated by the department of natural resources under sec. 144.26, Stats. These standards are found in 6 Wis. Adm. Code. Sec. NR 115.03, May, 1971, Register No. 185. The legislation, secs. 59.971 and 144.26, Stats., authorizing the ordinance was enacted as a part of the Water Quality Act of 1965 by ch. 614, Laws of 1965.

Shorelands for the purpose of ordinances are defined in sec. 59.971 (1), Stats., as lands within

1,000 feet of the normal high-water elevation of navigable lakes, ponds, or flowages and 300 feet from a navigable river or stream or to the landward side of the flood plain, whichever distance is greater. The state shoreland program is unique. All county shoreland zoning ordinances must be approved by the department of natural resources prior to their becoming effective. 6 Wis. Adm. Code, sec. NR 115.04, May, 1971, Register No. 185. If a county does not enact a shoreland ordinance which complies with the state's standards, the department of natural resources may enact such an ordinance for the county, Sec. 59.971 (6), Stats.

[2] There can be no disagreement over the public purpose sought to be obtained by the ordinance. Its basic purpose is to protect navigable waters and the public rights therein from the degradation and deterioration which results from uncontrolled use and development of shorelands. In the Navigable Waters Protection Act, sec. 144.26, the purpose of the state's shoreland regulation program is stated as being to "aid in the fulfillment of the state's role as trustee of its navigable waters and to promote public health, safety, convenience and general welfare".¹ In sec. 59.971 (1), which grants authority for shoreland zoning to counties, the same purposes are re-affirmed.² The Marinette County shoreland zoning ordinance in secs. 1.2 and 1.3 states the uncontrolled use of shorelands and pollution of navigable waters of Marinette county adversely affect public health, safety, convenience, and general welfare and impair the tax base.

The shoreland zoning ordinance divides the shorelands of Marinette County into general purpose districts, general recreation districts, and conservancy districts. A "conservancy" district is required by the statutory minimum standards and is defined in sec. 3.4 of the ordinance to include "all shorelands designated as swamps or marshes on the United States Geological Survey maps which have been designated as the Shoreland Zoning Map of Marinette County, Wisconsin or on the detailed Insert

1 "144.26 Navigable waters protection law (1) To aid in the fulfillment of the state's role as trustee of its navigable waters and to promote public health, safety, convenience and general welfare, it is declared to be in the public interest to make studies establish policies, make plans and authorize municipal shoreland zoning regulations for the efficient use, conservation, development and protection of this state's water resources. The regulations shall relate to lands under, abutting or lying close to navigable waters. The purposes of the regulations shall be to further the maintenance of safe and healthful conditions: prevent and control water pollution: protect spawning grounds, fish and aquatic life: control building sites, placement of structure and land uses and reserve shore cover and natural beauty....."

2 "59-971 Zoning of shorelands on navigable waters (1) To effect the purposes of s. 144.26 and to promote the public health, safety and general welfare, counties may, by ordinance enacted separately from ordinances pursuant to s. 59.97, zone all lands (referred to herein as shorelands) in their un-incorporated areas within the following distances from the normal high-water elevation of navigable waters as defined in s. 144.26 (2) (d): 1,000 feet from a lake, pond or flowage: 300 feet from a river or stream or to the landward side of the flood plain, whichever distance is greater. If the navigable water is a glacial pothole lake, the distance shall be measured from the high water-mark thereof."

Shoreland Zoning Maps.” The ordinance provides for permitted uses³ and conditional uses.⁴ One of the conditional uses requiring a permit under sec. 3.42(4) is the filling, drainage or dredging of wetlands according to the provisions of sec. 5 of the ordinance. “Wetlands” are defined in sec. 2.29 as “(a)reas where ground water is at or near the surface much of the year or where any segment of plant cover is deemed an aquatic according to N.C. Fassett’s “Manual of Aquatic Plants.” Section 5.42(2) of the ordinance requires a conditional-use permit for an filling or grading “Of any area which is within three hundred feet horizontal distance of a navigable waster and which has surface drainage toward the water ad on which there is: (a) Filling of more than five hundred square feet of any wetland which it contiguous to the water (b) Filling or grading of more than 2,000 square feet on slopes of twelve per cent or less.

In April of 1961, several years prior to the passage of this ordinance, the Justs purchased 36.4 acres of land in the town of Lake along the South shore of Lake Noquebay, a navigable lake in Marnette county. This land had a frontage of 1,-266.7 feet on the lake and was purchased partially for personal use and partially for resale. During the years 1964, 1966, and 1967, the Justs made five sales of parcels having frontage and extending back from the lake some 600 feet, leaving the property involved in these suits. This property has a frontage of 366.7 feet and the south one half contains a stand of cedar, pine, various hard woods, birch and red maple. The north one half, closer to the lake, is barren of trees except immediately along the shore. The south three fourths of this north one half is populated with various plant grasses and vegetation including some plants which N.C. Fassett in his manual of aquatic plants has classified as “aquatic.” There are also non-aquatic plants which grow upon the land. Along the shoreline there is a belt of trees. The shoreline is from one foot to 3.2 feet higher than the lake level and there is a narrow belt of higher land along the shore known as a “pressure ridge”

or “ice heave,” varying in width from one to three feet. South of this point, the natural level of the land ranges one to two feet above lake level. The land slopes generally toward the lake but has a slope less than twelve per cent. No water flows onto the land from the lake, but there is some surface water which collects on land and stands in pools.

The land owned by the Justs is designated as swamps or marshes on the United States Geological Survey map and is located within 1,000 feet of the normal high-water elevation of the lake. Thus, the property is included in a conservancy district and, by sec. 2.29 of the ordinance, classified as “wetlands.” Consequently, in order to place more than 500 square feet of fill on this property, the Justs were required to obtain a conditional-use permit from the zoning administrator of the county and pay a fee of \$20 or incur a forfeiture of \$200 for each day of violation.

In February and March of 1968, six months after the ordinance became effective, Ronald Just, without securing a conditional-use permit, hauled 1,040 square yards of sand onto this property an filled an area approximately 20 feet wide⁴ commencing at the southwest corner and extending almost 600 feet north to the northwest corner near the shoreline, then easterly along the shoreline almost to the lot line. He stayed back from the pressure ridge about 20 feet. More than 500 square feet of this fill was upon wetlands located contiguous to the water and which had surface drainage toward the lake. This fill within 300 feet of the lake also was more than 2,000 square feet on a slope less than 12 percent. It is not seriously contended that the Justs did not violate the ordinance and the trial court correctly found a violation.

The real issue is whether the conservancy district provisions and the wetlands filling restrictions are unconstitutional because they amount to a constructive taking of the Justs’ land without compensation. Marinette

3 “3.41 Permitted Uses.

- (1) Harvesting of any wild crop such as march hay, ferns, moss, wild rice, berries, tree fruits and tree seeds.
- (2) Sustained yield forestry subject to the provisions of Section 5.0 relating to removal of shore cover.
- (3) Utilities such as, but not restricted to, telephone, telegraph and power transmission lines.
- (4) Hunting, fishing, preservation of scenic, historic and scientific areas and wildlife preserves.
- (5) Non-resident buildings used solely in conjunction with raising water fowl, minnows, and other similar lowland animals, fowl or fish.
- (6) Hiking trails and bridle paths.
- (7) Accessory uses.
- (8) Signs, subject to the restriction of Section 2.0.”

4 “3.42 Conditional Uses. The following uses are permitted upon issuance of a Conditional Use Permit as provided in Section 9.0 and issuance of a Department of Resource Development permit where required by Section 30.11, 30.12, 30.19, 30.195 and 31.05 of the Wisconsin Statutes.

- (1) General farming provided farm animals shall be kept one hundred feet from any non-farm residence.
- (2) Dams, power plants, flowages and ponds.
- (3) Relocation of any water course.
- (4) Filling, drainage or dredging of wetlands according to the provisions of Section 5.0 of this ordinance.
- (5) Removal of top soil or peat.
- (6) Cranberry bogs.
- (7) Piers, Docks, boathouses.”

county and the state of Wisconsin argue the restrictions of the conservancy district and wetlands provisions constitute a proper exercise of the police power of the state and do not so severely limit the use or depreciate the value of the land as to constitute a taking without compensation.

[3-8] To state the issue in more meaningful terms, it is a conflict between the public interest in stopping the desoilment of natural resources, which our citizens until recently have taken as inevitable and for granted, and an owner's asserted right to use his property as he wishes. The protection of public rights may be accomplished by the exercise of the police power unless the damage to the property owner is too great and amounts to a confiscation. The securing or taking of a benefit not presently enjoyed by the public for its use is obtained by the government through its power of eminent domain. The distinction between the exercise of the police power and condemnation has been said to be a matter of degree of damage to the property owner. In the valid exercise of the police power, the damage suffered by the owner is said to be incidental. However, where the restriction is so great the landowner ought not to bear such a burden for the public good, the restriction has been held to be a constructive taking even though the actual use or forbidden use has not been transferred to the government so as to be a taking in the traditional sense. *Stefan Auto Body v. State Highway Comm.* (1963), 21 Wis.2d 363, 124 N.W.2d 319; *Buhler v. Racine County* (1966), 33 Wis.2d 319, 146 N.W.2d 403; *Nick v. State Highway Comm.* (1961), 13 Wis.2d 511, 109 N.W.2d 71, 111 N.W.2d 95; *State v. Becker* (1934), 215 Wis. 564, 255 N.W. 144. Whether a taking has occurred depends upon whether "the restriction practically or substantially renders the land useless for all reasonable purposes." *Buhler v. Racine County*, supra. The loss caused the individual must be weighed to determine if it is more than he should bear. As this court stated in *Stefan*, at pp. 369-370, 124 N.W.2d 319, p. 323, "...if the damage is such as to be suffered by many similarly situated and is in the nature of a restriction on the use to which land may be put and ought to be borne by the individual as a member of society for the good of the public safety, health or general welfare, it is said to be a reasonable exercise of the police power, but if the damage is so great to the individual that he ought not to bear it under contemporary standards, then courts are inclined to treat it as a 'taking' of the police power."

[9] Many years ago, Professor Freund stated in his work on *The Police Power*, sec. 511, at 546-547, "It may be said that the state takes property by eminent domain because it is useful to the public, and under the police power because it is harmful From this results the difference between the power of eminent domain and the police power, that the former recognizes a right to compensation, while the latter on principle does not." Thus the necessity for monetary compensation for loss suffered to an owner by police power restriction arises when restrictions are placed on property in order to create a public benefit rather than

to prevent a public harm. Rathkopf, *The Law of Zoning and Planning*, Vol. 1, ch. 6, pp. 6-7.

[10] This case causes us to re-examine the concepts of public benefit in contrast to public harm and the scope of an owner's right to use of his property. In the instant case we have a restriction on the use of a citizen's property, not to secure a benefit for the public, but to prevent a harm from the change in the natural character of the citizen's property. We start with the premise that lakes and rivers in their natural state are unpolluted and the pollution which now exists is man made. The state of Wisconsin under the trust doctrine has a duty to eradicate the present pollution and to prevent further pollution in its navigable waters. This is not, in a legal sense, a gain or a securing of a benefit by the maintaining of the natural status quo of the environment. What makes this case different from most condemnation or police power zoning cases is the interrelationship of the wetlands, the swamps and the natural environment of shorelands to the purity of the water and to such natural resources as navigation, fishing, and scenic beauty. Swamps and wetlands serve a vital role in nature, are part of the balance of nature and are essential to the purity of the water in our lakes and streams. Swamps and wetlands are a necessary part of the ecological creation and now, even to the uninitiated possess their own beauty in nature.

[11, 12] Is the ownership of a parcel of land so absolute that man can change its nature to suit any of his purposes? The great forests of our state were stripped on the theory man's ownership was unlimited. But in forestry, the land at least was used naturally, only the natural fruit of the land (the trees) were taken. The despoilage was in the failure to look to the future and provide for the reforestation of the land. An owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others. The exercise of the police power in zoning must be reasonable and we think it is not an unreasonable exercise of that power to prevent harm to public rights by limiting the use of private property to its natural uses.

[13] This is not a case where an owner is prevented from using his land for natural and indigenous uses. The uses consistent with the nature of the land are allowed and other uses recognized and still others permitted by special permit. The shoreland zoning ordinance prevents to some extent the changing of the natural character of the land within 1,000 feet of a navigable lake and 300 feet of a navigable river because of such land's interrelation to the contiguous water. The changing of wetlands and swamps to the damage of the general public of upsetting the natural environment and the natural relationship is not a reasonable use of that land which is protected from police power regulation. Changes and fillings to some extent are permitted because the extent of such changes and fillings does not cause harm. We realize no case in Wisconsin has yet dealt with

shoreland regulations and there are several cases in other states which seem to hold such regulations unconstitutional; but nothing this court has said or held in prior cases indicate that destroying the natural character of a swamp or a wetland so as to make that location available for human habitation is a reasonable use of the land when the new use, although of a more economical value to the owner, causes a harm to the general public.

[14, 15] Wisconsin has long held that laws and regulations to prevent pollution and to protect the waters of this state from degradation are valid police-power enactments. State ex rel. Martin v. Juneau (1941), 238 Wis. 564, 300 N.W. 187; State ex rel. LaFollette v. Reuter (1967), 33 Wis. 2d 272, 168 N.W.2d 304; Reuter v. Department of Natural Resources (1969), 43 Wis. 2d 272, 168 N.W.2d 860. The active public trust duty of the state of Wisconsin in respect to navigable waters requires the state not only to promote navigation but also to protect and preserve those waters for fishing, recreation, and scenic beauty. Muench v. Public Service Comm. (1952), 261 Wis. 492, 53 N.W.2d 514, 55 N.W.2d 40. To further this duty, the legislature may delegate authority to local units of the government, which the state did by requiring counties to pass shoreland zoning ordinances. Menzer v. Elkhart Lake (1971), 51 Wis.2d 70, 186 N.W.2d 290.

[16, 17] This is not a case of an isolated swamp unrelated to a navigable lake or stream, the change of which would cause no harm to public rights. Lands adjacent to or near navigable waters exist in a special relationship to the state. They have been held subject to special taxation, Soens v. City of Racine (1860), 10 Wis.271, and are subject to the state public trust powers, Wisconsin P. & L. Co. v. Public Service Comm. (1958), 5 Wis.2d 167, 92 N.W.2d 241; and since the Laws of 1935, ch. 303, counties have been authorized to create special zoning districts along waterways and zone them for restrictive conservancy purposes.⁵ The restrictions in the Marinette county ordinance upon wetlands within 1,000 feet of Lake Noquebay which prevent the placing of excess fill upon such land without a permit is not confiscatory or unreasonable.

Cases wherein a confiscation was found cannot be relied upon by the Justs. In State v. Herwing (1962), 17 Wis.2d 442, 117 N.W.2d 335, a “taking” was found where a regulation which prohibited hunting on farmland had the effect of establishing a game refuge and resulted in an unnatural, concentrated foraging of the owner’s land by waterfowl. In State v. Becker, supra, the court held void a law which established a wildlife refuge (and prohibited hunting) on private property. In Benka v. Consolidated Water Power Co. (1929), 198 Wis. 472, 224 N.W. 718, the

court held if damages to plaintiff’s property were in fact caused by flooding from a dam constructed by a public utility, those damages constituted a “taking” within the meaning of the condemnation statutes. In Bino v. Hurley (1955), 273 Wis. 10, 76 N.W.2d 571, the court held unconstitutional as a “taking” without compensation an ordinance which, in attempting to prevent pollution, prohibited the owners of land surrounding a lake from bathing, boating, or swimming in the lake. In Piper v. Ekern (1923), 180 Wis. 586, 593, 194 N.W. 159, 162, the court held a statute which limited the height of buildings surrounding the state capitol to be unnecessary for the public health, safety, or welfare and, thus, to constitute an unreasonable exercise of the police power. In all these cases the unreasonableness of the exercise of the police power lay in excessive restriction of the natural use of the land or rights in relation thereto.

Cases holding the exercise of police power to be reasonable likewise provide no assistance to Marinette county in their argument. In More-Way North Corp. v. State Highway Comm. (1969), 44 Wis.2d 165, 175 N.W.2d 749, the court held that no “taking” occurred as a result of the state’s lowering the grade of a highway, which necessitated plaintiff’s reconstruction of its parking lot and loss of 42 parking spaces. In Wisconsin Power & Light Co. v. Columbia County (1958), 3 Wis.2d 1, 87 N.W.2d 279, no “taking” was found where the county, in relocating a highway, deposited gravel close to plaintiff’s tower, causing it to tilt. In Nick v. State Highway Comm., supra, the court held where property itself is not physically taken by the state, a restriction of access to a highway, while it may decrease the value of the land, does not entitle the owner to compensation. In *Buhler* the court held the mere depreciation of value was not sufficient ground to enjoin the county from enforcing the ordinance. In Haslinger v. Hartland (1940), 234 Wis. 201, 290 N.W. 647, the court noted that “(a)ssuming an actionable nuisance by the creation of odors which make occupation of plaintiffs’ farm inconvenient ... and impair its value, it cannot be said that defendant has dispossessed plaintiffs or taken their property.”

The Justs rely on several cases from other jurisdictions which have held zoning regulations involving flood plain districts, flood basins and wetlands to be so confiscatory as to amount to a taking because the owners of the land were prevented from improving such property for residential or commercial purposes. While some of these cases may be distinguished on their facts, it is doubtful whether these differences go to the basic rationale which permeates the decision that an owner has a right to use his property in any way and for any purpose he sees fit. In Dooley v. Town Plan & Zon. Com. Of Town of Fairfield

5 In *Jefferson County v. Timmel* (1952), 261 Wis. 39, 51 N.W.2d 518, the constitutionality of a conservancy district use restriction was upheld as being based on a valid exercise of police power. The purpose for this conservancy district, however, was for highway safety and not for the prevention of pollution and the protection of the public trust in navigable waters.

(1964), 151 Conn. 304, 197 A.2d 770, the court held the restriction on land located in a flood plain district prevented its being used for residential or business purposes and thus the restriction destroyed the economic value to the owner. The court recognized the land was needed for public purpose as it was part of the area in which the tidal stream overflowed when abnormally high tides existed, but the property was half a mile from the ocean and therefore could not be used for marina or boathouse purposes. In *Morris County Land I. Co. v. Parsippany-Troy Hills Tp.* (1963), 40 N.J. 539, 193 A.2d 232, a flood basin zoning ordinance was involved which required the controversial land to be retained in its natural state. The plaintiff owned 66 acres of a 1,500-acre swamp which was part of a river basin and acted as a natural detention basin for flood waters in times of very heavy rainfall. There was an extraneous issue that the freezing regulations were intended as a stop-gap until such time as the government would buy the property under a flood-control project. However, the court took the view the zoning had an effect of preserving the land as an open space as a water-detention basin and only the government or the public would be benefited, to the complete damage of the owner.

In *State v. Johnson* (1970), Me., 265 A.2d 711, the Wetlands Act restricted the alteration and use of certain wetlands without permission. The act was a conservation measure enacted under the police power to protect the ecology of areas bordering the coastal waters. The plaintiff owned a small tract of a salt-water marsh which was flooded at high tide. By filling, the land would be adapted for building purposes. The court held the restrictions against filling constituted a deprivation of a reasonable use of the owner's property and, thus, an unreasonable exercise of the police power. In *MacGibbon v. Board of Appeals of Duxbury* (1970), 356 Mass. 635, 255 N.E.2d 347, the plaintiff owned seven acres of land which were under water about twice a month in a shoreland area. He was denied a permit to excavate and fill part of his property. The purpose of the ordinance was to preserve from despoilage natural features and resources such as salt marshes, wetlands, and ponds. The court took the view the preservation of privately owned land in its natural, unspoiled state for the enjoyment and benefit of the public by preventing the owner from using it for any practical purpose was not within the limit and scope of the police power and the ordinance was not saved by the use of special permits.

[18] It seems to us that filling a swamp not otherwise commercially usable is 'not in and of itself an existing use, which is prevented, but rather is the preparation for some future use which is not indigenous to a swamp. Too much stress is laid on the right of an owner to change commercially valueless land when that change does damage to the rights of the public. It is observed that a use

of special permits is a means of control and accomplishing the purpose of the zoning ordinance as distinguished from the old concept of providing for variances. The special permit technique is now common practice and has met with judicial approval, and we think it is of some significance in considering whether or not a particular zoning ordinance is reasonable.

A recent case sustaining the validity of a zoning ordinance establishing a flood plain district is *Turnpike Realty Company v. Town of Dedham* (June, 1972), 72 Mass. 1303, 284 N.E.2d 891. The court held the validity of the ordinance was supported by valid considerations of public welfare, the conservation of "natural conditions, wildlife and open spaces." The ordinance provided that lands which were subject to seasonal or periodic flooding could not be used for residences or other purposes in such a manner as to endanger the health, safety or occupancy thereof and prohibited the erection of structures or buildings which required land to be filled. This case is analogous to the instant facts. The ordinance had a public purpose to preserve the natural condition of the area. No change was allowed which would injure the purposes sought to be preserved and through the special-permit technique, particular land within the zoning district could be excepted from the restrictions.

[19] The Justs argue their property has been severely depreciated in value. But this depreciation of value is not based on the use of the land in its natural state but on what the land would be worth if it could be filled and used for the location of a dwelling. While loss of value is to be considered in determining whether a restriction is a constructive taking, value based upon changing the character of the land at the expense of harm to public rights is not an essential factor or controlling.

We are not unmindful of the warning in *Pennsylvania Coal Co. v. Mahon* (1922), 260 U.S. 393, 416, 43 S.Ct. 158, 160, 67 L.Ed. 322:

"..... We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

This observation refers to the improvement of the public condition, the securing of a benefit not presently enjoyed and to which the public is not entitled. The shoreland zoning ordinance preserves nature, the environment, and natural resources as they were created and to which the people have a present right.⁶ The ordinance does not create or improve the public condition but only preserves nature from the despoilage and harm resulting from the unrestricted activities of humans.

⁶ On the letterhead of the Jackson County Zoning and Sanitation Department, the following appears: "The land belongs to the people ... a little of it to those dead ... some to those living But most of it belongs to those yet to be born...."

[20] We note the lower court dismissed the action commenced by the Justs, although it sought a declaratory judgement and the rights of the Justs were declared. This dismissal is in conflict with the procedure which this court has made clear should be followed, namely, that the complaint should not be dismissed when contrary to the plaintiffs' contention, but rather the judgement should set forth the declaratory adjudication. *City of Milwaukee v. Milwaukee County* (1965), 27 Wis.2d 53, 67, 133 N.W.2d 393; *David A. Ulrich, Inc. v. Saukville* (1959), 7 Wis.2d 173, 181, 96 N.W.2d 612; *Denning v. Green Bay* (1955), 271 Wis. 230, 72 N.W.2d 730.

“The exercise of the power to declare laws unconstitutional by inferior courts, should be carefully limited and avoided if possible. The authorities are to the effect that unless it appears clearly beyond a reasonable doubt that the statute is unconstitutional, it is considered better practice for the court to assume the statute is constitutional, until the contrary is decided by a court of appellate jurisdiction.”

DECISION NO. A25/98

IN THE MATTER

of the Public Works Act 1981

AND

IN THE MATTER

of an objection under section 23(3) of the Act by
P G HATTON and V C G HATTON

MIS 12/96)

To:

**The Far North District Council
Kaikohe**

And to:

**P G and V C G Hatton
Taupo Bay**

REPORT AND FINDINGS OF THE ENVIRONMENT COURT

INTRODUCTION

1. By notice dated 13 June 1996, the Far North District Council gave notice to PAUL GUSTAV HATTON and VIRGINIA CAROLINE GROSVENOR HATTON (the Hattons) of its intention to take parts of their land¹ at Taupo Bay for road.

2. By notice to the Registrar of the Planning Tribunal dated 4 July 1996 the Hattons objected under section 23(3) of the Public Works Act 1981 to the proposal by the District Council to take that land.

3. On 5 February 1997 the District Council sent to the Environment Court² and to the Hattons a reply to the objection.

4. Pursuant to section 24(3) of the Public Works Act, the Environment Court has inquired into the objection and the intended taking, and for that purpose it conducted a public hearing at Waitangi on 27, 28 and 29 January 1998. The members of the Court who conducted that hearing were Environment Judge D F G Sheppard (presiding), Environment Commissioner P A Catchpole and Environment Commissioner I G McIntyre. At the hearing the District Council was represented by counsel, Mr M A Ray, and the Hattons were represented by counsel, Mr G J Mathias.

5. Taupo Bay Road passes from State Highway 10 at Akatere some 10 kilometres to Taupo Bay. It is the only formed road access to Taupo Bay, the settlement at which has a permanent population of about 90 people. The road has been in existence since about 1910-1915, and it has been maintained by the District Council and its predecessor³ for many years. In about 1989 or 1990 the District Council had the surface of a section of the road sealed. That section was on the last hill into Taupo Bay, where the road had been a problem for maintenance and for safety to road users.

6. In about 1995 the District Council proposed to seal the road from State Highway 10 to the existing sealed section on the last hill, and it also hoped to seal the last 1.2 kilometres from the bottom of the sealed hill into the township at Taupo Bay. Preliminary surveys showed that parts of the road which had long been formed and used did not pass along the legal alignment for the road. Those parts included sections of road on pieces of a property which had been bought by the Hattons in 1991, and which were the subject of the District Council's notice of intention

to which the Hattons had objected. The other parts have since been acquired by the District Council for road, by agreement with the respective owners.⁴ The District Council only needs to acquire the pieces of land owned by the Hattons which were the subject of its notice of intention to take in order to complete legalisation of the Taupo Bay Road on the alignment on which it has been formed and used for many decades.

7. In their notice of objection, the reasons given by the Hattons for their objection were —

- (i) The land is sought to be taken to further private interests rather than the public interest.
- (ii) Alternative legal road access is available to that which is sought to be taken.
- (iii) The fact that an existing formed road crosses the objectors' land is irrelevant as such road has been constructed without legal mandate.
- (iv) The objectors' land is not required to provide a legal link between existing legal roads as alternative legal access is available.
- (v) The land is sought to be taken by the Council to remedy errors by it in approving land development when no legal formed road access to such areas so developed was in fact available.
- (vi) The Council has failed to meet the statutory responsibility imposed upon it to negotiate in good faith to acquire the land now sought to be taken prior to commencing this acquisition action.
- (vii) The amount of land being sought to be take is excessive.
- (viii) The taking of the objectors' land is inappropriate and/or premature as such will not provide unrestricted legal road access as claimed there being other land to be acquired before that can be achieved with no guarantee being available that such land can in fact be acquired.
- (ix) The process initiated by the Council through first its notice of desire to acquire land and then its subsequent notice of intention to take land is invalid in that such documents do not correctly describe the land sought to be taken.

8. In addressing the Environment Court at the hearing, counsel for the Hattons stated their case in these terms:

- (i) the objective of the local authority is to primarily foster/enhance private rather than public interests;
- (ii) inadequate consideration has been given to alternative routes or other methods of achieving its stated objective;

1 The pieces of land described in the notice are described in the Schedule at the end of this report.

2 The Environment Court is the same court as the former Planning Tribunal: see section 6(1) of the Resource Management Amendment Act 1996.

3 Taupo Bay, and the road to it, was in the district of the former Whangaroa County Council until the reorganisation of local government in 1989.

4 A gazette notice to give effect to a recommendation by the Maori Land Court for a declaration as road of a former Maori road line has not yet been published, but it is not suggested that the delay arises from anything other than pressure of work in Land Information New Zealand; nor is there any reason for doubting that the declaration will be gazetted in due course.

- (iii) it would not be fair, sound and reasonably necessary for the land of the objectors to be taken; and
- (iv) the Council has failed to negotiate in good faith such being a pre-requisite before any compulsory acquisition pursuant to section 18(1)(d) PWA.

9. Counsel announced that the nine grounds of objection set out in the notice of objection would be covered in the consideration of those four matters.

10. Having inquired into the objection and intended taking and having conducted its hearing for that purpose, the Environment Court has to ascertain the objectives of the District Council; enquire into the adequacy of the consideration given to alternative sites, routes, or other methods of achieving those objectives; and decide whether in its opinion it would be fair, sound, and reasonably necessary for achieving the objectives of the District Council for the objectors' land to be taken.⁵

11. The Court has a discretion to send the matter back to the District Council for further consideration in the light of any directions the Court might give.⁶

12. The elements of the Hattons' case stated by their counsel are now considered in turn by reference to the matters to which the Court has to give attention.

PRIVATE RATHER THAN PUBLIC INTERESTS

13. First we consider the claim that the District Council's objective is to primarily foster/enhance private interests rather than the public interests. It is well established that a taking authority may not acquire more land than is reasonably necessary for the work proposed⁷; that a power given for promoting the public interest may not be used for promoting a private interest⁸; and that a public authority may not acquire land for a collateral objective⁹.

14. There were two main limbs to the Hattons' case in this respect. The first was that the District Council is seeking to acquire the land for the private benefit of the owners and residents of properties at Taupo Bay, properties which over a period of many years have been subdivided and developed with the approval of the District Council and its predecessor without legal road access. The second limb was that the District Council is seeking to take more land than the minimum amount necessary, for the collateral purpose of giving adjacent properties frontages to the road which they did not previously have. Each of those issues is addressed separately.

Private interests of property owners

15. In support of the Hattons' case that the District Council is seeking to take the land for the private interests of the owners and residents of Taupo Bay, they relied on a passage in a report dated 9 June 1995 to the Council's Operations Committee which recommended that the Council commence procedures under the Public Works Act for the acquisition, compulsorily if necessary, of the subject land. The passage of the report referred to read:

Finally, by way of some background to this process, Council has received numerous letters [and 'phone calls] of support from the Taupo Bay community [resident and non-resident], encouraging Council to continue on with the process of acquiring the land from the Hattons for the road.

While most of these are firmly focused on having the remainder of the road into the Bay sealed, there is a recognition from the population that their properties are legally without access into or out of the township, and that has caused considerable consternation.

16. Counsel for the District Council replied that the Council's objective is to provide a public road for use by the public at large. He sought to distinguish the case of provision of an access lane across the rear of a property to provide access to a neighbour's property, as in *Adams v Hutt County Council*¹⁰, and reminded us that the existing road follows its legal alignment except for a few short stretches which are required to complete it, and repeated that the Council has a single agenda, to complete the legal road.

17. In *Adams v Hutt County Council* the Court of Appeal held that it was not within the power to take land for a service lane to do so if the purpose of the proposed service lane is to provide an individual landowner with access for his family and friends and others whose business with him is of an entirely private nature, and there is no reasonable prospect that it will be used by the general public.

18. *Adams v Hutt County Council* does not appear to have been cited in *Bartrum v Manurewa Borough*¹¹, in which the Supreme Court restrained a borough council from taking land to provide a neighbour with sufficient road access to enable him to subdivide his land, as promoting the interest of the subdividing owner.

19. We accept the District Council's submission that those cases are distinguishable from the present. We find

⁵ Public Works Act 1981, section 24(7)(a), (b) and (d).

⁶ Public Works Act 1981, section 24(7)(c).

⁷ *Quinlin v Mayor etc of Wellington* [1929] NZLR 491.

⁸ *Bartrum v Manurewa Borough* [1962] NZLR 21.

⁹ *Municipal Council of Sydney v Campbell* [1925] AC338.

¹⁰ [1957] NZLR 774 (CA).

¹¹ [1962] NZLR 21.

that in this case the Council's objective is to make lawful what has long since been formed and used as a public road. The road is used and is intended to be used by the public generally, and it is not confined to use by owners of land at the Taupo Bay settlement. As an elected body, the District Council could be expected to wish to be informed "by way of some background" of expressions of the views of its constituents. However the fact that the Council was informed of views supportive of the proposal does not cause us to doubt the finding we have made about the Council's objective. We do not accept the first limb of the Hattons' case in this respect.

Taking more land than needed

20. From the outset the Hattons had made plain to the District Council their attitudes that if their land was to be acquired, they should have a significant say in how the access is to be constructed, and to limit it to the condition it was in 1990 when they bought their land, or in 1994 before the sealing was carried out. In a letter to the District Council dated 21 March 1995 Mr Hatton set out their preliminary thoughts of their minimum requirements in seven items of which the second was this —

The land and/or easements that we would create over the land ... would, first only include the area reasonably required by the Council for a roadway and, secondly would, as a minimum, retain in our ownership a small strip of land, belonging to us, on both the northern and southern edges of our property. (This might involve a very minor adjustment to the current "road line", to retain this strip on the Northern side in one piece for 10 metres or so).

21. The report of 9 June 1995 to the Council's Operations Committee contained a summary of their position in that respect in the following passages:

Mr and Mrs Hatton have so far declined to Consent to the road, requiring the following conditions to be met by Council ;

That Council covenant with them [in some way] that the road from the top of the hill down to the Bay will never be realigned, improved, widened or sealed;

That Council will let the existing length of seal going down the last hill to the Bay deteriorate until it is no better than a metalled road;

That the land required for road be kept to a minimum, leaving part of the land in the Hattons' ownership.

[This is a brief outline of their conditions; they are spelled out in more detail in the Hattons' letters to Council.]

Mr and Mrs Hatton have been advised that Council has no mandate to arbitrarily decide that **any** road

will not now or ever be improved in any way, without some form of widespread consultation process, such as, for example, the District Plan process which allows for public notification and submissions on such proposals, so that what is eventually adopted in the plan is reflective of that Community's desires.

Mr and Mrs Hatton require that the above condition be secured somehow, and I believe that identification in the district plan would be the only practical mechanism for a Council to "covenant" to do not to do any thing.

Finally also, the state of formation of the Road is not the important issue here - Council wishes to secure **legal public access** into the Bay, by the acquisition and gazettal of land for Road; and what may happen to the road by way of maintenance, upgrading, whatever, will be carried out by Council in accordance with its statutory rights and obligations under the Public Works, Local Government and other Acts once that access is secured.

The Hattons have also been assured that the land the Council requires is the minimum required for the Road. While they wish to retain some of the land under their control, I do not feel that Council could be seen to be acting either fairly or reasonably in agreeing to a situation where other landowners are left in a situation where the access to their properties, and their use and enjoyment of their land, is left in the hands of a private individual, when it is possible to legalise the area [that has always been in use and generally accepted] as a public road.

...

The Hattons have advised in discussions that their desire is not for financial gain, but that it is their basic philosophy that the road should never be improved.

...

While negotiations on the compensation/land exchange proposals mentioned above will continue, it is unlikely that Council can meet their primary condition of consent; ie that the road will never be improved [realigned, widened sealed].

22. Counsel for the Hattons explained that they wanted the area taken kept to a minimum, and to keep strips "to give them control", and submitted that there was nothing in the report to the Council which provides justification for the taking of the totality of the land owned by the Hattons for road. He contended that any additional purposes for which land, or the extent of the land, sought to be acquired could not justify the taking now sought, and that the extent of the land sought is excessive for that purpose. By way of example he quoted the following passages from a letter from the Council to the Hattons dated 1 June 1995 —

Specifically, the full width of land desired for road from the Voyce property to the Motor Camp is required, as access to the Owhero Stream is

necessary for present and future drainage and river control works.

... I do not feel that Council could be seen to be acting either fairly or reasonably in agreeing to a situation where other landowners are left in a situation where the access to their properties, and their use and enjoyment of their land, is left in the hands of a private individual when it is possible to legalise the area [that has always been in use and generally accepted] as a public road.

23. Counsel gave particulars of three respects in which the Hattons contended that more land was proposed to be taken than the minimum needed for the road.

24. The first was that part of the land proposed to be taken at the eastern end of the Hattons' property (described in the Schedule to this report) is on the other side of the Owhero Stream from the road itself, and that the only justification for taking that part is to provide the full 20-metre prescribed standard road width¹², but the report of 9 June 1995 had not referred to the Council's power to reduce the width where it is difficult or inexpedient to provide the standard width.

25. The second was that within the same area part of a very steep bank was sought to be taken, and that this area was the subject of an approval for subdivision.

26. The third was land at the western end of the Hattons' property where the width of the land proposed to be taken is about 40 metres.

27. The District Council's response was in the evidence of a consulting engineer Mr M J Winch. He deposed that the first area there is insufficient width between the existing legal boundary and the Owhero Stream to accommodate a road without realigning the stream on to the adjoining motor camp property.

28. Mr Winch deposed that the second area (the bank) is on the inside of a curve and needs to be part of the road to ensure that a safe sight distance can be maintained.

29. In respect of the land at the western end, Mr Winch deposed that the legal road width would be increased to 40 metres to avoid leaving an unusable severance of approximately 900 square metres. He accepted that it would be possible to move the road over to reduce the area of land required, and deposed that the realignment would cost around \$30,000 and would result in a lower standard of alignment in order to save a relevant insignificant area of land. The possible severance of about 900 square metres is considerably smaller than could be allowed as a separate

title,¹³ and a building could not be erected on it in compliance with the required setbacks. The witness suggested that if it is part of the road, the area could be useful for a pull-off area for vehicles which break down on the hill, and could be used to dispose of spoil if there is a slip in the area, or for other road maintenance purposes.

30. Mr Winch gave the opinion that in order to provide for safe operation and maintenance of the road, and safe and convenient access to it, taking those pieces of land for road is reasonably necessary. The witness also expressed the opinion that creation of separation strips to give the Hattons control over access to other properties from the road would be improper, because one of the reasons for public roads is to provide access to properties. In cross-examination he confirmed that he had considered keeping the amount of land required to the smallest amount necessary, to the accuracy that the engineering plans had been prepared, in order to contain the present road formation and the road batters.

31. It is our understanding that this second limb of the Hattons' case depends on whether the District Council is correct in its attitude that providing road access to adjoining properties is a proper purpose of a road, or whether the Hattons are correct in claiming that provision of that access is promoting the private interests of the adjoining owners, and that intervening strips of land, not strictly needed for the passage of traffic, should be left in their ownership. It was not suggested that those strips would be capable of being used by them in any way other than as a means of controlling possible subdivision or development of adjoining properties.

32. Our understanding of the scope of the proper purpose of a road is derived from the common law of highways. That branch of law developed in England over centuries, but for the present case we do not need to delve into history. In 1935 Lord Atkin described the legal position in this way¹⁴ —

The owner of land adjoining a highway has a right of access to the highway from any part of his premises. The rights of the public to pass along the highway are subject to this right of access ... the ordinary traffic on any highway is always liable to be increased by the exercise by an adjoining owner of this right of access. The passage of the public along a footway is always liable to be temporarily interrupted by adjoining owners' right of access, whether to the footway or the roadway ...

As was pointed out by the Lord Chief Justice, it would be remarkable to find this well established right of an adjoining owner taken away and without compensation, especially in a local Act, unless there were very plain words to that effect.

12 Local Government Act 1974, 11th Schedule, clause 1.

13 The minimum site area prescribed by the proposed district plan is 1 hectare.

14 *Marshall v Blackpool Corporation* [1935] AC 16, 22.

33. As recently as 1955 the Master of the Rolls said ¹⁵ —

The rights of members of the public to use a highway are, prima facie, rights of passage to and from places which the highway adjoins...

34. In *Halsbury's Laws of England* the law is stated in this way ¹⁶ —

At common law an owner of land adjoining a highway is entitled to access to that highway at any point at which his land actually touches it, but he has no such right if a strip of land, however narrow, belonging to another and not subject to the public right of passage, intervenes.

35. Returning to New Zealand, we start with the definition of “road” in the Local Government Act 1974 ¹⁷ —

“Road” means the whole of any land which is within a district, and which —

- (a) Immediately before the commencement of this Part of this Act was a road or street or public highway; or
- (b) Immediately before the inclusion of any area in the district was a public highway within that area; or
- (c) Is laid out by the council as a road or street after the commencement of this Part of this Act; or
- (d) Is vested in the council for the purpose of a road as shown on a deposited survey plan; or
- (e) Is vested in the council as a road or street pursuant to any other enactment ...

36. It is well established in this country that the common law rights of frontagers to access to adjoining roads apply here. ¹⁸ Activities on roads which are ancillary to the main purpose were discussed recently. ¹⁹

37. In this case the District Council proposes to take the Hattons' land for road. For this purpose, that means it proposes to take it for road within the meaning given to that word in the Local Government Act, a meaning which includes a public highway. The authorities show that a purpose of a public highway is for frontagers to have access to and from the highway along the frontage of their properties. The existence of a strip of land intervening between their properties and the highway, as the Hattons propose, would preclude owners of those properties from

exercising those rights. Therefore we hold that defining the area of land to be taken for road to extend to the adjoining property boundaries, to accord the right of access to and from those properties, is for the purpose of the road, and is not for a collateral purpose of promoting their private rights. For the District Council to have defined the land to be taken in the way contended for by the Hattons, by leaving strips of land in the Hattons' ownership to give them the power to control subdivision and development on the neighbouring properties, would be to diminish the public purpose of the road for the private benefit of the Hattons, and we agree with Mr Winch that to do so would not have been a proper exercise of public power.

38. We also accept the Council's attitude that in taking land for road it may properly take not only the width needed for a carriageway, but whatever additional width may be needed for batters, for sight lines, for drainage and stream control works, or other engineering requirements so that the road can be safe for use by the public and can be maintained in that condition. In summary, we do not accept the second limb of the Hattons' objection that the amount of land proposed to be taken is excessive in that it is more than may be needed for carriageway, or that allowing adjacent properties frontages to the road is an improper exercise of the Council's power.

ALTERNATIVE ROUTES

39. The second main element of the Hattons' case was that inadequate consideration had been given by the District Council to alternative routes or other methods of achieving its stated objective. In that respect, it was submitted that it is not for us to decide which is the better route or method; and that it is for the Council (and not its officers) to consider the alternatives having regard to the advice of its engineers and consultants. ²⁰

40. For the Hattons it was submitted that the Council had given no consideration to alternative routes or methods, as the staff report to the Operations Committee dated 20 June 1995 had contained no assessment of any alternatives but had been confined to the taking of the Hattons' land.

41. In his evidence Mr Hatton said —

While it seems that there is no formal legal access available, and that in the case of a road from Totara North the gradient would be rather steep, there does not appear to have been a serious let alone

¹⁵ *Randall v Tarrant* [1955] 1 All ER 600 (CA), 603, per Evershed, MR.

¹⁶ *Halsburys Laws of England* (4th ed) vol 21, paragraph 123.

¹⁷ Local Government Act 1974, section 315(1).

¹⁸ See for example *Middleton v Takapuna Borough* [1945] NZLR 434 and *Fuller v MacLeod* [1981] 1 NZLR 390 (CA).

¹⁹ See *Paprzik v Tauranga District Council* [1992] 3 NZLR 176.

²⁰ *Davis v Wanganui City Council* (1986) 11 NZTPA 240.

any attempt made to acquire the pieces of land which would provide for a roadway for the full length of the roadline between Totara North and Taupo Bay. Similarly no alternatives appear to have been considered to acquire land to alleviate gradient concerns.²¹

... if the Council is entitled to compulsorily acquire private land for the purpose of a road into Taupo Bay then presumably the road could be relocated on another property so as to avoid my property. It would seem from the Council's evidence that this is in fact the case.

Certainly to relocate would be more expensive and our property may be the most convenient for the Council to pursue but when we are not willing sellers should our land be taken simply to suit the convenience of the Council when it has brought this situation on itself? From the evidence there does not appear to have been any attempt to actually investigate whether other landowners would sell parts of their land to the Council for the required road.²²

42. In their original objection the Hattons had claimed that alternative legal access is available. That assertion was not made out by that or any other evidence. Mr Winch testified that there is no continuous legal road connecting Taupo Bay with the remainder of the road network, and we find that to be so.

43. Totara North is a settlement on the northern shore of the Whangaroa Harbour. The reference to an alternative route from Totara North was addressed in Mr Winch's evidence. He deposed that the cadastral plans show a road between Taupo Bay Road and Totara North about 7.5 kilometres long, but that it is largely unformed. At one point the route descends steeply at a gradient of 50% and Mr Winch testified that it would not be possible to construct a road to an acceptable gradient while keeping the road and earthworks within the legal road boundaries in that area. The continuity of the legal road is broken at the Wairakau Stream where a section of Crown land severs the road. There is a walking track generally on the road from the Wairakau Stream to Totara North, but it does deviate significantly in one place. The track has a gradient of up to 20%. Mr Winch deposed that this is too steep for normal vehicles and that reducing the gradient to an acceptable grade could not be achieved without deviating from the legal alignment. The route passes through land which is almost entirely administered by the Department of Conservation or Maori land and is covered in regenerating native forest. The area is designated both a Significant Natural Area and of Outstanding Landscape Value on the proposed district plan. Mr Winch gave the

opinions that construction of a road through that area would be very damaging to the environment, and that it is unlikely to be agreed to by the owners of sections of land required for the route beyond the legal road. He added that the community of interest for Taupo Bay residents lies with Mangonui, Taipa and Kaitaia, and that if a road from Taupo Bay to Totara north could be formed, it would be 11.2 kilometres longer than the present road for motorists travelling north. In addition, the Totara North road would not bypass the pieces of land proposed to be taken at the eastern end of the Hattons' land.

44. Mr Winch had also considered a possible alternative route to the north, also shown on cadastral plans, which he referred to as the Tupou route. It forms a loop from the Taupo Bay Road 3.8 kilometres long. The western 2.2 kilometres is formed as road, but the initial 1 kilometre was never public road, and the central 0.9 kilometre, which traverses a steep hillside, had not been formed and had been closed as road and sold to the adjoining property owners. Mr Winch deposed that the side slope of over 20% and the unstable soils made that route impractical for roading. The final 0.8 kilometre is legal road with an existing track partly on the legal road and partly on neighbouring properties. Mr Winch deposed that this route would be expensive to form and would have high ongoing maintenance costs and the risk of road severance due to slips. If it could be formed it would be 1.7 kilometres longer than the present Taupo Bay Road and, like the putative road from Totara North, would not bypass the pieces of land proposed to be taken at the eastern end of the Hattons' land.

45. Mr Winch accepted that it is physically possible to bypass the Hattons' property by realigning and reconstructing the Taupo Bay Road on other private property adjoining the existing road. He had considered three options for doing that.

46. Option A would realign the road to the south of the piece proposed to be taken at the western end of the Hatton property. Land from two private properties would be required. The total area of that land would be 1.6120 hectares, more than the 1.0037 hectares required for the present alignment of the road, because more extensive earthworks would be required to cross a gully and spur. The new alignment would be 625 metres long, compared with the existing length of 610 metres between the same points. The witness estimated that the cost of formation and construction of a sealed road on that route would be about \$180,000, compared with the estimated costs of \$36,000 for sealing the 270 metres of existing road (currently unsealed) which would be bypassed.²³

21 Page 8, paragraph 3.2.

22 Page 9, paragraph 5.

23 The cost estimates do not include land purchase costs or GST.

47. Option B would realign to the south the existing road at the eastern end of the Hattons' land. Parts of three private properties would be required instead of the Hatton land at that end. Their total area would be 4,660 square metres, compared with the 2,408 square metres to complete the existing road at that end. The deviation would have to cross the Te Owhero Stream and a tributary, requiring three large box culverts. A 20-metre wide road reserve would come within 1 metre of the Voyce house, and the road construction would require removal of at least two rows of pine trees on the Voyce property. Mr Winch gave the opinion that the lack of screening and the proximity of the road to the house would severely reduce the amenity value of the Voyce house. The road reserve on the southern side of the Te Owhero Stream would also encroach within 6 metres of a motorcamp building, and the witness considered that the amenity value of the motorcamp would be adversely affected. The new alignment would be 360 metres long compared with the existing road length of 330 metres between the same points. The estimated cost of a sealed road on that route would be about \$203,000, compared with about \$32,000 for sealing the existing unsealed road.

48. Option C would realign to the north the existing road at the eastern end of the Hattons' land. Parts of three private properties would be required instead of the Hatton land at that end. Their total area would be 4,610 square metres, compared with the 2,408 square metres to complete the existing road at that end. This option would also create two severances, one of about 2,100 square metres and the other of about 410 square metres. The deviation would start at the western end at an existing track, climb over a spur, and descend to rejoin the existing road across Lot 95 DP 56268. That property has a shed at the back but is otherwise vacant. Although it is not as wide as the standard road width of 20 metres, a road could be accommodated on it because the land is completely flat. However purchase of that property for road would deny the owners the use of their property, and the road realignment would also result in loss of amenity for neighbouring properties by changing a side boundary to road frontage and opening up the rear of the properties to view from the road.

49. A box culvert over the Owhero Stream would be required to provide physical access to the motorcamp at the frontage with the legal road. The route would involve extensive earthworks in crossing the spur. The new alignment would only be 320 metres long, compared with 350 metres between the same points on the existing alignment. Mr Winch estimated that the cost of forming and constructing a sealed road on this route would be about \$160,000, compared with about \$32,000 for sealing the corresponding stretch of the existing unsealed road.

50. Having heard Mr Winch cross-examined, we find that he approached his tasks with the skill and integrity of a professional consultant, and we accept his evidence and opinions accordingly.

51. In these proceedings it is the duty of the Court to enquire into the adequacy of the consideration given to alternative routes or other methods of achieving the Council's objective.²⁴ Insofar as that objective is cast as legalising the existing Taupo Bay Road, it begs the question of alternative routes. It should be understood to be the provision of a legal public road to Taupo Bay.

52. A duty for the taking authority to give consideration to alternative routes or methods is to be inferred from the direction to the Court to consider the adequacy of that consideration.²⁵ In this case the evidence does not establish that the Council gave consideration to alternative routes or methods, as it should have done. The consideration of the alternatives was done by Mr Winch, after the District Council had given notice of its intention to take the Hattons' land, and after they had lodged their objection. In these respects the process followed by the District Council was deficient.

53. It is important that all public authorities exercising powers conferred by Parliament faithfully follow the procedures prescribed by law. A public authority exercising powers to take private property compulsorily is expected to follow the processes intended with particular care.

54. We have considered whether the regrettable omission of the District Council to do so in respect of consideration of alternative routes and methods of achieving its objective should be decisive of these proceedings. However there are two reasons why we have concluded that its omission should not lead us to allow the objection on that ground alone.

55. The first relates to the provisions of the Public Works Act. The Act does not directly and expressly impose a duty to consider alternative routes and methods: that has to be inferred from the duty imposed on the Court when an objection is lodged. Further, the Act does not direct the Court to send the matter back to the local authority in any case when it finds that inadequate consideration has been given to alternatives. Parliament has expressly provided that the Court is to exercise a discretion whether or not to send the matter back.

56. The second ground relates not to process but to the substance of the alternative routes and methods. In that respect, we find that on the evidence before us the case for preferring the completing the legalisation of the existing

²⁴ Public Works Act 1981, section 24(7)(b).

²⁵ *Davis v Wanganui City Council* (1986) 11 NZTPA 240; *Ngatikahu Trust Board v Mangonui County Council* Planning Tribunal Decision A 57/89.

road, long since formed and in use, over all the alternative routes and methods, is so overwhelming that it would be empty pedantry to send the matter back to the District Council with a direction that it consider them. The only sensible outcome could be formation of an opinion that in the public interest all the alternatives are inferior to the current proposal. Such a process would be futile.

57. In summary the result of our enquiry into the adequacy of the consideration given to alternative routes or other methods of achieving the District Council's objectives is that the consideration was omitted, and in the circumstances of these proceedings that is not decisive against that proposed taking.

FAIR SOUND AND REASONABLY NECESSARY

58. The third ground for the Hattons' case is that it is not fair, sound, or reasonably necessary for achieving the District Council's objective for their land to be taken. That language reflects the Court's duty to decide whether in its opinion it would be fair, sound, and reasonably necessary for achieving the objectives of the local authority for the objectors' land to be taken.²⁶

59. Counsel for the Hattons stated that the basis of their case in that respect was the matters already considered under the previous headings, namely that the Council's objective was to foster private interests rather than the public interest, and that inadequate consideration had been given to alternative routes and methods of achieving its objective. We have already given our reasons for not accepting the Hattons' case in those respects.

60. In particular we rely on the evidence of Mr Winch, which we summarised earlier in this report, for our opinion that taking the Hattons' land would be sound and reasonably necessary for achieving the Council's true objective of providing a public road to Taupo Bay. We have also to decide whether it would be fair to take their land. That is partly dependent on the fourth ground of the Hattons' case, that the Council had failed to negotiate in good faith, an assertion which we consider next. Leaving aside that question about negotiations, we have also to consider the substantive question whether taking their land for road would be fair. In that respect our opinion is influenced by two factors. The first is that we are satisfied that it is reasonably necessary that there be a public road to Taupo Bay; that there is no realistic alternative to the route which passes over the pieces of the Hattons' land which the Council proposes to take; and that those pieces are no more than is reasonably necessary for the road to be kept and maintained safe for use, and to allow access from the private properties along its course as well as for passage to and from Taupo Bay by the public generally.

The second is that the road was formed along the present route in about 1915; it has been maintained and improved by successive local authorities since then; so that when the Hattons came to buy their land in 1990 the course of the road over pieces of the land which they bought was already long established and clearly evident. On the basis of those factors, and recognising that the law provides for payment of full compensation for the land taking and for any injurious affection or damage,²⁷ it is our opinion that the taking for road of those pieces of the Hattons' land would be fair.

61. We have now to consider the fourth ground of the Hattons' case, their assertion that the District Council failed to negotiate with them in good faith, and if so, whether that made it unfair for their land to be taken.

FAILURE TO NEGOTIATE IN GOOD FAITH

62. The Hattons alleged that the District Council had failed to negotiate in good faith with them in an attempt to reach an agreement. They relied on section 18(1)(d) of the Public Works Act 1981 which provides —

Where any land is required for a public work the ... local authority ... shall, before proceeding to take the land under this Act —

...

Make every endeavour to negotiate in good faith with the owner in an attempt to reach an agreement for the acquisition of the land.

63. The District Council asserted that it had complied with that requirement, and a fully detailed account of the Council's dealings with the Hattons was contained in the evidence of Ms L A Winch, the Council's former Property/Legalisation Officer, and the evidence of Mr R P Manuel, its Legal Services Co-ordinator.

64. The Hattons' claimed that there had been a fixed determination from the outset to take the land the subject of these proceedings, even though the extent of that taking was seemingly for collateral purposes, such as drainage and river control work and provision of road boundaries for adjacent property owners, and without intending or wishing to consider the Hattons' views.

65. From Mr Hatton's evidence the heart of this ground of objection was their preference that Taupo Bay remain peaceful, quiet and secluded, and their opposition to anything which might allow more people to visit Taupo Bay.

66. That attitude underlay two main bases for this ground of objection. The first was the Hattons' wish to retain strips of land between pieces of land which were to become road

²⁶ Public Works Act 1981, section 24(7)(d).

²⁷ Public Works Act 1981, section 60(1).

and the land of adjacent property owners. They wished to retain those strips so that they could control future subdivision and development of those properties. The second was their opposition to sealing of the Taupo Bay Road, because they supposed that a sealed road would encourage more people to visit Taupo Bay.

67. It is true that the Council officials who were engaged in negotiating with the Hattons were not willing to deal with them on the bases of retaining the roadside strips, and of the Council covenanting that it would not carry out sealing work on Taupo Bay Road. That was because of the officials' understanding that it would not be proper for the Council to assist in the creation of such strips for that purpose, nor for it to fetter the judgment of future councils whether sealing the road may be in the public interest. We have found no basis for supposing that their understanding on those matters was other than genuinely and sincerely held.

68. Earlier in this report we have given our reasons for upholding the attitude of the District Council and its officials about the roadside strips. We also consider that their attitude to the Hattons' stipulation that the Council covenant not to carry out further sealing on the road, and to allow the existing sealing to deteriorate, was sound in law.

69. It follows that in our opinion it was not lack of good faith, nor was it unfair, for the Council to have taken those stances in its endeavours to negotiate with the Hattons as owners in an attempt to reach an agreement for the acquisition of the land.

CONCLUSION

70. During the hearing, we enquired of counsel whether the history of the formation and maintenance of the Taupo Bay Road indicated the possibility of the doctrine of implied dedication, or the provisions of section 110 of the Public Works Act 1928 or a similar enactment, being applicable.²⁸ We record that neither party took the opportunity to make submissions on those questions.

71. The Court can award costs either in favour of or against the objector or the District Council.²⁹ We recognise that it was the Council's action in giving notice of intention to take the land which initiated the issue between the parties, and that the Hattons lodged their objection to protect their interest in their land from a procedure which they opposed. We consider that it would be inappropriate to order them to pay costs to the Council. However none of their grounds of objection was made out so it would be

inappropriate for the Council to be ordered to pay costs to the Hattons. Accordingly, we consider that the costs of the proceedings should lie where they have fallen, and we make no order for payment of costs.

72. The Environment Court reports —

- (a) That it has inquired into the objection by the Hattons to the intention of the District Council to take pieces of their land (described in the schedule to this report) for road, and into the proposed taking of those pieces of land, and for that purpose it conducted a hearing at Waitangi on 27, 28 and 29 January 1998:
- (b) That it has ascertained that the objective of the District Council is to provide a public road to Taupo Bay:
- (c) That it has enquired into the adequacy of the consideration given to alternative routes and methods of achieving that objective, and has found that the District Council omitted to give consideration to those matters but that is not decisive of the objection: and
- (d) That in its opinion it would be fair, sound and reasonably necessary for achieving the District Council's objective for the Hattons' land described in the schedule to this report to be taken.

THE SCHEDULE

The pieces of land described in the notice of intention to take land and the subject of this report are in Block II Whangaroa Survey District and comprised in Certificate of Title 29A/1247 being —

1 Part Taupo 2B Block, having an area of 1.0037 hectares, and marked as Area D on SO Plan 66203;

2 Parts Taupo 4 and 5 Blocks, having areas of 17.6 perches, 33 perches and 1 rood 4.6 perches, and shown on SO Plan 44975.

DATED at AUCKLAND this 24th day of March 1998.

D F G Sheppard
Environment Judge

hatton.doc

²⁸ See for example *Auckland City Council v Man o'War Station* (High Court Auckland CP1355/83; 19 August 1997, Anderson J).

²⁹ Public Works Act 1981, section 24(13).

DECISION NO. A88/99

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of an objection pursuant to section 23(3) of the Public Works Act 1981

BETWEEN CADE HUBERT DAROUX and CECILY KAY DAROUX
(MIS 13/98)

AND TIMOTHY FOX FOWLER
(MIS 12/98)

AND JOHN VICTOR IMPERATRICE and PATRICK JOHN HANNAH
(MIS 10/98)

AND BETTY CROUDIS and STUART ALEXANDER COMBER
(MIS 21/98)

AND BETTY CROUDIS, COLIN WILLIAM CROUDIS and STUART
ALEXANDER COMBER
(MIS 22/98)

Objectors

AND THE MINISTER OF LANDS

Respondent

AND COUNTIES POWER LIMITED

A Section 274 person

To : Minister of Lands

And to : The objectors

And to : Counties Power Limited

REPORT AND FINDINGS OF THE ENVIRONMENT COURT

BASIS OF PROCEEDINGS

1. Under section 23 of the Public Works Act 1981 (“the PWA”) the four objectors have objected to a notice of intention to take an easement against the titles to the applicants’ properties served on them by the Minister of Lands. The notices were dated 10 June 1998.
2. The notices were issued following an application to the Minister by Counties Power Limited (“Counties Power”) in December 1996, pursuant to section 186 of the Resource Management Act (“the RMA”). This application requested that the Minister issue a notice taking an easement over the title to each objector’s land for the purpose of allowing a 110 kilovolt electricity line and associated poles to run through it.
3. The Minister served the notices pursuant to his power to do so under section 23(1)(c) of the PWA. These proceedings have now been brought by the objectors who object to the Minister’s notice under section 23(3) of the PWA. This report is made pursuant to section 24(7) of the PWA.

BACKGROUND

4. Counties Power is a company engaged in the supply of electricity in the Counties’ area south of Auckland. Relevant to these proceedings is the supply of electricity to the town of Pukekohe.
5. Counties Power commenced operations on 17 May 1993. The company was formed as a result of the Energy Companies Act 1992 and is the successor to the Franklin Electric Power Board, which provided electrical services in the district from the 1920s. Whereas the Franklin Electric Power Board engaged in both the retail sale of electricity and the construction and maintenance of lines and equipment for the supply of electricity, Counties Power has now disposed of the retail side of the business.
6. All of the shares in Counties Power are held in Trust for the beneficial owners, who are the customers drawing electricity through the company’s network. The trustees are elected by the beneficiaries.
7. These proceedings result from the need for the town of Pukekohe to have a secure power supply. The option chosen was to upgrade power lines that supply the town from 33 kilovolts to 110 kilovolts. The existing 33 kilovolt lines transverse a number of properties. Counties Power have negotiated easements over some of those properties. Over a number of the others, although Counties Power has not yet been able to negotiate easements, it has negotiated permission to obtain access to the lines for the upgrading work. The objectors in these actions have not allowed such access.
8. Counties Power is a network utility operator and, is a requiring authority under the RMA. In that capacity, it has asked the Minister of Lands (“the Minister”) to acquire an interest in the objectors’ lands, namely an easement for the conveyance of electricity, on behalf of Counties Power pursuant to the Minister’s powers under the PWA. The Minister has agreed to the taking of the easement and has issued notices of intention to take land under the PWA.
9. The objectors have lodged objections with this Court against the compulsory taking as they are entitled to do under section 23(3) of the PWA.

THE ENVIRONMENT COURTS JURISDICTION

10. The Court’s jurisdiction with regard to these objections is derived from section 24 of the PWA and in particular from section 24(7). It states that:

“(7) The Planning Tribunal (*now the Environment Court*) shall—

- (a) Ascertain the objectives of the Minister or local authority, as the case may require:
- (b) Inquire into the adequacy of the consideration given to alternative sites, routes, or other methods of achieving those objectives:
- (c) In its discretion, send the matter back to the Minister or local authority for further consideration in the light of any directions by the Tribunal:
- (d) Decide whether, in its opinion, it would be fair, sound, and reasonably necessary for achieving the objectives of the Minister or local authority, as the case may require, for the land of the objector to be taken:
- (e) Prepare a written report on the objection and on the Tribunal’s findings:
- (f) Submit its report and findings to the Minister or local authority, as the case may require.”

11. Having inquired into the objections and intended takings and having concluded its hearing for that purpose, the Environment Court has to ascertain the objectives of the Minister which are of course in reality the objectives of Counties Power; inquire into the adequacy of the consideration given to alternative sites, routes, or other methods of achieving those objectives; and decide whether, in its opinion, it would be fair, sound and reasonably necessary for achieving the objectives of the Minister for the easement to be taken.¹

¹ Public Works Act 1981, section 24(7)(a), (b) and (d).

COUNTIES POWER'S LEGISLATIVE STATUS

12. Counties Power is an electricity distributor as defined by section 2 of the Electricity Act 1992. It is also an electricity operator as defined by the same section, but agreed to sell its retailing operations to Contact Energy on 31 March 1999 under the Electricity Reform Act 1998. Section 2 of the Electricity Act 1992 states:

“**Electricity distributor**” means a person who supplies line function services to any other person or persons:

“**Electricity operator**” means—

- (a) ...
- (b) Any body or person that, immediately before the 1st day of April 1993, was the holder of a licence issued under section 20 of the Electricity Act 1968 and in force immediately before that date; ...”

13. Section 166(c) of the RMA states:

“**Network utility operator**” means a person who—

- (c) Is an electricity operator or electricity distributor as defined in section 2 of the Electricity Act 1992 for the purpose of line function services as defined in that section.”

14. The definition of “line function services” within the Electricity Act 1992 is:

- “(a) The provision and maintenance of works for the conveyance of electricity;
- (b) The operation of such works, including the control of voltage and assumption of responsibility for losses of electricity.”

15. Counties Power undertake “*line function services*.”

16. Counties Power are therefore a “*Network Utility Operator*” for the purposes of section 166 of the RMA.

17. By a gazette notice dated 14 December 1993, the Minister for the Environment approved Counties Power Limited as a requiring authority for its network operation of the supply of line function services. Counties Power is therefore a “*requiring authority*” for the purposes of section 167 of the RMA.

18. Pursuant to section 186 of the Resource Management Act 1991:

“A network utility operator that is a requiring authority in respect of a project or work may apply to the Minister of Lands to have the land required for the project or work acquired or taken under Part II of the Public Works Act 1981 as if the project or work were a Government work within the meaning of that Act; and, if the Minister of Lands agrees, the land may be so acquired or taken.”

19. As Counties Power is both a network utility operator and a requiring authority under the RMA it can apply to

the Minister of Lands to exercise his powers under the PWA pursuant to section 186.

HEARING

20. Pursuant to section 24(3) of the PWA, the Environment Court has inquired into the intended taking and the objections, and for that purpose it conducted a public hearing at Auckland on the 24, 25, 26 February 1999, 1 and 2 March 1999, 12 and 13 April 1999, 7 and 20 May 1999. The members of the Court who conducted that hearing were Environment Judge R-G Whiting (presiding), Environment Commissioner J-R Dart and Environment Commissioner F Easdale. At the hearing the Minister was represented by Ms B Arthur; Counties Power, which sought audience under section 274 of the RMA, was represented by Mr A McKenzie, Mr A Hazelton and Ms M Bromley; the objectors, Mr T-F Fowler and C-H and C-K Daroux, were represented by Ms DR Bates QC; and the remaining objectors were represented by Mr R-A Houston QC.

21. At the completion of the first 57 days of hearing on 2 March 1999 the proceedings were adjourned part-heard to 12 April 1999. When the Court resumed on 12 April 1999 counsel advised the Court that in the intervening period considerable negotiations had been undertaken between the parties and it appeared that they were close to settlement. They requested further time and most of the allocated hearing time for 12 and 13 April was taken up with the parties being involved in negotiations. Those negotiations resulted in a resolution of all matters apart from the duration of the easements. Consent memoranda were filed with the Court on 15 April 1999 and the consent memoranda are attached hereto and marked A, B, C and D, respectively.

22. Following the filing of those memoranda, the matters were adjourned until the 7 May for a hearing on the one issue remaining, namely, the duration of the easements. The hearing was uncompleted on that day and was adjourned to 20 May. At the hearing on 7 May and 20 May, respectively, Mr Houston QC acted for all of the objectors.

CONSENT MEMORANDA

23. When the consent memoranda were presented to the Court, we had already heard a considerable amount of evidence. Consequently, the Court was in a position to be able to consider the consent memoranda in an informed way. As a result, -we could see no reason to object to, or question, their detailed provisions.

24. In the circumstances, we do not consider it necessary to discuss the evidence in detail. In our view, a brief synopsis will suffice. From the evidence, we find that the following was established:

- Counties Power takes the supply of electricity from the national grid operated by Transpower.

Transpower delivers its electricity to Counties Power via two substations located at Bombay and Glenbrook, respectively. These are the only two sources of electricity which are conveniently available to Counties Power.

- From the Bombay and Glenbrook substations the power is distributed around the Counties Power network via 33 kilovolt lines. The 33 kilovolt lines are terminated at substations and from these substations power is delivered via a local network of lines at 11 kilovolts.
- Pukekohe is supplied by two 33 kilovolt lines, “the north line” and “the south line”, which come directly from the Transpower substation at Bombay. They were originally constructed in 1956. The objectors’ lands lie along this route.
- The purpose of having two lines is to ensure security of supply. In the event that one line is damaged, or is out of action for the purposes of routine maintenance, then the other line should be capable of taking the full load required to be delivered to Pukekohe. Also, having two lines reduces the risk that the entire supply will be interrupted by a simple accident or incident. In this way, security of supply can be assured.
- There has been an ever-increasing demand for the supply of electricity to the Pukekohe area commensurate with the area’s growth. This increased demand has put considerable strain on the existing 33 kilovolt lines. The risk to security of supply to the Pukekohe area is unacceptable if it continues to be supplied at 33 kilovolts.
- Counties Power conducted a number of investigations; over several years; to consider the options available to improve the supply to Pukekohe. It reached a decision in 1995 that the most suitable solution to this problem was to upgrade the north and south lines to 110 kilovolts.
- It then commenced a programme of consultation with landowners over whose land the north and south lines ran. Unfortunately, that consultation commenced on a view by Counties Power as to its legal rights which was subsequently held to be in error. Counties Power had received legal advice from its previous lawyers which indicated that it was able to exercise a right of entry to the objecting landowners’ properties under section 23 of the Electricity Act 1992. Section 23 allows an electricity company access to existing works for the purpose of inspecting, maintaining or operating those works. It is not necessary for the purpose of this decision to set out section 23 of the Electricity Act in detail.
- In reliance on that advice, Counties Power proceeded to obtain the agreement of those landowners with whom it had been able to reach agreement and, for the majority of landowners’ properties, this was not an issue. However, Counties Power, in furtherance of its understanding that consent was not strictly necessary, also proceeded with the work on the land of those landowners who did not agree.
- Some confrontation followed which ultimately resulted in injunctive proceedings in the Pukekohe District Court². That Court found that upgrading the lines to 110 kilovolts could not be classified as “*inspecting, maintaining, or operating the works*” and, accordingly, Counties Power could not obtain the benefit of section 23 of the Electricity Act 1992 for the purpose of performing those works.
- We were left in no doubt that commencing construction of the line over the objectors’ properties without their permission caused a great deal of animosity between the parties. On the one hand, Counties Power had been advised that they had statutory authority to do this; on the other hand, the objectors saw it as an infringement of their rights.
- Following the case in the District Court, Counties Power were faced with the situation of having to ensure a secure supply to Pukekohe, but were not able to take advantage of the alternative it had selected of upgrading the north and south lines. Further negotiations were, not surprisingly, unsuccessful. Accordingly, Counties Power requested that the Minister of Lands proceed to acquire land, or rather an interest in land, belonging to the objectors under the PWA.
- On 17 December 1996, Counties Power applied to the Minister of Lands seeking appropriate easements against the properties of each of the objectors. Further negotiations in consideration of alternatives followed.
- Over a year later, on 23 December 1997, the Minister of Lands issued notices of desire to acquire easements over the properties. There followed further negotiations by the Minister and Counties Power. A settlement was reached with one of the objectors, a Mr Donovan.

² Counties Power Limited v Betty Croudin & Ors District Court NP182/96 Pukekohe Registry, 29 August 1996.

- On 10 June 1998, the Minister issued notices of intention to take an easement under section 23 of the PWA. Subsequently, objections were lodged pursuant to section 23(3) of the PWA. Negotiations (including formal mediation) continued. A settlement was reached with another of the original objectors, a Mr Kearney.

25. The settlements now reached by the present parties and set out in the consent memoranda filed is, in our view, consistent with the evidence we heard. We congratulate the parties on resolving a large number of issues, some of them complex because of their effect on one or more of the parties. The settlement seemed, to us, to be a natural evolution of events as the evidence unfolded. A synthesis of the issues was achieved by the evidence-in-chief, cross-examination and re-examination. This synthesis brought the parties from an apparent arms-length position to one of accord in all matters but one.

DURATION OF EASEMENT

The Issue

26. The sole issue to be determined by us by way of recommendation is the duration of the easement. The objectors' original contention was that the easements should have a finite life; of 50 years, and should come to an end at that time, whether or not the lines are still in use. Counties Power's contention was and still is that no duration for the easements should be specified. The easements are limited as to the type of line, and the capacity of the line. Thus, they will come to an end when a line coming within the terms of the easement ceases to be used for the purpose of supply to Pukekohe. That may be earlier, or later, than 50 years from now. No arbitrary limit should be imposed.

The Legal Test to be applied

27. The starting point for this Court, in considering the options, is the Minister's notices: they give notice of intention to acquire an easement, without any specified duration. Our task in respect of the duration of the easement, is as set out in section 24(7)(d) of the PWA. "*The Land*" is the land referred to in the notices, i.e., the easement, of unspecified duration. Accordingly, we must consider whether it would be fair, sound and reasonably necessary for achieving the objectives of the Minister for the easements to be unspecified as to duration.

The Evidence

28. On that issue, we heard evidence from two expert witnesses for Counties Power and two expert witnesses for the objectors. The two who gave evidence for Counties Power were Mr M Hoskins, the planning engineer for Counties Power, and Mr AD Jenkins, a consultant

specialising in energy issues, and currently holding a contract to administer the Electricity Network Association. For the objectors, evidence was given by Mr JH Vernon, a consulting electrical engineer, and Mr DR Smyth, a registered valuer. We were able to assess the evidence of these witnesses in the light of the evidence we had heard from the many witnesses who had given evidence previously.

29. Mr Hoskin's concern as a planning engineer for Counties Power, was that a finite term of 50 years for the easement would be inadequate for the likely physical life of the lines. He referred us to various distribution scenarios to cope with increased demand, such as the construction of a third line, the construction of further zone substations and the possibility of local generation. In his view, those different scenarios could extend, indefinitely, the need for the existing sub-transmission system as allowed under the easement.

30. Mr Jenkins also gave evidence on behalf of Counties Power. He has had a long involvement with the electricity industry in New Zealand. He told us that much of New Zealand's distribution infrastructure was built in the 1950s and 1960s, using technologies and materials selected for durability. This period of intensive line construction has, in his view, created a need for a renewed cycle of reinvestment, as aging equipment fails or is retired, or as load growth places higher failure risks on lines. As an example of the pressures for such reinvestment, he referred us to the failure of supply to Auckland's CBD in the early part of last year.

31. He was concerned that imposing a fixed approval period on line renewal and expansion programmes at the end of this first major asset life cycle would mean that a similar cycle would be repeated. If the easement was for a finite period of 40 or 50 years, pressure for line renewal will again emerge in 40 or 50 years' time. This would have the inevitable result, he said, of equipment being installed with a comparable expected economic life. Perpetuating such a cycle of standardised lives would not, in his view, be in the best interests of the environment or the economy. He made a parallel with the emerging pressures for renewal of other key infrastructure assets such as water supply, roads and sewerage. He opined that the approval processes are likely to be overwhelmed as a raft of approval renewal applications come in, and simultaneous reinvestment pressures will place stresses on funding and on developers.

32. Mr Jenkins also referred to technological changes which, in his opinion, would easily prolong the life of the lines well beyond 50 years. He said:

"The last 50 years of power line investment have been characterised by fairly standard technology: while the quality of insulators, transformers and switch gear has improved, essentially, lines on poles built to standard specifications have

continued to do much the same job. (*emphasis in original*)

It would be presumptuous to assume that the same core technologies will dominate the lines business in another 40 to 50 years, or even in another 20 years. Just as mainframe computer technologies have been supplanted by PCs, I believe that it is likely we will witness the emergence of a range of technologies that could well have the effect of greatly reducing the pressures to replace lines as load growth continues.

For example, new demand-side technologies such as solar energy measures, heat pumps, etc, are already available to shift load away from peak times, meaning that the span of years before a new line's loading reaches to peak capacity levels is likely to become extended. Similarly, new centrifugal storage and local small-scale peaking generation technologies appear to be becoming viable.

With this increasingly varied and dynamic suite of technologies it would seem to make sound economic and environmental sense to avoid the rigidities created by finite approval periods, and to rely increasingly on market-driven investment decisions to decide how long lines should exist for.³

33. Mr Jenkins further opined that it will not contribute to sound electricity investment decisions to have uncertainties about the future configuration of the transmission/distribution system created by finite easements. Further, he said that, if a precedent of applying finite approvals is established, investors will face the added risk that what starts as a 50-year approved period for one line may become a 30-year period for another line and so forth. Such a level of increased uncertainty would not make any positive contribution to the electricity industry, an industry where the electricity lines, like sewers, roads and water pipes, make an essential contribution to the nation's economy; and to the quality of life of New Zealanders.

34. For the objectors, evidence was given on the question of the duration of the easement by Mr JH Vernon, an experienced electrical engineer. He worked for the State Hydro-Electric Department for 5 years and for the Wellington Municipal Electricity Department for 34 years, including being its general manager for over 17 years before he retired in December 1989. He has been engaged as a consulting engineer since then by various government and other bodies. Mr Vernon referred to the legislative changes in recent times resulting in the privatisation of the electrical industry. He told us that in his view the electricity reforms have resulted in:

“Asset creation: The power supply company will have an asset that can be sold and a power line placed in an easement (*and*), with the added security that brings, is an enhanced asset that will be worth more to the company.

Income production: The line plays a pivotal role in producing an income stream for the power supply company. The certainty that this easement brings is invaluable. This has been taken for granted in the past.

Term of easement: The longer the term of the easement the more valuable it must be for the company and the worse it is for the landowner. The converse also applies.

Contribution: The landowner's co-operation is needed to achieve each of the above. Yet the landowner's neighbours can rejoice that the line is “not in their backyard”. The landowner therefore finds that he has contributed substantially to the prosperity of the power company and should expect to be compensated accordingly.”⁴

35. Mr Vernon then criticised the option taken by Counties Power of upgrading the existing line along its present route. He said:

“It bisects some properties, intrudes into a number of views, limits use of land, and is too close and too prominent in some locations. Such a route, if being-chosen today, would not be countenanced.”

36. He then referred to other options available and then discussed the financial considerations arising out of Counties Power obtaining an easement over the objectors' land. He stressed the value of the 110 kilovolt lines to the company and their financial importance by way of an asset and the return of income that will accrue to the company arising from that asset. He then said:-

“In engineering terms the components of a power line system will wear out and/or degrade over time and will eventually be unserviceable. There will generally be failures and breakages in a line which will require maintenance from time to time but at some point one or other of the components generally used in the line will require replacement. By replacing all the components as they wear out the engineering life of the line can be extended indefinitely. We have seen that the north line and south line were installed in the 1950s and that major replacement programs were undertaken around 1986 and in the early 1990s.”⁵

37. Mr Vernon then referred to the difficulty of predicting what will happen to the Pukekohe area over the

³ Allan Jenkins' paragraphs 4.1-4.4.

⁴ Paragraph 8A.

⁵ Vernon, paragraph 58.

next 25 to 50 years and what the electricity supply system would be like at the end of that time. He opined that Counties Power wanted to make provision for future growth in this area, but that growth will force changes in the land use, which, in turn, can be expected to result in intensified land use and substantial residential development in the areas affected by the lines well within 50 years. He then concluded:

“The electricity industry has had to accept the concept of allocating all costs correctly. This has caused the industry to examine in minute detail how their various costs originate, and it has now been discovered that easements represent real value to them, and to the landowners. The value that is placed on them, and the term of their lives is a matter for negotiation in each case. I submit that it would be reasonable, in the present case, for the tenure and terms of the easement to be reviewed after 50 years as I have suggested with the future arrangements and their value being determined by negotiation or by an appropriate Court.”⁶

38. During the course of the cross-examination of him by Mr McKenzie, what Mr Vernon meant by the words “... *for tenure in terms of the easement to be reviewed after 50 years* ...” became clear. He was not advocating a finite period of time for the easement following which the lines would have to be taken down if successful negotiations for the renewal of the easement were not completed, but rather, a review of the various other conditions of the easement at the end of a period such as 50 years. This conclusion to Mr Vernon’s evidence was more in the nature of a submission than an objective assessment of opinion by an expert for the benefit of the Court.

39. Mr Vernon’s evidence, as clarified during the cross-examination of Mr McKenzie, was not in accord with Mr Houston’s contention that the easement should be of a finite term, namely, 50 years. As a consequence, Mr Houston was forced to change his stance slightly by suggesting a “holding over” clause. Thus, the objectors’ position was modified with the following clauses suggested in writing:

“Term

The term of the transmission easement shall be fifty (50) years.

Holding over

Notwithstanding the term above mentioned the grantee shall have the right to continue to use the easement land and transmission easement in the terms of the transfer which shall remain in full force and effect after the expiry of the term until or unless terminated after the period of fifty (50)

years⁷ by not less than ten (10) years notice in writing by the owner of the land.”

40. Mr D-R Smyth, an experienced valuer and a member of the Land Valuation Tribunal, also gave evidence in support of the objectors. Like Mr Vernon, he referred to the legislative changes which brought about the privatisation of the electrical industry. He then discussed the benefits that would accrue to Counties Power as a consequence of a registered easement being obtained over the objectors’ land. He opined that, broadly speaking, the benefits that go with the easement can be summarized as, firstly, the right to construct, maintain and operate a transmission line of the size required to service Pukekohe and to profit therefrom; and, secondly, the opportunity to sell, assign, sublet or otherwise dispose of the property right represented by the easement and to gain accordingly. He stressed that the essential difference between the now exhausted statutory authority that Counties Power had for the now redundant 33 kilovolt power lines and the proposed registered easement is that the former was vested in a community-based authority for the community’s benefit and the latter is an essential property right for the establishment of a private commercial enterprise. He concluded that, in his view, an appropriate term was between 40 and 50 years as that length of time will give the owners of the power line ample time to recover costs and reap financial reward and to make long-term commercial decisions. As for the owners of the land along the power line route, there would then be the opportunity for each generation to deal with the circumstances of its time. He, too, modified his stance slightly in his supplementary evidence to accord with the evidence of Mr Vernon, when he said:

“It is not expected following from what Mr Vernon said in evidence on 7 May 1999 that the power lines must be pulled down and removed in 2049. What the landowners seek by coming to Court is a mechanism which allows them, or more correctly future generations of landowners, to take part in the decision-making process in 2049 as to the future use of their land.”

He emphasised that each generation of landowners and of course the power company should have the opportunity to deal with the circumstances of their time.

COUNSELS’ SUBMISSIONS

41. Mr McKenzie, on behalf of Counties Power, addressed the three requirements in section 24(7)(d) of the Act, namely, which of the two options would be fair, sound and reasonably necessary for achieving the objectives of Counties Power.

⁶ Vernon, paragraph 62.

⁷ The words underlined were added verbally by Mr Houston.

42. With regard to fairness, he submitted that the 50-year option would impose an arbitrary cut-off with no rational basis and which would have serious implications for Counties Power and the consumers of Pukekohe. He submitted that it would not be fair to impose a limit based upon an assumption as to the likely life of the line, which would be unnecessary to protect the position of one party if the assumption is correct, but severely burdensome on the other party if the assumption is incorrect. A consideration of fairness, he contended, strongly favours the unspecified option rather than one which seeks to impose an arbitrary time limit based on what are, at this stage, uncertain future events.

43. With regard to soundness, he submitted that the test on this element is of the technical soundness of the proposed duration of the easement, which, in turn, involves a consideration of what is “sound” from a technical point of view, namely, whether the term of the easement will provide a sound technical solution to the problem which the easement is intended to address. He submitted that it would not be sound to impose an arbitrary time limit which may mean that a transmission line, which is still being operated in an effective way and which still forms part of a technically sound distribution and supply system, would be rendered inoperable. That would be neither technically nor commercially sound.

44. Mr McKenzie further submitted that the implications of a decision to impose an arbitrary time limit on the easements will extend far beyond this particular case and, if a time limit is imposed for these lines, then it may well become a precedent for other cases. Against that background, time-limited easements, whether by negotiations, or by compulsory acquisition, could be expected to become the industry norm. This would severely damage the ability to make sensible technical and investment decisions, in areas which extend far beyond the distribution system itself.

45. He then addressed the third issue, namely, what duration of easement is “reasonably necessary for achieving the objectives of the Minister”. He submitted that, in the light of the settlement of all other matters, the proper approach is upon the basis that achieving those objectives -involves:

- (a) The granting of easements for the lines;
- (b) The lines are to conform with the descriptions in the easements; that is, single or double circuit lines of a 110 kilovolts;
- (c) The rights under the easements are to construct the lines and to inspect, maintain, repair and operate the lines.

46. Since the purpose of the lines is to secure adequate supplies of electricity to Pukekohe, he submitted that it is clearly reasonably necessary that the easement should last as long as the lines are achieving that purpose. He emphasised that, on their terms, and, even if their duration was unspecified, the easements are not available to Counties Power in perpetuity to make whatever arrangements it chooses to supply Pukekohe. They apply only to the lines described, and are limited, in practice, to the useful life of those lines. He submitted that, in considering what is reasonably necessary from the perspectives of both the landowners and the company, the appropriate balance to be achieved is: the landowners’ position is protected in that they have certainty that the only lines permitted are those described and when those lines cease to be the appropriate means of supply, the rights under the easement will expire; and the company’s position is protected to the extent that it can make its planning decisions in the knowledge that it will have the use of the lines so long as they remain useful. He acknowledged that technology may, within the next 50 years, change so radically that the lines will be redundant. If that happens, then, because of their restriction to lines of a particular voltage and capacity, the easements will become redundant, and will be able to be extinguished. He added the cautionary note that it would be most imprudent to predict that such a technological change rendering the lines redundant will happen, or as to its likely timing.

47. Mr McKenzie also submitted that it is appropriate to compare what Parliament considered as appropriate for the protection of existing lines when the statutory right of access for lines in general was removed. He referred to section 23 of the Electricity Act 1992 which preserves a right of access to inspect, maintain and operate existing lines, which are, essentially, the same rights as those conferred by the easements settled between the parties. Parliament did not see fit to impose an arbitrary time limit on the exercise of those rights.

48. Mr Houston cited *Telecom Auckland Limited v Auckland City Council*⁸ and the Court of Appeal’s approval of the principle that a statute should not be read to make it do more than is necessary to achieve its purpose. Blanchard J, in delivering the decision of the Court of Appeal cited with approval the English Court of Appeal Judges when they said in *Newcastle-under-Lyme Corporation v Wolstanton Ltd.*⁹

“In these circumstances and bearing in mind the general rule that no greater right or interest rights or interests should be treated as conferred on the undertakers than are necessary for the fulfilment of the object of the statute ...”¹⁰

⁸ 1999 1 NZLR 426 CA.

⁹ [1947] Ch. 92.

¹⁰ *Ibid* p. 435.

49. He submitted that the Court should not recommend more than is reasonably necessary to fulfill the rights of the utility, an electricity operator, to construct its 110 kilovolt transmission lines and to inspect, maintain, repair and operate those 110 kilovolt lines. He referred to the contents of the Minister's notices and submitted that the Court cannot go outside the notices or expand or enlarge their intent.

50. Mr Houston stressed that Counties Power Limited is a private utility company whose aim is to make a commercial profit. He addressed section 24 of the Act as to what would be fair, sound and reasonably necessary for achieving the objectives of Counties Power. He submitted that it is difficult for Counties Power to assert that an easement in perpetuity is fair, sound and reasonably necessary to enable them to do what they have always claimed is but an "upgrade" of their lines. He also referred to the fact that approximately one quarter of the existing landowners over whose properties the lines traverse, have not yet granted easements.

51. He reminded us that the route runs through some of the most valuable and productive land in the country and where closer settlement is already taking place. He pointed out that the line runs close to large residential dwellings and he cited the following head note from *Dean v Attorney-General*:

"The power of the Crown to acquire land compulsorily arose from the ancient right of eminent domain and was a draconian, but necessary, power in a complex and collective society. To the extent that the Crown's powers were a direct interference with individual property rights, those powers must be strictly construed and must be exercised in good faith and even handedly."

52. He referred to Hammond J's judgment at page 191 line 27 where the learned Judge said:

"... including ... due regard to the interest of the person being dispossessed ... and ... fairness."

53. Mr Houston submitted that it is reasonable that each generation of citizens should have an opportunity to deal with the circumstances of the day. He contended that we are dealing with competing requirements, wishes and points of view of landowners and an electrical utility company and the needs of the public generally for electricity supply. The landowners are suggesting that, in approximately two generations' time, that is, 50 years from now, the easements be re-negotiated. Fairness, he says demands that the, then, landowners have their say.

DETERMINATION

54. In recent times, particularly since 1987, the electricity industry has been progressively restructured. The initial reforms restructured the electricity generation sector of the industry. On 1 April 1987, the Electricity Corporation of New Zealand Limited was established as a state-owned enterprise. It acquired the assets of the electricity division of the Ministry of Energy. Hitherto, the Minister of Energy had held responsibility for the production, transmission and supply of electricity. Regulatory barriers to entry into the electricity industry were removed. On 1 April 1988, Transpower Limited was established as a subsidiary of the Electricity Corporation of New Zealand Limited. On 1 July 1994, Transpower Limited was split from the Electricity Corporation of New Zealand Limited and established as an independent state-owned enterprise. This split was intended to ensure open and competitive access for all potential suppliers to the transmission line.

55. In addition to the reforms in the generation sector, there has been restructuring of the electricity supply sector of the industry. The Energy Companies Act 1992 provided for the corporatisation of electricity supply authorities. This has been complemented by the Electricity Act 1992 which deals with the regulation of the electricity sector. Electricity supply companies are now able to compete for customers in each other's geographic areas.

56. The effect of the recent restructuring and progressive reform has been the privatisation of the electricity industry. Power companies have significant and increasing private ownership and the state-owned enterprises are now in a position where they can be sold to the private sector. A competitive or market-related return is expected on all assets employed. This is in sharp contrast to the concept of community benefit, which was part and parcel of the old electricity boards constituted under the Electric Power Boards Act 1925. Section 84 of that Act gave the boards wide powers to enter upon private land for the purposes of constructing, maintaining and repairing power lines. Those wide powers were not transferred to the new entities and, with regard to power lines, the statutory authorities were restricted to maintaining and operating those lines that were in place prior to, or at the time of, the passing of the 1992 Act¹². It follows that Counties Power now requires registered easements and in common with other new power companies must rely much more on consultation and negotiation with landowners than they have had to in the past. If negotiation fails they may apply to the Minister of Lands to have the land required for the project or work acquired or taken under the Public Works Act 1981 as if

11 1997 2 NZLR 180.

12 See Part III of the Electricity Act 1992 sections 22-29.

the project or work was a government work within the meaning of that Act¹³. The effect of any proclamation taking the land would be to vest the land in the network utility operator instead of in the Crown. Accordingly, any easement would become an asset of the utility operator, in this case Counties Power, and, accordingly, could be assigned, sublet or otherwise disposed of by it.

57. We are acutely conscious of the effect of the legislative changes which have brought about the privatisation of the electrical industry. We particularly note what Mr Vernon stressed namely, that the essential difference between the now exhausted statutory powers for the redundant 33 kilovolt line and the proposed easement is that the former was vested in a community based authority for the community benefit and the latter is a commercial property right. This significant difference is however only part of the picture. Electricity still remains and will continue to remain in the foreseeable future an important public utility. The shift to privatisation does not in any way diminish the importance of electricity as a commodity necessary for many facets of modern day living across the whole spectrum of human endeavour from domestic to industrial. No doubt it is for this reason that Parliament prescribed the right for a network utility operator to apply to the Minister of Lands to take land under Part II of the PWA. What is required is a proper and fair sense of balance between the two interests.

58. As we have said, the easement opted for by Counties Power is an easement with no duration stated but which would come to an end when a line coming within the terms of the easement, ceased to be used for the purpose of supplying electricity to Pukekohe. We find on the evidence that the life of the line could exceed 50 years. The effect of recommending the option of a finite term as first contended by the objectors would impose an arbitrary cut-off which could have serious implications. A further period of consultation and negotiation would be required and, in the event of this being unsuccessful, some form of compulsory acquisition would again have to be effected depending upon the law at the relevant time. Such a task is not insurmountable even taking in the worse scenario. But if power companies were to be faced with a constant raft of such incidents over a period of time we can see immense difficulties not just for the power companies, but more importantly, for the consumers of electricity. Continuity of electricity supply is not a luxury, it is a necessity. It takes little imagination to recognise the chaos that can be caused to all sectors of the community arising out of an inability to provide an adequate and continuous supply of electricity to a district. As an illustration of that chaos, we were referred in evidence to the consequences of the recent loss of an adequate supply of electricity to the central business district of Auckland City.

59. The importance of continuance of supply was clearly recognised by Mr Vernon when he said, during the course of Mr McKenzie's cross-examination:

"Yes, but I haven't heard anyone say that the line has to be pulled down after 40 years or 50 years. Certainly it has been suggested and I support the concept that the easement and the terms of it be reviewed but perhaps it may be necessary to protect the line itself ..."¹⁴

60. Mr Vernon's evidence was reflected in the amended proposition, including a "holding over" clause, put to the Court by Mr Houston on behalf of the objectors. It is that amended proposition that now needs to be judged, against an unspecified duration limited to the type and capacity of the line.

61. The starting point is the principle enunciated in *Telecom Auckland Ltd.*: that a statute should not be read to make it do more than is necessary to achieve its purpose. The notices of intention to take say:

- "1. Take notice that the Minister of Lands proposes to take under the Public Works Act 1981 an easement over your land described in the schedule to this notice.
2. The easement is required for the transmission of electricity and to permit the upgrading of the existing Bombay to Pukekohe transmission lines to 110 kv.

...

REASONS FOR TAKING LAND

The reasons why the Minister considers it essential to take an easement over your land are as follows:

The existing 33 kv lines are no longer sufficient to meet increasing demand for power and must be upgraded to conduct 110 kv. The easement is necessary because the statutory protection to the existing lines will not extend to an upgrading."

62. Mr Houston urged us to take a narrow view of the wording of the notices. He submitted that an easement of unspecified duration was not reasonably necessary to achieve an "upgrade" of the lines. It would be artificial to put such a narrow construction on the wording of the notices. The purpose of the lines is to secure adequate supplies of electricity to Pukekohe. It follows that once the lines have been upgraded then the lines require to be maintained in a condition that will ensure a continuous supply.

63. It is at least implicit in Mr Houston's submissions that the "holding over" clause will meet the concerns of continuity of supply by giving the power company 10 years (over and above the 50 years) in which to re-negotiate new

¹³ Section 186(1) of the Resource Management Act.

¹⁴ Page 16 of transcript.

terms or take alternative action. This brings us to a consideration of what would be fair, sound and reasonably necessary to achieve the objectives of the Minister.

64. The starting point must now be that the lines should not be removed until such time as they are no longer required for the conveyance of electricity within the terms of the contract. That was the clear import of Mr Jenkins' evidence. We found his evidence most helpful and he impressed us with both his expertise and his objectivity. It was also as far as Mr Vernon was prepared to go; he could not envisage the lines having to be arbitrarily removed. What emerged from Mr Vernon's evidence was that, not the "duration", but the "terms" of the easement be reviewed at a fixed period.

65. No suggested wording of an appropriate review clause was put forward. Such a clause would have to provide for a complex disputes resolution procedure in the event of the parties being unable to agree. However, as we understand Mr Houston's submission, the "holding over" clause is in lieu of the review clause and may well extend the duration of the easement.

66. We have already stressed what we consider to be a need for continuity of supply. With regard to the question of fairness, we accept Mr McKenzie's submission to the effect that it would be severely burdensome on the power company to be required to re-negotiate an easement in the event of the lines being needed after the initial period of 50 years. Such a burden would be increased if easements limited in duration became the accepted norm. While the lines and their easements are valuable assets, the commercial benefit to the company should not distract us from the need to ensure continuity of supply to the consumers. We emphasise that the commercial benefit to the power company and the corresponding detriment to the objectors, are matters to be considered more in the award of compensation and therefore a matter that is subject to a different jurisdiction.

67. Further, we consider it would not be technically sound, when planning for an electricity supply system which must provide for continuity of supply for an undefined period, to impose arbitrary time restrictions on the optimum structure of the network. Such restrictions would severely damage the ability of a power company to make sensible technical decisions.

68. In making those observations, we stress that the easements, on their terms, and even if their duration was unspecified, are not available to Counties Power in perpetuity. They apply only to the lines described and are limited in practice to the useful life of those lines, which may be more, or may be less, than the sought for 50 or 60 years. To that extent the landowners are protected. The company's position

is also protected. We therefore find that, in our opinion, it would be fair, sound and reasonably necessary for achieving the objectives of Counties Power for the easement to contain an unspecified term but to apply only to the lines described and limited to the useful life of those lines.

Costs

69. The Court can award costs either in favour of or against the objector or the other parties¹⁵. We recognise that it was Counties Power, through the statutory procedure of applying to the Minister to give notice of intention to take the land, which initiated the issue between the parties. The objectors lodged their objections to protect their interests in their land from a procedure which they opposed. We consider that it would be inappropriate to order them to pay costs. Some of their grounds of objection were resolved by consent. Their objection relating to the life of the easement was not made out, so it would be inappropriate for Counties Power to be ordered to pay the costs of the objectors. Accordingly, we consider that the costs of the proceedings should lie where they have fallen, and we make no order for payment of costs.

THE ENVIRONMENT COURT REPORTS

- (a) That it has inquired into the objection by the objectors to the intention of the Minister to take an easement against the titles to the objectors' properties and into the proposed taking of those easements, and for that purpose it conducted a hearing at Auckland on 24, 25 and 26 February 1999; 1 and 2 March 1999; 12 and 13 April; and 7 and 20 May 1999.
- (b) That it has ascertained that the objectives of the Minister at the request of Counties Power is to upgrade the existing lines from 33 kilovolts to 110 kilovolts so as to secure an adequate supply of electricity to Pukekohe.
- (c) That, having considered the adequacy of the consideration given to alternative routes and methods of achieving that objective, it has found that the memoranda of consent filed by the parties are appropriate in the circumstances and that the easements should be for an unspecified term; and
- (d) That, to give effect to the memoranda of consent would, in its opinion, be fair, sound and reasonably necessary for achieving the objectives of the Minister and that it would be fair, sound and reasonably necessary for achieving those objectives for the easements to be for an unspecified term.

DATED at AUCKLAND this day of 1999.

R Gordon Whiting
Environment Judge

¹⁵ See for example *Auckland City Council v Man O'War Station* High Court Auckland CP 1355/83; 19 August 1997, Anderson J).

3

The Place of Culture in Environmental Management

DECISION NO. A73/2000

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of four appeals under section 120 of the Act

BETWEEN **KOTUKU PARKS LIMITED**
(RMA 1655/98)

KAPITI ENVIRONMENTAL ACTION INC
(RMA 1672/98)

WAIKANAE ESTUARY GUARDIANS
(RMA 1673/98)

TE RUNANGA O ATI AWA KI WHAKARONGATAI INC
(RMA 1685/98)
Appellants

AND **THE KAPITI COAST DISTRICT COUNCIL**
Respondent

BEFORE THE ENVIRONMENT COURT
Environment Judge DFG Sheppard (presiding)
Environment Commissioner IGC Kerr
Environment Commissioner J Kearney

HEARING at **WELLINGTON** on 4, 5, 6, and 7 October 1999, 31 January, and 1, 2, 3, 4, 7, 8, and 9 February 2000.

APPEARANCES

S L Bielby (on 4-7 October 1999), J S Kós (from 31 January 2000) and A J Beatson for Kotuku Parks Limited

C M Stevens and K M Anderson for Kapiti Environmental Action Inc

A R Edwards and J L Topliff for the Waikanae Estuary Guardians

S Forbes and M Baker for Te Runanga O Ati Awa Ki Whangarongatai Inc

V Hamm and A Mahuika for the Kapiti Coast District Council

G Hulbert for the Minister of Conservation (in respect of Appeal RMA1655/98 only)

B Weeber for the Royal Forest and Bird Protection Society Inc

DECISION

INTRODUCTION

[1] These appeals concern a proposal for subdivision of land at the mouth of the Waikanae River for residential development. Kotuku Parks Limited bought land there in the 1970s, and has already completed subdivision and development of considerable areas which are now occupied by houses. The current proposal is called Stage IV, by reference to a concept plan for staged subdivision of the total area which was approved by the then Kapiti Borough Council in 1989.

[2] The decisions by the Kapiti Coast District Council which are the subject of the present appeals granted subdivision consents and consents for the required earthworks, and imposed conditions. By its appeal Kotuku Parks Limited challenged certain of the conditions imposed. By their appeals, Te Runanga O Ati Awa Ki Whakarongatai Inc, Kapiti Environmental Action Inc, and the Waikanae Estuary Guardians seek that the consents be declined, or modified to substantially reduce the number of residential lots to be created by the subdivision.

[3] Te Runanga O Atia Awa Ki Whakarongatai Incorporated (“the Runanga”) is the iwi authority for a number of hapu who hold manawhenua over lands on the Kapiti Coast, including the land the subject of the appeals. The Maori people represented by the Runanga claim a relationship with that land as ancestral land containing waahi tapu, and a responsibility in respect of the area generally as kaitiaki.

[4] Kapiti Environmental Action Incorporated (“KEA”) is an incorporated society. Its objects include preserving and protecting the environment of the Kapiti district. It has about 60 paid-up members.

[5] The Waikanae Estuary Guardians (“the Guardians”) is an unincorporated group of about 70 people formed in 1997 to encourage appreciation of the Waikanae Estuary and its occupants, and to lobby for their protection and wellbeing.

[6] The Minister of Conservation took part in the Court’s hearing of the appeals to the extent of opposing the appeal by Kotuku Parks Limited against certain of the conditions imposed by the District Council.

[7] The Royal Forest and Bird Protection Society Incorporated (“Forest and Bird”) is an incorporated society which has around 38,000 members (the Kapiti Branch has 547 members). The objects of the society include

preservation and protection of indigenous flora and fauna and natural features of New Zealand, and advocating the protection of indigenous species, their habitats and ecosystems. Forest and Bird took part in the appeal hearing in support of the appeals by KEA and the Guardians.

THE PROPOSAL

[8] The land proposed to be subdivided in Stage IV contains 3.2 hectares, and lies to the south and east of the Waikanae River and estuary. Most of that land is owned by Kotuku Parks Limited, but the site also includes two parcels of land owned by members of a family which has been in occupation of it at least since the 1850s. The proposed subdivision would create 31 lots (ranging in size from 600 square metres to 1330 square metres) for residential use, and four lots for road, reserve and reserve access. The application also seeks consent for earthworks, including ‘borrowing’ about 65,000 cubic metres of material from two areas of land to the east of the subdivision site to build up ground level on the subdivision site to a level equivalent to the 1-in-100 year flood level.

STATUS OF RESOURCE CONSENTS

[9] By the District Council’s operative district plan, the subdivision site and the earthworks borrow areas are in the Residential zone. Resource consent is required for the subdivision and for the earthworks. Considered separately, the subdivision would be a controlled activity, and the earthworks a discretionary activity. There was an issue between the parties about the status of the resource consent application in the circumstances. Kotuku Parks Limited contended that the application should be assessed as a controlled activity; the District Council, KEA, the Runanga, and Forest and Bird contended that it should be assessed as a discretionary activity. The issue is significant because if the application is to be assessed as a controlled activity, consent has to be granted, and the Court’s jurisdiction is restricted to imposing conditions;¹ but if it is a discretionary activity, then the Court would have power to refuse consent, as sought by other appellants.² Therefore we address that issue first.

[10] This issue calls for application of provisions of the district plan, which describes various types of activity. We quote the descriptions of permitted activity, controlled activity and discretionary activity:

- (i) A permitted activity is any activity which is listed in the rules as a permitted activity and which complies with all the permitted activity standards or any activity not listed as any other activity and which complies with all the permitted activity standards. If the activity

¹ Resource Management Act 1991, section 105(1)(a) (as substituted by section 55(1) of the Resource Management Amendment Act 1993).

² Resource Management Act 1991, section 105(1)(b) (as substituted by section 55(1) of the Resource Management Amendment Act 1993, and amended by section 22(1) of the Resource Management Amendment Act 1997).

meets all performance standards, there is no need for a resource consent. The activity is permitted as of right.³

- (ii) A controlled activity is any activity which is listed in the rules as a controlled activity and which complies with the permitted activity standards but which involves Council specifying matters over which it reserves control.

A resource consent is required for a controlled activity but generally need not be publicly notified ... Unless there are special circumstances, an application for resource consent for a controlled activity must be approved subject to the Council exercising control over the matters specified in the Plan.⁴

- (iii) A discretionary activity is any activity which is listed in the rules as a discretionary activity and which complies with all of the discretionary activity standards or any activity which does not comply with any one or more of the permitted or controlled activity standards and is not otherwise listed as a noncomplying activity.

A discretionary activity requires an application for a resource consent which may or may not be publicly notified and which may or may not be approved. The matters to be taken into account when deciding on an application are outlined in section 104 of the Resource Management Act 1991.⁵

[11] The Residential zone rules identify various classes of activity. We quote the items cited in counsels' submissions:

The following are permitted activities:

- (i) One dwelling and one family flat and accessory buildings on any lot provided they comply with all the permitted activity standards.
- (ii) Additional dwellings on a lot (up to a maximum of four dwellings per lot) provided that each dwelling and overall development meets all permitted activity standards (refer to D.1.2.1) and controlled activity subdivision standards (refer to D.1.2.2).

- ...
- (xii) All other activities, excluding retailing, which are not listed as CONTROLLED, DISCRETIONARY, NONCOMPLYING or PROHIBITED and which comply with all the permitted activity standards.

...⁶
The following are controlled activities, provided they comply with the controlled activity standards:

...
(iv) SUBDIVISION
Subdivision (including boundary adjustments) where:

- Public roads, public water supply systems, sanitary drainage systems and surface water drainage systems are available to serve the subdivision .
- All the controlled activity standards for subdivision are complied with (refer to D1.2.2).

The matters over which the Council reserves control are:

- The design and layout of the subdivision including earthworks.
- The imposition of financial contributions in accordance with Part E of this Plan.
- The imposition of conditions in accordance with Section 220 of the Resource Management Act 1991.

...⁷
The following are discretionary activities:

- (i) All activities which are not listed as NONCOMPLYING or PROHIBITED and all other activities which do not comply with one or more of the permitted activity or controlled activity standards.

- ...
- (vi) Buildings ... over 8 metres in height and up to a maximum of 10 metres in height and which comply with all the permitted and controlled activity standards.

(vii) SUBDIVISION – HIGH DENSITY
Subdivision where:

- Public roads, public water supply systems, sanitary drainage systems and surface water drainage systems are available to serve the subdivision .
- All the discretionary activity standards for subdivision are complied with (refer to D.1.2.3).

...⁸
[12] We also quote the relevant items from the permitted activity standards and the controlled activity standards:

PERMITTED ACTIVITY STANDARDS

...
EARTHWORKS
The following standards apply when carrying out earthworks for any activity such as constructing new buildings and relocating buildings, building roads and access ways to building sites, subdivision lots, parks and parking areas. These standards do not apply, however, to road maintenance activities within road reserves.

- (i) Earthworks shall not be undertaken:
 - On slopes of more than 28 degrees.

3 Kapiti Coast District Plan, Part D.1.(B)(i).
4 Kapiti Coast District Plan, Part D.1.(B)(ii).
5 Kapiti Coast District Plan, Part D.1.(B)(iii).
6 Kapiti Coast District Plan, Rule D.1.1.1.
7 Kapiti Coast District Plan, Rule D.1.1.2.
8 Kapiti Coast District Plan, Rule D.1.1.3.

- Within 20 metres of a waterbody, including wetlands and coastal water, except cultivation of a field and domestic gardening. This standard shall also not apply to activities associated with maintenance of the watercourse or stormwater control.
- (ii) In any ponding area or overflow path no earthworks shall:
 - involve the disturbance of more than 20 m³ (volume) of land; or
 - alter the existing ground level by more than 1.0 metre, measured vertically.
- (iii) In all other areas, no earthworks shall involve the disturbance of more than 50 m³ (volume) of land and shall alter the existing ground level by more than 1.0 metre, measured vertically.

This standard applies whether in relation to a particular earthwork or as a total of cumulative earthworks.

Except that this standard shall not apply in respect of earthworks associated with approved building developments, subject to a building consent, provided that the earthworks do not extend more than 2.0 metres beyond the foundation line of the building in any 12 month period.

A clause in the contract for any earthworks shall contain the following:

Should a waahi tapu or other cultural site be unearthed during earthworks the operator and/or owner shall:

- (a) cease operations;
- (b) inform local iwi;
- (c) inform the NZ Historic Places Trust (NZHPT) and apply for an appropriate authority if required;
- (d) take appropriate action, after discussion with NZHPT, Council and Tangata Whenua, to remedy damage and /or restore the site.

...⁹

CONTROLLED ACTIVITY STANDARDS

...

SUBDIVISION

...

(viii) Building Sites

Each lot shall have a building site above the estimated 1% flood event. All-weather access should not adversely affect the flood hazard.

...¹⁰

[13] Kotuku Parks Ltd contended that because the subdivision is a controlled activity provided it complies with the controlled activity standards, the earthworks for that subdivision are part of the controlled activity because the Council has reserved control over earthworks. Counsel submitted that the general permitted-activity standard for earthworks, which is stated to apply “when carrying out earthworks for any activity such as constructing ...

subdivision lots ...”, is intended to apply to small-scale activity rather than general subdivision. Counsel also observed that subdivisions in the Kapiti Coast district normally require substantial earthworks, in excess of 50 cubic metres.

[14] The thrust of the submissions for the respondent, for KEA, for the Runanga, and for Forest and Bird, was that the earthworks are a separate activity from the subdivision, and are a discretionary activity, making the whole proposal a discretionary activity.

[15] They contended that the control reserved over subdivision earthworks is control over the design and layout of the earthworks, and does not have the effect of making subdivision earthworks a controlled activity. They observed that the Council had not provided for subdivision earthworks as a controlled activity; and that it had prescribed standards for earthworks as a permitted activity, none of which is complied with by the present proposal. The rule describing discretionary activities includes activities which do not comply with one or more of the permitted activity or controlled-activity standards. They submitted that because the earthworks do not comply with the permitted-activity standards, they are correctly classified as a discretionary activity.

[16] In reply to the submissions for Kotuku Parks Ltd, it was observed that subdivision is a controlled activity provided it complies with controlled-activity standards, including the standard that each lot is to have a building site above the estimated 1% flood level. However the proposed subdivision cannot comply with that standard without more earthworks than qualify as a permitted activity, including earthworks in the borrow areas. Being beyond the subdivision site, the subdivision rule does not apply to the earthworks in those areas. If consent to those earthworks is not upheld, the subdivision could not comply with the controlled-activity standard and would become a discretionary activity.

[17] Those parties also submitted that it does not follow that because land is zoned Residential, the uses provided for in that zone can be carried out on every part of every parcel of land in that zone. Therefore the expectation that subdivision of the site would involve earthworks in excess of the permitted-activity standards does not have the effect of treating the earthworks as part of the activity of subdivision.

[18] Counsel for Kotuku Parks Ltd, Mr Kós, submitted that the rule describing permitted, controlled and discretionary activities is not a definition, but is provided

⁹ Kapiti Coast District Plan, Rule D.1.2.1.

¹⁰ Kapiti Coast District Plan, Rule D.1.1.2.

as a guide only. He also submitted that the introductory words to the earthworks standards show that those standards apply to earthworks for three classes of activity, namely constructing new buildings, relocating buildings, and building roads and accessways.

[19] It is correct that the provision describing the types of land-use activity is placed under a general heading: “Guide to Part D – Rules and Standards.” However the words which precede the descriptions of the types of activity are –

The following determines the type of activity in the rules of this Plan.¹¹

That prescriptive language, and the contents of the succeeding descriptions of the types of activity, show an intention that the descriptions are to be given effect in applying the provisions of the plan. The classes of activity are prescribed by the Act, and it is necessary for the plan to apply them.

[20] We have to decide on the classification of the proposed activity in respect of the earthworks. The issue is whether the earthworks makes the subdivision activity a discretionary activity or a controlled activity.

[21] Even if the earthworks on the subdivision site could be treated as part of the activity of subdivision, we do not accept that the earthworks on the borrow areas beyond the subdivision site can be so treated, merely because they are to be carried out to obtain fill material for the subdivision. The earthworks on the borrow areas are a separate activity.

[22] Those earthworks do not comply with the permitted-activity standards for earthworks in that they involve the disturbance of more than 50 cubic metres by volume, and would alter the existing ground level by more than one metre, measured vertically. Therefore the earthworks in the borrow areas are not a permitted activity.

[23] The description of discretionary activity includes an activity which does not comply with the permitted or controlled activity standards, and is not otherwise listed as a noncomplying activity.¹² The earthworks in the borrow areas do not comply with the permitted-activity standards and are not listed as a noncomplying activity. We hold that the effect of that provision of the district plan is that those earthworks are a discretionary activity.

[24] The subdivision is not independent of the earthworks in the borrow areas. Those earthworks are necessary to provide filling so the subdivision can comply with the standard about providing building sites above the 1% flood level on each lot.¹³ They are an integral part of the subdivision project.

[25] The status of the earthworks in the borrow areas controls the status of the activity as a whole, because there cannot be a hybrid activity¹⁴. As those earthworks are a discretionary activity, the effect is that the subdivision itself (which would have been a controlled activity if it could otherwise have complied with the flood-level standard) becomes a discretionary activity too.

[26] Therefore, applying the provisions of the plan, we hold that the proposal the subject of these appeals is to be considered as a discretionary activity. It follows that the scope of the Court’s jurisdiction in these proceedings enables it to grant consent and to impose conditions, or to refuse consent.¹⁵

PART II

[27] The resource consent applications the subject of these proceedings have to be decided for the purpose of the Resource Management Act as stated in section 5(1),¹⁶ and elaborated in succeeding provisions of Part II of that Act. We therefore address such of those provisions as are apt to influence the decision of the applications.

Provision for wellbeing

[28] The meaning given to ‘sustainable management’ includes managing the use, development and protection of natural and physical resources in a way which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety.¹⁷ We accept that the proposed subdivision and development of the subdivision site for residential use would represent management of the resources involved in a way which enables Kotuku Parks Limited, and those who benefit from its business activities, and purchasers of the residential lots to be created, to provide for their social and economic wellbeing, and for their health and safety. Less directly, as residential development of land which has been zoned Residential for over 20 years, in a locality identified in the district plan for future growth, it may be

11 Kapiti Coast district plan paragraph D.1(B), p 199.

12 Ibid, clause (iii), p 200.

13 Kapiti Coast district plan, paragraph D.1.2.2(viii), p 227.

14 *Aley v North Shore City Council* [1988] NZRMA 361 (HC). The cross-boundary questions addressed in *Contact Energy v Waikato Regional Council* (2000) 6 ELRNZ 1, 22 are not applicable.

15 Resource Management Act 1991, section 105(1)(b).

16 The purpose of the Act is to promote the sustainable management of natural and physical resources.

17 Resource Management Act 1991, section 5(2).

taken to enable the community to make similar provision, responding to what we accept is strong demand for housing opportunities in that locality. In those respects we find that the proposal serves the purpose of the Act.

Goals of section 5(2)(a) – (c)

[29] Paragraphs (a) to (c) of section 5(2) state goals to be achieved while managing natural and physical resources in ways and rates which enable provision for wellbeing health and safety. The goals are stated in general language. We can address the particular issues that they raise for these proceedings by reference to other provisions of Part II. We return to the application of those goals in making our judgment on the applications.

Natural character of the coastal environment

[30] By section 6, functionaries are directed to recognise and provide for certain values as matters of national importance. We quote the values listed in paragraph (a) of that section:

- (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:

[31] There is no question but that the subdivision site, and the borrow areas, form parts of the coastal environment. It is not a pristine area. There is housing development to the south and east of the subdivision site and the borrow areas, and on higher ground to the north of the Waikanae River mouth. The course of the river itself has been constrained by an artificial cut, and by a groyne or mole on the southern bank. However the subdivision site and the borrow areas currently retain much of their natural sand-dune landform.

[32] It was the case for Kotuku Parks Limited that the design of the subdivision development incorporates some recognition of, and provision for preserving the natural dune-form character of the subdivision site, by retaining at least some of the form of the most prominent dune on that site.

[33] The conditions imposed by the respondent required redesign to allow for the retention of the dune formation within Lots 140 to 144 in its current natural state, and required that a sand dune in the borrow area referred to as Cut A is to be preserved in its natural state.

[34] In cross-examination the Chairman of Kotuku Parks Limited, Mr A A Fraser, agreed that the volume of fill material to be taken from the borrow areas and imported to the subdivision site would be about 65,000 cubic metres, and that the most significant dune would be lowered in height from 9 metres to 6 metres.

[35] Mr I M Prentice, a registered surveyor who had designed the subdivision, testified that 70 % of the subdivision site requires to be built up to the 100-year flood level, that about 10,000 cubic metres of fill material can be obtained within the site, and the balance from the borrow areas. He calculated the amount of fill material required as 51,000 cubic metres, and explained that the application for 75,000 cubic metres was a contingency, and was the parameter by which the Court was asked to judge the application. He produced a plan showing two areas in the subdivision site where the levels are proposed to be lowered. The witness stated that his design criteria had included retention of natural landform wherever practically possible.

[36] The original proposal had involved taking 19,750 cubic metres from the borrow area Cut A; and 45,000 cubic metres from Cut B. The condition requiring that the sand dune in Cut A is to be preserved in its natural state was challenged by Kotuku Parks Limited, which urged that Cut A be reduced to 15,000 cubic metres, with landscaping and planting measures to mitigate any adverse effects. In cross-examination Mr Prentice agreed that his revised design of the dune at Cut A would involve modification of the natural shape of that dune, in that it is proposed to be lowered.

[37] An environmental scientist, Mr M J Robertson, gave the opinions that the dunes within the subdivision site have less interesting form than others in the area, are not unique in the district, and are of limited value compared with other dune areas. He also gave the opinion that from a landform perspective there would be little value in protecting specific sand dunes on the site. The witness considered that the foredune area identified as vulnerable is outside Stage IV. Concerning the borrow areas, Mr Robertson observed that they are zoned Residential, and gave the opinion that ‘borrow’ of sand from them would be achieved without significant impact on the natural landform by avoiding planar cuts and merging the cuts into the natural landform.

[38] A landscape architect, Mr G C Lister, testified that the dunes on the site that would be levelled are relatively small and likely to be visually overwhelmed within any conventional residential development. The reasons he gave for his opinion that the proposed subdivision is appropriate included that the natural character of the site is already modified by the adjacent development, and that the proposal and the conditions of consent reduce the inevitable effects on natural character.

[39] Mr Lister gave the opinion that low-density housing, with building platforms among the existing landforms, would still require substantial modification of the dunes to provide a road into the site, and the effectiveness of that approach would be compromised by the surrounding conventional subdivision. He supported the Council conditions for retention of the dune landform within Lots 141 to 144, and in Cut A.

[40] In cross-examination Mr Lister agreed that the dunes are very important in defining the natural character of the site, and are its main feature. He agreed that the natural character is highly sensitive to change, and that the proposed flattening would be a complete antithesis of the natural character. The witness also agreed that the development would compromise the natural character of the subdivision site, so that it would be irreversibly lost, but considered that the development would be appropriate because of the zoning and the adjacent development. The dune to be retained would be a remnant of the dune system, and would be diluted by the subdivision. He also agreed that the foredunes within the site are the last remaining ones on that coast for a considerable distance to the north and to the south.

[41] A planning consultant, Ms S J Allan, testified that the highest of the dunes on the site reaches 9 metres, other dunes reach 6 metres in height, and the average elevation is about 3 metres. She gave the opinions that the dune forms are not unusual or particularly interesting in a landform or geomorphological sense, are not performing a protective function, and that the dune landform itself is not worthy of protection. The witness also described the closest of the borrow areas as hummocky, and stated that the main area chosen for the 'borrow' is the highest dune in the vicinity. She gave the opinion that it has no particular merit as a landform, and appeared to have been 'borrowed' from in the past.

[42] Ms Allan deposed that substantial cuts are required to provide suitable grades for the access road through a dune at the entrance to the site, that other cuts are proposed to reduce the highest dunes on the site to provide more regular contours for building, and other parts are to be made more regular by minor areas of cut and fill. The witness stated that the overall effect of the proposed earthworks would be that the maximum height of the tallest dune on the site would be reduced from 9 metres to 6 metres, involving cuts of up to 4 metres in depth; and that fill depths generally would not exceed 1.5 metres, but in limited areas would be up to 2 metres. Ms Allan acknowledged that this 'smoothing' process would alter existing landforms, and gave the opinions that without disturbance of the natural contour, the zoned purpose of residential subdivision and development could not be achieved, and that the ability to retain natural character through a residential subdivision development in land of that type is very limited.

[43] In cross-examination, Ms Allan agreed that the landform of every allotment on the subdivision would be modified by cut and/or fill. She gave the opinions that where land is zoned for residential or other urban use, it becomes a matter of balance and compromise between retaining aspects of landform and allowing for residential development; and development would have to be at extremely low density to retain the natural character of the landform. Of the borrow area near an oxbow of the Waikanae River (Cut A), Ms Allan gave the opinion that

the modification of the face of the dune would be insignificant in the context of the whole feature.

[44] A District Council Senior Resource Consents Planner, Mr D A Rodie, deposed that the dunes within the subdivision and borrow sites are prominent landscape features within the area, and represent a substantial part of the remaining small number of natural dune formations that adjoin the Waikanae Estuary Scientific Reserve and add to the natural character of the area. He also deposed that the proposed lowering of the existing sand dunes, and the filling of low-lying areas in the subdivision site, would substantially alter the existing landform, although he considered that some alteration of the landform was to be expected, and the natural character compromised in any case.

[45] On the borrow areas, Mr Rodie gave the opinion that lowering the ground level at Cut A would create unacceptable adverse effects on the natural character of the adjoining oxbow. He supported the Council condition requiring that the sand dune at Cut A be preserved in its natural state, and that the dune at Cut B is not to be lowered further than the 9-metre contour.

[46] Another Senior Resource Consents Planner for the District Council, Mr C R Thomson, deposed that the existing dunes within the subdivision site represent a substantial part of the small number of natural dune formations remaining on the margins of the Waikanae Estuary Scientific Reserve, and contribute to the natural character of the area. He agreed that the dunes are a significant natural element of the site, and to some extent contribute to the natural character of the adjoining reserve. Mr Thomson gave the opinion that lowering the existing sand dunes and filling of low-lying areas within the subdivision site would substantially alter the existing landform. In cross-examination, he agreed that in terms of change to the land contour, the revised design for the works in Lots 141-144 would retain a significant portion of the dune.

[47] On the borrow areas, Mr Thomson acknowledged that they are significant landforms. He testified that the oxbow is an outstanding natural feature, and that the dune adjoining it has significant value. He considered that the proposed earthworks in that dune (Cut A) were not acceptable because of their proximity to the oxbow feature, and potential effects on landscape and amenity values. In cross-examination Mr Thomson accepted that the revised proposal for those earthworks was a significant improvement, depending on how that land is subsequently developed. He also testified that the earthworks at Cut B would result in alteration of the ground level of up to 12 metres, and gave the opinion that although the earthworks would impact on the landform the effects would not be significant because of other dunes of similar size, and retention of a "natural" dune shape.

[48] A consulting landscape architect, Mr J R Hudson, gave the opinion that in considering the natural character of the coastal environment, the estuary and the surrounding dune formation are inextricably linked. He considered that the estuary saltmarsh (to the north of the subdivision site) is the dominant natural feature, and that it is dependent on its context for its degree of natural character; and the subdivision site makes a significant contribution to the natural character of the area.

[49] In answer to questions by Mr Stevens, Mr Hudson deposed that the dunes on the subdivision site are a dominant feature of the site, and are the last foredunes not levelled by development in the immediate vicinity of the Waikanae River mouth. He agreed that the site warrants sensitive development, and that the proposed smoothing of the landform of the subdivision site is not a sensitive approach to development of the site, and is inappropriate. Mr Hudson also agreed that the conditions would not avoid or remedy adverse effects of the proposal. In cross-examination by Mr Kós, the witness agreed that the existing residential setting detracts from the high natural character of the area.

[50] A resource management consultant, Mr A A Aburn, gave these opinions on the topic:

...the foredune complex is a very important and significant feature of the natural landform and an essential element in the coastal environment.¹⁸

...it is one of the few remaining sites on this section of the Kapiti Coast with unmodified coastal dunes.¹⁹

Given the magnitude of the proposed earthworks, if the general landform is not completely lost it is very substantially lost. Indeed, in my opinion the natural character of the foredune complex is completely lost.²⁰

[51] In cross-examination by Mr Kós, Mr Aburn agreed that any form of residential development of that land would be likely to result in some alteration to the natural landform.

[52] Mr F Boffa, another landscape architect, testified that the coastal dunes of the Waikanae River estuary are landforms that are an integral component of the coastal environment; that the site displays a high level of natural character; and that earlier stages of the development had eliminated all evidence of the characteristic dune landscape adjacent to the Waikanae River estuary. He observed that natural character embraces more than appearance of natural elements, and is also concerned with natural patterns and processes.

[53] In his evidence Mr Boffa gave the opinions that the proposed Stage IV development would completely modify the dunes to the extent that the foredune system would largely be lost; and that the development would be quite inappropriate and out of character with the natural character of this important and significant coastal landscape. The loss of natural character would be considerable, and would tip the balance of the character values of the estuary away from a predominance of natural character values to a predominantly suburban-like character.

[54] We have summarised the evidence bearing on the extent to which the project would serve the values described in section 6(a). Our understanding of the evidence was enhanced by our observations in visiting the site and its environs in company with representatives of the parties. We now set out the findings which we make on this issue on the basis of that evidence.

[55] The subdivision site and the borrow areas are not in their pristine states. Even so, they still possess considerable natural character. Their contribution to the natural character of the coastal environment is enhanced by two features. The first is the proximity of the sites to the Waikanae River Estuary: the subdivision site being close to the mouth and the adjacent saltmarsh in the scientific reserve; and the borrow area called Cut A being close to the oxbow feature. The second is that the sand-dune landform of the sites is a remnant of the landform which once characterised the Kapiti coast, most of which has been destroyed.

[56] The project involves earthworks which include cutting earth from the borrow areas, moving earth within the subdivision site, filling low-lying areas by up to 2 metres, and (with the exception of retaining some of the form of the dune in Lots 140 to 144, which would be reduced in height from 9 metres to 6 metres) creating a generally smooth slope on the surface of the subdivision site at a level of about 4 metres in place of the naturally undulating dunes which reach up to 9 metres. The total amount of earth to be moved would be between 51,000 cubic metres and 75,000 cubic metres. The amount of material to be removed from Cut A would be 15,000 cubic metres, and the amount from Cut B would be 45,000 cubic metres. The removal of material from those areas would modify their natural forms.

[57] We find that earthworks of that extent conflict with the preservation of the natural character of the coastal environment. The conditions requiring retention of the forms of the dune in Lots 140 to 144, and the dune at Cut A would not be an adequate mitigation, as the works would necessarily change their forms and scale. Overall the

18 Statement of evidence, paragraph 8.27, p 24.

19 Ibid, paragraph 8.41, p27.

20 Ibid, paragraph 4.6, p 6.

natural sand-dune character of the sites would be changed for ever, and their contribution to the coastal environment would be lost.

[58] Because the landform of the sites contributes so much to the natural character of the coastal environment, and is among the last representatives of it in the district, it is our judgment that the development is inappropriate in that respect. Whether it is justified by the longstanding and current Residential zoning of the land and by the creation of the scientific reserve, are questions to be considered in the overall judgement of the applications.

Outstanding features and landscapes

[59] We now address the values listed in paragraph (b) of section 6:

- (b) The protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development:

[60] Our understanding of the meaning to be given to the adjective “outstanding” is that to qualify, a feature or landscape would need to be quite out of the ordinary on a national basis, and calls for a comparison with other features or landscapes.²¹

[61] Kotuku Parks Ltd contended that the subdivision site itself is not an outstanding natural feature or landscape (not being identified as such in the district plan), and although it accepted that the wider context is relevant, it contested that the proposal would impact on the surrounding landscape because of the influence of existing housing. The District Council submitted that the site is not outstanding, and that the development would not compromise the adjoining landscape and would not be inappropriate. However the Guardians submitted that the proposal does not provide for the values referred to in section 6(b), and the Runanga submitted that the site is an important cultural landscape.

[62] We have already summarised the evidence about the natural sand-dune features of the site. There is no evidence that they qualify as outstanding natural features. We focus on the evidence bearing on whether the subdivision development would be inconsistent with protecting an outstanding landscape.

[63] Mr Lister described the site as a remnant piece of rural landscape, lying adjacent to the Waikanae River estuary, which is a significant landscape. He gave the opinion that the houses in the subdivision would be less

prominent than existing houses on the south-east and south-west perimeter of the reserve, because low dunes in the estuary reserve would partly screen the housing, particularly from the northern part of the reserve, and there would be a margin of shrubland between the subdivision and the estuary itself. He affirmed that the dune features in the subdivision site are not outstanding features or outstanding landscapes.

[64] In cross-examination Mr Lister agreed that the adjoining outstanding landscape has to be seen in context, and that the context for the outstanding landscape includes the Stage 4 site and the remainder of the perimeter of the estuary. The witness also agreed that the compromise of the natural character of the site should be considered in the context of the estuary being an outstanding landscape. Further he agreed that the proposal had not been designed in sympathy or harmony with its neighbour.

[65] Mr Hudson agreed that from a visual perspective the site is sensitive to change, and warrants sensitive development. He accepted that the design of the subdivision development is not sensitive, that the proposal is inappropriate, and that it would be possible to design a more sensitive subdivision development of the site. Asked about the revised design for the borrow area, Mr Hudson would not agree that from a visual perspective, viewed across the oxbow, the effect of the removal of material from Cut A would be no more than minor.

[66] Mr Boffa deposed that visually, from most vantage points, the site is seen as an integral part of the Waikanae River estuary landscape; that the dunes on the Stage IV site are visually important in the context of the wider estuary landscape; and that the proposal would appear as a spur of development intruding into the estuary landscape. He considered it anomalous that the site is not identified in the district plan as an outstanding landscape; and remarked that the development makes no attempt to protect outstanding or significant landscapes.

[67] On the evidence we are not able to find that the proposal involves subdivision and development of outstanding natural features or landscapes.

Indigenous vegetation and fauna habitats

[68] Next we consider the values listed in paragraph (c) of section 6:

- (c) The protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna:

²¹ *Application for a Water Conservation Order in respect of the Mohaka River* (Planning Tribunal Decision W20/92), page 49.

[69] Kotuku Parks Ltd asserted that the subdivision site contains no significant indigenous vegetation, and that a proposed purpose-built fence, and other proposed conditions, satisfied the Department of Conservation concerns about the flora and fauna of the adjacent scientific reserve in the estuary. It contended that the defined extent of the scientific reserve must be taken to incorporate its own buffer zone. The company also contended that the site itself is not a significant bird habitat, and that the development (especially the proposed fence, and gates to prevent vehicle access to the estuary) would be beneficial for bird life on the estuary and beach.

[70] Forest and Bird asserted that the adjacent scientific reserve is an area of significant indigenous vegetation and significant habitat of indigenous flora, being a nationally significant wetland habitat for waders, seabirds and waterfowl, some of which are nationally threatened species. It maintained that these birds would be at risk from dogs and cats from the proposed subdivision. Forest and Bird and KEA contended that the more intense the development, the greater the threat to birds inhabiting the estuary and beach from cats and dogs. The Runanga generally concurred with those claims.

[71] An environmental consultant with specific knowledge of the Waikanae Estuary, Mr P C Kennedy, deposed to there being spinifex on the dunes, native vegetation close to the estuary and oxbow and behind the sand flats, and a dune lakelet dominated by raupo. He referred to the estuary as a wetland of national importance, used for roosting, breeding and feeding by wrybill, eastern bar-tailed godwits, turnstone, knot, banded dotterel and variable oystercatcher. Mr Kennedy gave the opinions that the proposed construction works would not result in loss of any ecological resources of note, and would not have any direct effect on the scientific reserve. He testified that the subdivision development would result in some restriction in the movement of people into the estuary, and gave the opinion that with education and signage the additional dwellings would not result in an increased level of disturbance to birds in the estuary by pets.

[72] In cross-examination Mr Kennedy agreed that ecologically the estuary is very important; and that 'light' development would have less potential risk for the resources of the estuary than intense development, even with education, signage and limited access. He confirmed to the Bench that the estuary is significant for its biological resources (referring particularly to bird species) and from the scientific and educational point of view.

[73] Ms Allan gave the opinions that protection of the significant wetlands adjacent to the site is assured through its identification and zoning in the district plan; and that the significant native vegetation in the ecological area (salt-marsh and dune vegetation) would not be adversely affected by the subdivision. She considered that future residents might assist with caretaking of the reserve. In

cross-examination Ms Allan stated that she did know of other areas of the Wellington region where residents look after nearby coastal reserve.

[74] Mr I E Cooksley, a Department of Conservation official responsible for management of the Waikanae Estuary Scientific Reserve, deposed that disturbance to birdlife, especially during nesting, is a problem that the Department will try and address with existing and future tracking. He considered that the proposed fencing, signage and education would assist. In cross-examination he accepted that the reserve is a nationally significant habitat for various species of birds, some of which are classified as threatened, and could be threatened by dogs, cats and other feral animals. He also agreed that dogs in the reserve, not on leads, are a major difficulty.

[75] Dr G N Park, an ecological consultant with particular professional experience of the Waikanae Estuary, deposed that the subdivision site is in intimate ecological association with the wetland in the scientific reserve. He testified that a few native vegetation species are present in the high stable backdunes (referring to flax, toetoe, karamu and manuka); but other than some old cabbage trees, no native growth survives around the dune lakes. Within the scientific reserve he reported spinifex in the low foredunes, taupata in the high foredune that abuts the estuary, flax and toetoe dominating the wetlands, salt-meadow in the tidal sand-flats, and raupo, pukio sedge, and harakeke and toetoe in the estuarine wetlands. Dr Park described the subdivision site as being part of a coastal system without peer in ecological quality terms on the entire south-west North Island coast. He stated that the coastal ecosystem is largely within the scientific reserve, a nationally significant place as a wader bird habitat.

[76] A zoologist with considerable experience of the bird habitats of the Waikanae Estuary, Mr A J Tennyson, described 64 native species of bird he had observed there, and deposed that 15 of them are threatened with extinction. Of them, variable oystercatchers and banded dotterel are known to breed at the Waikanae Estuary. The witness also testified that the estuary is an important stopover for indigenous wading birds which are migrating. He gave reasons for his opinion (which was not challenged) that the Waikanae Estuary is one of the most significant estuarine habitats for native birds in the lower North Island, and one of the best opportunities to conserve threatened species and to preserve the more common wetland birds representative of the region.

[77] Mr Tennyson gave the opinion that the increasing number of people living close to the estuary has meant that there are more horse riders, motorbike riders and domestic pets in the estuary reserve. He reported having seen evidence of white-fronted terns having been killed by cat or mustelid, and eggs of wading birds having disappeared overnight from otherwise undisturbed nests. The witness observed that the subdivision site is adjacent

to the least developed and most isolated and remote part of the estuary, and gave the opinion that increased human disturbance is likely to have serious impacts on the ability of birds to survive and breed there.

[78] On that evidence we find that the Waikanae Estuary is a significant habitat of indigenous fauna; that the indigenous vegetation there is a necessary part of that habitat, and that the proposed subdivision development would not be consistent with the national importance ascribed to protection of significant habitats of indigenous fauna.

MAORI RELATIONSHIPS AND KAITIAKITANGA

[79] By section 6(e), functionaries are directed to recognise and provide for the following as a matter of natural importance:

- (e) The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga.

[80] Section 7(a) requires attention to a related matter:

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:
...

[81] In these respects it was the case for Kotuku Parks Ltd that the Goodman family are tangata whenua of the subject land, based on long and close association with the site and the Waikanae Estuary, and that they exercise kaitiakitanga over the area. They support the project (which includes land owned by members of the family). Kotuku Parks Ltd contended that the views of that whanau should be given primary weight.

[82] Kotuku Parks Ltd informed the Court that it had voluntarily protected known urupa on its land (near the Stage IV site), and that a full archaeological survey carried out of the site had discovered no significant sites or other values. It maintained that kaitiakitanga is addressed by involvement of the Goodman whanau in the project.

[83] It was also the District Council's case that the Goodman whanau are tangata whenua, and claim mana whenua over the land.

[84] Te Runanga did not seek to contest in this forum the question who has mana whenua. It asserted that its hapu have lived in that place since about 1818, and many tribes before them; and that the estuary area in general has special associations for the iwi and hapu of Te Ati Awa. Te Runanga also submitted that kaitiakitanga had been misinterpreted by Kotuku Parks Ltd and the District Council, and

contended that it has to be exercised in accordance with tikanga Maori, by which substantial decisions are only made following hapu and iwi marae hui.

[85] Evidence on these topics was given by Mrs FTK Goodman (who was called on behalf of Kotuku Parks Limited) and Mr M Baker (who was called on behalf of Te Runanga).

[86] Mrs Goodman explained the succession of ownership of the piece of the site which she currently owns, and deposed that she and her aunt (Mrs Gayle Lopdell, owner of another piece of the subdivision site) considered themselves to be tangata whenua in the immediate area. She confirmed that they are from Te Ati Awa. In full consideration of all implications, including the family's long association with the land, and Maori issues, they had reached agreement with Kotuku Parks Ltd for their land to be included in the development, and were happy for it to proceed in the form proposed. Mrs Goodman testified that she was not aware of any wider issues, such as waahi tapu or other historic associations, which were contrary to the proposal proceeding.

[87] Mr Baker is Tumuaki of Te Runanga, which he described as the iwi authority for the hapu that comprise Te Ati Awa ki Whakarongatai. He testified that the Waikanae River is a central feature in the tribal lands, and produced numerous exhibits as evidence for kaitiaki connection to the place, river and estuary. He deposed that although they no longer own the land, tangata whenua still have a demonstrable relationship with the area, in that it has profound landscape and cultural associations, including sites of ancestral occupation and of battles and burials (which remain as waahi tapu). The witness also claimed that their ability to be kaitiaki for the river and coastal environment would be adversely affected. He explained that the scale and nature of the development would have a profound effect on the ecological integrity, natural character and intrinsic values of the area for which they are kaitiaki, to safeguard its wairua and mauri for future generations. Mr Baker testified that the site of the Stage IV subdivision contained old river paths, and places of ancient ancestral occupation.

[88] The conditions imposed by the District Council included Condition 39 which required the developer to notify representatives of tangata whenua, including Kapakapanui, at least 72 hours prior to commencement of earthworks, and to advise the District Council of the archaeologist to monitor the works. That condition was accepted by Kotuku Parks Limited. The advocate for Te Runanga, Ms Forbes, did not challenge or contradict the contention by counsel for Kotuku Parks Ltd that Te Runanga had advised it prior to the appeal hearing that it was satisfied with those conditions, and that archaeological concerns would not be raised at the appeal hearing. Ms Forbes stated Te Runanga's satisfaction that compliance with the conditions imposed on authority granted by the

Historic Places Trust for the earthworks would satisfy Te Runanga's aspirations for protection of heritage values. Mr Baker did not identify any waahi tapu on the subdivision or borrow area sites with any particularity that might enable verification or otherwise by advisers to Kotuku Parks Ltd or the District Council, and lead to a reliable finding in that regard.

[89] It is our understanding that neither section 6(e) nor section 7(a) calls for a consent authority (or the Court on appeal) to make any decision about ownership of land, about the extent of the rohe of any iwi or hapu, about who are tangata whenua, or who are kaitiaki, in respect of a particular site or area.²² We decline to attempt any finding on any of those points in respect of the subject sites.

[90] Considering the subject of section 6(e), the evidence establishes that Maori (including the Goodman whanau, and other people of Te Ati Awa) have cultural and traditional relationships with the subdivision site and its environs, that those are ancestral lands of theirs, and that the sites and their environs are places of past occupation by their ancestors. The evidence is not sufficient to enable us to find that there are burial sites or specific waahi tapu or taonga within the sites of the Stage IV subdivision or the borrow areas. In our judgment, Condition 39 is an adequate response in the circumstances.

[91] The evidence also establishes that the subdivision site is the subject of kaitiakitanga. The Goodman family claim to be kaitiaki, and so do Te Runanga. There was no specific evidence about how the whanau or Te Runanga have been accustomed to exercise kaitiakitanga in respect of the sites in the recent past. However we accept that if the proposed development occurs, it would inevitably limit the capacity for exercise of kaitiakitanga in respect of safeguarding the wairua and mauri of the sand dunes, and their association with past occupation by their ancestors.

TREATY OF WAITANGI PRINCIPLES

[92] Section 8 of the Resource Management Act provides—

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 take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).

[93] It is well established that a principle of the Treaty requires consultation with Maori in respect of projects that may affect their cultural interests.²³ A consent authority has to take those principles into account in reaching its decision.

[94] It was Te Runanga's case that the District Council had not consulted adequately with it over Kotuku Parks Limited's Stage IV project, and Te Runanga had been prejudicially affected. In particular it claimed that the District Council's consultation with Te Runanga had been limited to matters contained in the archaeological assessment, and had not extended to resource management issues. Te Runanga submitted that the consent authority, as an agency exercising functions and powers under the Act, has a duty to consult, and a duty to provide for active protection.

[95] It was the case for Kotuku Parks Ltd that it had consulted the whanau whose land comprises part of the subdivision site; that the whanau had indicated that it held mana whenua over the land; and that under Maori protocol the whanau could, if they wished, involve other iwi such as Te Runanga, but that they did not wish to do so. It was also the company's case that during a six-month adjournment of the primary hearing, it had met with Te Runanga at Waikanae Marae; and that after the primary decision had been given there had been a further meeting of representatives of Te Runanga and the applicant, and subsequent communications between them.

[96] The District Council reminded us that its hearing committee had adjourned the primary hearing partly to allow the applicant to carry out further consultation with Te Runanga; and that the hearing committee had been made aware of Te Runanga's views about the project and took them into account, as well as those of the Goodman whanau, in determining the application.

[97] We do not accept that a regional or district council, acting in its capacity as consent authority under the Resource Management Act to hear and decide a resource consent application, itself has a duty to consult with Maori. The general language of section 8 directs a consent authority to take into account the principles of the Treaty of Waitangi. It does not impose on a consent authority the duties of the Crown under the Treaty. The Resource Management Act 1991 contains clear directions about the duty of consent authorities in regard to notification of resource consent applications. It would not be consistent with those specific provisions to impute to a consent authority an additional duty to consult with Maori. Nor would it be consistent with the quasi-judicial role of a consent authority that it should itself consult with Maori, who may end up as submitters in opposition to the application which it has to decide.

[98] Our understanding of the consent authority's duty to take into account the consultation principle of the Treaty is that it should be on enquiry that there has been

²² See *Winter v Taranaki Regional Council* Environment Court Decision A106/98.

²³ *NZ Maori Council v Attorney General* [1989] 2 NZLR (CA) 42, 52.

consultation where that is appropriate. In that respect, a report to the consent authority on the resource consent application by officials or consultants of the Council should address that issue. However consultation is not an end in itself, but a way of taking relevant principles of the Treaty into account.²⁴ In practice, it is the applicant who will need to consult with Maori, in cases where that is appropriate, to avoid the risk of the application being postponed²⁵ or refused by the consent authority if it is not satisfied that grant of the resource consent would be consistent with its duty to take into account the principles of the Treaty.

[99] This understanding of the way section 8 applies in practice to consent authorities hearing and deciding resource consent applications is, we believe, consistent with the approach adopted by the Planning Tribunal in a number of decisions when the question first arose.²⁶

[100] Mr Baker testified that the Runanga had not been consulted by the District Council staff, and that the only discussions that happened were in the meeting that occurred during the adjournment of the primary hearing, not during the assessment of environmental effects stage. He added that the adjournment meeting revealed that the applicant had no expectation of modifying their proposal or discussing the environmental effects of the subdivision and earthworks. He urged that the Council, having identified that the applicant did not wish to consult with the iwi authority, should have discussed the application with the Runanga. He regretted that no opportunity had been given to discuss options for avoiding sites and protecting heritage and ecological feature during the application stage.

[101] Mr Fraser gave evidence that Kotuku Parks Ltd had had various communications with Kapakapanui (the environment and heritage arm of Te Runanga), and that Mrs Goodman had indicated that her whanau did not wish to involve the iwi. The witness reported that at the meeting during the adjournment, and at a later meeting, Kakapanui had indicated that from their perspective the subdivision density was too high, but no specific proposal had been put forward except in the broadest sense to reduce the number of lots to about four.

[102] Mr Fraser deposed that Kotuku Parks Ltd had been prepared to listen to Kapakapanui's concerns; that Kotuku Parks were open-minded, although working to an existing concept plan; that there had been plenty of time for discussions; but they did not receive sufficiently detailed feedback to choose an alternative. He understood that Kapakapanui had felt that, because there was a concept

plan in place, they were not open to consultation, and he observed that it would be difficult to progress discussions without an indicative proposal. He had concluded that the aspirations for the site of Kotuku Parks Ltd and Kapakapanui were basically incompatible.

[103] Mr Rodie testified that after the applications were received, the District Council had asked Kotuku Parks Ltd to consult with Kapakapanui. Kotuku Parks Ltd had expressed the belief that it would be appropriate to consult with the Goodman whanau, and had presented a letter from Mrs Goodman stating their claim to have manawhenua, that they had no concerns about the development, and that they had chosen not to involve iwi in matters relevant to this development. Mr Rodie also reported that the Council's hearing committee had adjourned the hearing of the resource consent applications to enable completion of the archaeological report and consultation with Kapakapanui in relation to it. After that, the committee had found that adequate consultation had taken place. In cross-examination Mr Rodie deposed that none of the Council staff had met with Te Runanga over the proposal.

[104] Mr Rodie's colleague, Mr Thomson, confirmed that evidence, and gave the opinion that consultation had taken place to the extent that the views of tangata whenua on the proposed development were known in sufficient detail for the Council to make a decision taking those views into account. In cross-examination he agreed that the applicant had not consulted with Te Runanga before the initial hearing, nor had the Council. Mr Thomson also gave the opinion that if an applicant chooses not to consult Maori, Council staff have to seek information from them. He explained that at the time the Council's practice in that regard had been evolving.

[105] Initially Kotuku Parks Ltd had consulted with the Goodman whanau, who discouraged consultation with Te Runanga. However two pieces of land included in the subdivision site are owned by members of the Goodman whanau, who stand to gain from the subdivision development proceeding. That could have been a disincentive to their raising with Kotuku Parks Ltd any Maori cultural issues about the development. Having been asked by the Council to consult with Te Runanga, for Kotuku Parks Ltd to confine its consultation to the whanau, who were virtually co-proponents of the subdivision, was not adequate to enable the Council to take into account the principles of the Treaty as required by section 8.

[106] We understand Mr Fraser's point that ultimately it turned out that the aspirations of Kotuku Parks Ltd and Te

24 *Tangiora v Wairoa District Council* Environment Court Decision A6/98.

25 See eg *Purnell v Waikato Regional Council* Environment Court Decision A85/96; *Marlborough Seafoods v Marlborough District Council* Environment Court Decision W12/98.

26 See *Ngatiwai Trust Board v Whangarei District Council* Decision A7/94; *Hanton v Auckland City Council* Decision A10/94; *Whakarewarewa Village v Rotorua District Council* Decision W61/94, and *Mangakahia Maori Komiti v Northland Regional Council* Decision A107/95.

Runanga for the site were so far apart that agreement could not be reached. We also accept that Kotuku Parks Ltd needed to have a concept to be the subject of consultation. Even so, by the time the applications had been notified and submissions received, the best opportunity for truly fruitful consultation had passed. Greater gain may be expected from consultation before the concept has been developed to the stage necessary to define a resource consent application. For those reasons the consultation that occurred during the adjournment of the primary hearing could not have had the same quality as consultation prior to lodging the resource consent applications.

[107] Evidently the hearings committee was not satisfied with the consultation that had occurred, and asked for more during the period of the adjournment. That later consultation, by being focused on (if not confined to) the archaeological report, did not address Te Runanga's concerns in other respects.

[108] Taking those three weaknesses in combination, we find that the consultation with tangata whenua was not sufficient to enable the primary consent authority to be confident that it had the understanding necessary to take into account the relevant principles of the Treaty in deciding the resource consent applications. However we acknowledge that the Court has had the benefit of Te Runanga's case presented at the de novo hearing of the applications on these appeals, so this Court is able to take their concerns into account.

RESTRICTION ON SUBDIVISION CONSENT

[109] Section 106 of the Act restricts subdivision consent in certain circumstances. We quote the section:²⁷

106. Subdivision consent not to be granted in certain circumstances – (1) A consent authority shall not grant a subdivision consent if it considers that either –

- (a) Any land in respect of which a consent is sought, or any structure on that land, is or is likely to be subject to material damage by erosion, falling debris, subsidence, slippage, or inundation from any source; or
 - (b) Any subsequent use that is likely to be made of the land is likely to accelerate, worsen, or result in material damage to that land, other land, or structure, by erosion, falling debris, subsidence, slippage, or inundation from any source – unless the consent authority is satisfied that sufficient provision has been made or will be made in accordance with subsection (2).
- (2) A consent authority may grant a subdivision consent if it is satisfied that the effects described in subsection (1) will be avoided, remedied, or mitigated by one or more of the

following:

- (a) Rules in the district plan;
- (b) Conditions of a resource consent, either generally or pursuant to section 220(1)(d);
- (c) Other matters, including works.

[110] It was the case for the Waikanae Estuary Guardians that the land proposed to be subdivided, and future houses on that land, are or are likely to be subject to material damage by subsidence induced by earthquake, and by inundation and erosion from the sea in conditions of storm surge, tsunami, and sea-level rise. The Guardians called Mr A R Edwards and Dr J R Goff to give evidence on those topics. Evidence to the contrary was given by Mr R B O'Callaghan, called on behalf of Kotuku Parks Limited.

[111] Mr Edwards is a senior geologist. He gave evidence that the Kapiti coast plain has in geologically-recent time suffered at least two catastrophic episodes of coastal erosion; that the present foreland is likely to be geologically ephemeral; and that the probability of another great catastrophe occurring in this area in the geologically-near future is high. He urged a precautionary approach to ongoing urbanisation of the Kapiti District coastline.

[112] In cross-examination, Mr Edwards agreed that there is no peer-reviewed and published material supporting his opinions. He accepted that the dunes adjacent to the site have been subject to progradation since about 1950, and that the scale of catastrophe he anticipated would have effects along the entire Kapiti coast. He also stated that by the geologically-near future, he meant a period of hundreds of years.

[113] Dr Goff is a scientist specialising in Quaternary geology, physical coastal processes, geohazards and coastal management studies. He gave evidence that there have been at least six catastrophic saltwater inundations of the Kapiti Coast in the past 5300 years. Dr Goff reported some evidence of wave heights of between at least 6 to 11 metres above sea level, and of two metres in a tsunami in 1855 AD. He gave the opinion that events of that scale in this region have a return period of at least one every 250 years, and larger catastrophic saltwater inundation events about one every 400 years.

[114] Asked in cross-examination about a Wellington Regional Council assessment of tsunami risk, Dr Goff responded that this assessment had been based on information that did not include recent work on which he had based his evidence. He did not accept that Kapiti Island would protect the Kapiti coast from a tsunami parallel or sub-parallel to the coast. The warning of a locally generated tsunami would be only between 20 and 2 minutes. He also gave the opinion that the site, being in an estuary by the

²⁷ Section 106 as amended by section 56 of the Resource Management Amendment Act 1993.

side of a river, would be more susceptible to tsunami.

[115] Mr O’Callaghan is a consulting civil engineer with a post-graduate qualification in hydraulics and coastal engineering. He had assessed safe building levels for the proposed subdivision based on achieving the minimum level required for protection from flooding from the Waikanae River and the sea. Mr O’Callaghan had considered two cases. The first was a 1% annual probability flood-event in the river coinciding with a 5% annual probability storm sea-surge event (including a 200-millimetre allowance for future sea-level rise). The second was a 1% annual probability storm sea-surge event, with a similar allowance for future sea-level rise. It was on consideration of those cases that he had adopted the minimum building platform level of 3.4 metres RL on which the subdivision development had been designed. That allowed a freeboard for contingencies of 0.75 metres. The District Council had recommended 3.6 metres RL for roads, and 3.8 metres RL for houses, and Kotuku Parks Ltd had accepted those greater safety factors as the design levels.

[116] Mr O’Callaghan had considered the risk of inundation from tsunamis. He deposed that the design level adopted would create levels higher than those of surrounding developed residential areas, and that the available freeboard would exceed all recorded events on the west coast of New Zealand over the last 150 years. Mr O’Callaghan gave the opinion that the proposed levels, with their conservative allowance for freeboard, would provide a sufficiently high platform to provide an acceptably low risk from tsunamis.

[117] In cross-examination, Mr O’Callaghan confirmed that even a 100-year event followed by a 20-year event would not pose a risk at the design building platform levels. He accepted that mean sea-level had already risen by about 0.06 of a metre since the datum was established in 1953.

[118] Having considered that evidence we consider that the approach taken by Mr O’Callaghan is consistent with sound engineering practice. Although a rare major event causing extensive inundation or erosion could occur on this coast at any time, it is not standard practice to design for such extreme events as those described by Mr Edwards and Dr Goff. The Kapiti District Council was satisfied that by raising the building platform levels sufficient provision would be made to avoid or mitigate the likelihood of damage, and we make the same judgment.

REQUIRED CONSIDERATIONS

[119] By section 104(1) of the Resource Management Act, Parliament has directed consent authorities to have regard to various matters when considering resource consent applications. We quote the subsection (omitting immaterial provisions)²⁸ –

- 104. Matters to be considered** – (1) Subject to Part II, when considering an application for a resource consent and any submissions received, the consent authority shall have regard to –
- (a) Any actual and potential effects on the environment of allowing the activity; and
 - ...
 - (c) Any ... New Zealand coastal policy statement, regional policy statement...; and
 - (d) Any relevant objectives, policies, rules, or other provisions of a plan...; and
 - ...
 - (f) Any relevant regional plan or proposed regional plan, where the application is made in accordance with a district plan; and
 - ...
 - (i) Any other matters the consent authority considers relevant and reasonably necessary to determine the application.

[120] The opening words of the subsection “Subject to Part II” indicate that the duty to have regard to the matters listed has to yield in cases where to have regard to them would conflict with Part II.²⁹ In this case, no party submitted that any such conflict would arise, and we are not aware of any reason why it might. We therefore proceed to have regard to such of the matters listed as are material.

Planning instruments

[121] Our consideration of the relevant provisions of Part II of the Act shows that there would be effects on the environment of allowing the proposed earthworks and subdivision. There are planning instruments of some of the classes listed in section 104(1), and we will address material provisions of those instruments before returning to the environmental effects. Many provisions of the relevant planning instruments express similar objectives as are contained in Part II of the Act, and apply them in similar ways. So to avoid tedious detail, we identify the main provisions which should influence the decision of the applications before the Court.

²⁸ As substituted by section 54 of the Resource Management Amendment Act 1993.

²⁹ *Paihia and District Citizens Assn v Northland Regional Council* Planning Tribunal Decision A77/95; *Russell Protection Society v Far North District Council* Environment Court Decision A125/98.

New Zealand Coastal Policy Statement

[122] This instrument,³⁰ consistent with section 6 of the Act, seeks as a national priority to avoid adverse effects of development on the landform, natural character, waahi tapu, and fauna and flora along the coast. It recognises that this need not preclude appropriate development in appropriate places, and indicates that policy statements and plans should define where subdivision and development would be appropriate in the coastal environment.

Wellington Regional Policy Statement

[123] Chapter 7 of this instrument³¹ applies the Act and the New Zealand Coastal Policy Statement to the coastal environment of the Wellington Region. It recognises the potential for development to cause significant adverse effects, especially cumulative effects, loss of natural character and damage to coastal ecosystems and landscape features. There are policies for protection of significant landscapes, landforms, and sand dunes. Some particular examples are identified, and the Waikanae Estuary is not among them, but the policy is not restricted to those identified. The instrument calls for consideration of the extent to which natural character has already been compromised in an area, and the viability of alternative sites for proposed activity which are outside the coastal environment.

Regional plans

[124] The only regional plans brought to our attention were a regional soil plan and a regional coastal plan, neither of which is applicable to the project the subject of these proceedings.

Kapiti Coast district plan

[125] The Kapiti Coast district plan³² is designed to assist the District Council in achieving the purpose of the Act³³ and implementation of the New Zealand Coastal Policy Statement and the Wellington Regional Policy Statement in that district. Accordingly it too identifies as important issues the effects of residential subdivision on landform and environmental features and values, particularly in the coastal environment; and recognises that landscapes are under threat from inappropriate development such as flattening of sand dunes.

[126] The district plan expresses objectives of ensuring that subdivision and development avoids or minimises

adverse impacts on the natural and physical environment; and protects the remaining habitats. On earthworks, the plan stipulates avoiding adverse effects by taking into account impacts on prominent or visually sensitive landforms, including dunes, avoiding creation of unnatural scar faces, and altering existing landforms. It adopts a policy of maintaining the integrity and character of the underlying landform and habitats.

[127] We have already stated our findings that by the district plan the sites the subject of these applications are zoned Residential, and that the applications for consent to the proposed earthworks and subdivision have to be considered as discretionary activities. Waikanae generally is one of the areas identified for future growth; and the proposal meets the standards for subdivision, such as the size and shape of lots to be created. The site is among the areas identified for urban subdivision, and is not among the areas identified as an outstanding landscape or an ecological area. However the plan plainly intends that the areas for intensive residential subdivision to accommodate the demand for population growth “shall not include land ... within the coastal environment”.³⁴

[128] Kotuku Parks Ltd submitted that policies about buildings and earthworks in the coastal environment showed that the district plan envisaged that there would be new buildings and earthworks there. Its counsel also made submissions based on subtle distinctions in the wording of provisions for the Residential zone and for the Rural zone.

[129] We are grateful for those submissions. Yet the individual provisions need to be read in the context of the plan to achieve the purpose of the Act (as elaborated in Part II), and has not to be inconsistent with the Coastal Policy Statement and the Regional Policy Statement. Further we recognise that the plan will necessarily have been prepared piecemeal and is not to be construed as finished Chancery draftsmanship.³⁵ The plain meanings of the provisions previously cited are consistent with the provisions of section 6 we have already considered, and also with the provisions of the Coastal Policy Statement and the regional policy statement. So we do not accept that inferences of the kind advanced on behalf of Kotuku Parks Ltd should prevail over the plain meaning of the words of the plan previously cited.

[130] The case for Kotuku Parks Ltd placed strong reliance on the Residential zoning of the site as justifying earthworks necessary to raise the proposed lots to the

³⁰ *New Zealand Gazette*, 5 May 1994, p 1563.

³¹ Operative since 15 May 1995.

³² Operative since 30 July 1999.

³³ Resource Management Act 1991, section 72.

³⁴ *Kapiti Coast District Plan*, section C.7.2, page 133.

³⁵ *Rattray v Christchurch City Council* (1984) 10 NZTPA 59 (CA); *Sandstad v Cheyne Developments* (1986) 11 NZTPA 250 (CA); *Application by Millbrook Country Club* Environment Court Decision C45/97.

required safe level. In our opinion that approach would place more weight on the zoning than it ought to bear. It is a zoning which applies to substantial areas of the District. Much of the zone that was not already developed at the time the plan was made operative lies some distance from the immediate coastal environment. Much of the zone could be developed without the scale of earthworks needed in the proposed subdivision. We hold that the true interpretation of the district plan is that the earthworks and subdivision for residential use of this site is to be so designed that it serves the superior instruments (Part II of the Act, the Coastal Policy Statement and the Regional Policy Statement), and respects the provisions of the plan which implements them.

Effects on the environment

[131] As directed by section 104(1)(a) of the Act, we now have regard to any actual and potential effects on the environment of allowing the activity. We have already considered the positive effects. Among the potentially adverse effects we have already considered effects on the natural character of the coastal environment. Although the proposal does not involve development of outstanding natural features or landscapes, it may still have visual effects in a landscape, even though it is not an outstanding one, so we will address that topic. We have already found that the development would not be consistent with protection of the nearby significant indigenous fauna habitat. We have found that the effects on the relationship of Maori with the site can be addressed adequately by a condition which is acceptable to Kotuku Parks Limited; and that the proposed development would limit the capacity for exercise of kaitiakitanga.

[132] We now consider the visual effects of the subdivision development on the landscape. In that regard Mr Lister deposed that that the design of the proposal and the conditions of consent would reduce the inevitable effects and soften the appearance of the subdivision from the estuary. In cross-examination he accepted that the subdivision had not been designed in sympathy and harmony with the adjacent estuary area.

[133] Mr Hudson gave reasons for his opinion that the additional housing on the proposed subdivision would have a significant adverse effect, although he considered that the proposed conditions would mitigate the adverse effects. In cross-examination he accepted that the site warrants sensitive development, and agreed that features of the project did not represent sensitive development, and would be inappropriate. He also gave the opinion that the conditions would not avoid or remedy the adverse effects

and that it would be possible to design a more sensitive subdivision development for the site.

[134] Mr Boffa gave the opinion that the proposal would have major adverse visual effects, and that the mitigation measures proposed are cosmetic and would not be effective in avoiding, reducing or mitigating the adverse effects. He confirmed that the development would be very visible and prominent. In cross-examination he agreed that previous urban development had caused substantial compromise of the area.

[135] In our consideration of this issue, we assume that the development would be carried out in accordance with the consent conditions imposed by the District Council. We accept that the required planting, the building height restrictions, and restrictions on colour and reflective glass would all contribute to mitigate the visual effects. Even so, having considered the evidence we find that the totality of the development, from earthworks replacing the natural undulations with a mainly featureless landform, to houses and accessory structures (including fences), would result in a landscape that would be less attractive. The removal of material from the borrow areas would alter their natural shapes, and would also have an adverse visual effect. In short, the proposal would have adverse visual effects that would not be fully avoided, mitigated or remedied.

[136] In summary, we find that the proposal would be likely to have positive economic effects for Kotuku Parks Ltd and those who benefit from its business activities, and social and economic effects for purchasers of the residential lots. We also find that it would have adverse effects on the environment in that the natural character of the sand-dune landform in the coastal environment would be lost; in inconsistency with protection of nearby significant habitat for indigenous birds, including some threatened species; and in adverse visual effects in a sensitive landscape.

OTHER RELEVANT MATTERS

[137] A consent authority is also to have regard to any other matters it considers relevant and reasonably necessary to determine the application.³⁶ In that regard, we consider the history of the total development of which this project is Stage IV. That total development has been carried on for a quarter of a century now, with Kotuku Parks Ltd applying professional standards and co-operating with the Council and other authorities, especially over creation of reserves. The subject land has been zoned for residential development over that period, and the subdivision is generally in accordance with a concept plan accepted by the District Council more than a decade ago.

³⁶ Resource Management Act 1991, section 104(1)(i).

[138] Even so, the current proposal has to be judged by the purpose and provisions of the Resource Management Act 1991, not those of the Town and Country Planning Act 1977 and the Local Government Act 1974 by which the zoning was originally set, and the concept plan approved. The present regime introduces strong provisions for sustainable management of environmental resources that were not found in the earlier Acts. Even a developer with a record of the quality of that which has been earned by Kotuku Parks Ltd should not expect its reputation to influence the application to its proposal of the matters of national importance in section 6, or decision by reference to the statutory purpose.

JUDGMENT

[139] Having followed the directions contained in the Act, we have now to make a discretionary judgment whether the consents required should be granted or refused.³⁷ That judgment has to be informed by the stated purpose of the Act, the promotion of sustainable management of natural and physical resources, as defined in section 5.

[140] The explanation of sustainable management in section 5(2) ties enabling people and communities to provide for their wellbeing, health and safety with achieving the goals described in paragraphs (a), (b) and (c) of that subsection. In this case consideration of the extent to which the proposal fails to achieve those goals overlaps consideration of the adverse effects of the proposed activity on the environment. The outcome is to connect the adverse effects to the statutory purpose itself. Some adverse effects are to be given particular weight, in that they represent failures to recognise and provide for matters of national importance described in section 6. In this case, the loss of the natural character of the sand-dune landform of the coastal environment, and the exposure of the adjacent significant habitat for indigenous birds (especially threatened species), conflict with matters listed in section 6(a) and (c) respectively. In addition there is the adverse visual effect, and the duty to have particular regard to the hindrance which the development would place on the exercise of kaitiakitanga. The need to give weight to these matters is confirmed by adoption of relevant values in the Coastal Policy Statement, the Regional Policy Statement and the district plan.

[141] To the positive effects already identified, there is the recent confirmation in the district plan of the Residential zoning of the site. However that is a general zoning applying to large areas of the district. It does not imply

that every part of every piece of land in the zone may be subdivided to the maximum permitted intensity, irrespective of the environmental effects. Nor does it imply that consent will be given to earthworks of the scale proposed here, where they damage the natural character of coastal dunes.

[142] In our judgment, giving as much weight as we can to the positive benefits, the longstanding residential zoning, and the concept plan approval prior to the present regime, in respect of the particular proposal before the Court those factors are outweighed by the cumulative effects of that damage, of failing to protect the adjacent significant habitat of indigenous fauna, the adverse visual effects, and the impairment to kaitiakitanga. In short, in the circumstances of the particular site the proposal is too intensive and would have effects on the environment that are too great.

[143] That is not to conclude that no residential use of the site should be permitted. But it is not appropriate for the Court set limits, nor to offer the owners advice about how to design development that deserves consent.

CONDITIONS

[144] In the circumstances, there is no point in the Court addressing the issues raised by the parties in respect of Kotuku Parks Limited's appeal against the consent conditions.

DETERMINATIONS

[145] For the reasons given, Appeals RMA1672/98, RMA1673/98 and RMA1685/98 are allowed, the respondent's decision is cancelled, and the resource consent applications are refused, without prejudice to the making of further applications in respect of a different proposal. Appeal RMA1655/98 is consequentially disallowed.

[146] The question of costs is reserved.

DATED at **AUCKLAND** this day of 2000.

For the Court:

D F G Sheppard
Environment Judge

³⁷ Resource Management Act 1991, section 105(1)(b).

DECISION NO. A91/98

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of an appeal under section 120 of the Act

BETWEEN **ROBERT TE KOTAHI MAHUTA,**
WAIKATO-TAINUI, TAINUI MAAORI
TRUST BOARD and NGA MARAE TOOPU
(Appeal RMA 662/97)
Appellants

AND **THE WAIKATO REGIONAL COUNCIL**
and THE WAIKATO DISTRICT COUNCIL
Respondents

AND **ANCHOR PRODUCTS LIMITED**
Applicant

BEFORE THE ENVIRONMENT COURT

Environment Judge D F G Sheppard
Environment Commissioner P A Catchpole
Environment Commissioner F Easdale

HEARING at AUCKLAND on 4, 5, 6, 8, 11, 12, 13 and 14 May 1998.

Counsel

Mr MLS Cooper and Mr G M Sandelin for the appellants

Mr J Milne for the respondent

Mr M C Holm, Ms H A Atkins, and Ms R V Keating for the applicant

DECISION

A

THE PROCEEDINGS

[1] Anchor Products Limited (Anchor Products) wishes to expand the capacity of its dairy factory at Te Rapa, and to install a new gas-fired cogeneration plant (in place of an existing coal-fired power plant) to supply energy to the expanded milk-processing plant. The existing dairy factory has capacity to process up to 3 million litres of milk per day. The proposed expansion would increase the capacity to 8 million litres per day. The cogeneration plant was originally intended to generate up to 150 megawatts of electricity, but Anchor Products has reduced the size of the proposed plant to 45 megawatts, with consequential reductions in the quantities of water to be taken from the Waikato River, and of wastewater to be discharged.

[2] Applications were made to the Waikato Regional Council (the Regional Council) and to the Waikato District Council (the District Council) for the resource consents needed for Anchor Products' project. The resource consents that were granted by those primary consent authorities are described in the appendix to this decision. Numerous conditions were imposed on the consents granted.

[3] Four appeals to the Environment Court arose from a joint decision of the Waikato Regional Council and the Waikato District Council granting those resource consents. Subsequently, an appeal by Mr RA Porter and Mrs Porter¹ was withdrawn, as were appeals by Mr Tizard² and by Greenpeace New Zealand³. That left Appeal RMA 662/97 to be heard and decided by the Court.

[4] In that appeal the appellants are Robert Te Kotahi Mahuta, Waikato-Tainui, Tainui Maaori Trust Board and Nga Marae Toopu. Waikato-Tainui are the descendants of the Tainui Waka, referred to and defined in the definition of "Waikato" in section 2 of the Waikato Raupatu Claims Settlement Act 1995, which lists 33 hapu of Waikato. Sir Robert Mahuta is principal negotiator on behalf Waikato-Tainui in respect of a claim by them under the Treaty of Waitangi Act 1975 for the Waikato River. Tainui Maaori Trust Board is a statutory body incorporated under the Maori Trust Boards Act 1955, and is the iwi authority of the iwi of Waikato, mandated by the 61 Waikato marae. Nga Marae Toopu is a body representing all marae in the wider group of Tainui, and which has mandated Sir Robert Mahuta to represent them on all matters concerning the Waikato River.

[5] By their notice of appeal those appellants sought that the decision by the Regional Council and the District Council be cancelled, and that the consents sought by the applicant be denied. The notice of appeal raised nine broad grounds. However as the appellants' case was presented, it was particularly directed to three matters: the special relationship of Waikato-Tainui with the Waikato River, the adverse effects on the river of taking water from the river and of discharging contaminants to it, and the inadequacy of consideration by Anchor Products and its advisers of alternative methods of wastewater disposal.

[6] In the reply to the appeal lodged on behalf of the primary consent authorities on 15 December 1997, the Regional Council maintained that the conditions imposed were appropriate to ensure that the potential adverse effects on the Waikato River are avoided, remedied or mitigated. However, by the time of the hearing of the appeal the Regional Council took a different attitude. Having had further technical advice, it maintained that a condition imposed on the discharge permit for wastewater about the limits on the concentration of phosphorus in the discharge should be amended. An amended notice of reply to the appeals was lodged⁴ by the Regional Council proposing an amended condition setting reduced phosphorus limits. Anchor Products accepted that the limits on phosphorus concentration in the discharge might be reduced, but resisted the extent of the reductions involved in the amended condition proposed by the Regional Council.

[7] During the course of the hearing of the appeal, counsel for the appellants announced that the appellants would not raise any specific challenge to the grant of the land-use consent. Accordingly, there was no need for us to call on the District Council to present its case in support of the decision to grant that consent, and there being no opposition, the District Council was dismissed from the proceedings.

B

THE PROPOSAL

[8] Anchor Products' dairy factory at Te Rapa is 10 kilometres north-west of Hamilton, immediately to the east of State Highway 1, and to the west of the Waikato River. It is one of ten manufacturing sites of the New Zealand Dairy Group (the Dairy Group). The proposal is to expand the dairy factory to create what the Dairy Group calls a "megasite." The expanded Te Rapa factory would become one of five megasites planned for the Group⁵. It was indicated that, in the process of consolidation of the Dairy

1 Appeal RMA 668/97.

2 Appeal RMA 693/97.

3 Appeal RMA 693/97.

4 Amended reply lodged on 10 May 1998, pursuant to leave granted on 8 May 1998, replacing the reply lodged on 15 December 1997.

5 The others are Lichfield, Wairoa, Hautapu and Edgecumbe.

Group's manufacturing on the megasites, the Group's other dairy factories will be closed by about 2009.

[9] The expanded factory would have capacity to process 8 million litres of whole milk per day producing primarily skim and whole milk powder for export, and cream production would be increased from 650,000 litres of cream per day to 2 million litres per day, making products such as butter, milk fat, cream cheese and fat blends.

[10] In the expanded factory, the use of steam would increase by about 40%, and electricity demand would increase by about 600%, from 5 megawatts to 30 megawatts at peak demand. The increased demand for energy is proposed to be met by installing a 45 megawatt gas-turbine cogeneration plant on the site.

[11] Mr R E Townshend, Group General Manager of Anchor Products, deposed that there is demand for additional capacity in order to meet projected milk flows in the 1999 season. He testified that the volume of milk had increased because of market conditions (such as the international price for dairy products 1991/1992 season), mergers, closures of smaller factories⁶, weather, and other variables. The overall volume of milk produced continues to increase, the peaks can be sudden and variable, and the shoulder period is also subject to variation in terms of volume and length of period.

[12] He observed that failure to provide capacity to process the increasing quantity of milk produced could lead to disposal of milk on-farm, with possible environmental effects and adverse economic effects for those farmers, and for Anchor Products.

[13] As part of the expansion, Anchor Products proposes to construct an additional milk-powder drier; a new evaporator hall; extensions to the existing drystores; additional milk silos; an expansion to the tanker reception area; an extension to the cream processing plant; additional coolstores; a new separated access system from State Highway 1 and a new internal roading pattern; and a new wastewater treatment system for dairy factory wastewater, cooling water and stormwater.

[14] The cogeneration plant (which is to be constructed and run by Contact Energy Limited) would be a new project that would supersede the existing coal-fired plant on the site. The plant would use a gas turbine generator to produce both electricity and steam. The steam would all be used in the dairy factory, and any excess electricity would be "exported."

[15] The reduction in size of the cogeneration plant (already mentioned) has resulted in corresponding reductions in the use of water and wastewater (5,000 cubic metres per day and 1,500 cubic metres per day less, respectively), and consequential amendments to the consents granted by the joint hearing can be made. The reduction also meant that a 110 kilovolt transmission line (for which resource consent would be needed) is no longer required, as the plant could now use 33 kilovolt lines, for which resource consent is not needed.

[16] The proposal includes a partly land-based system for disposal of wastewater. There would be a gully system of rock-lined weirs, and a rock-lined conduit (enabling some contact with the land). This system was proposed as an alternative to a pipe discharging directly into the Waikato River, in response to tangata whenua concerns about that method of disposal. The proposal also includes recognition and protection of the site on the river edge of the former Mangaharakeke Pa.

[17] Much of the evidence and argument in these proceedings (both at the primary hearing and at the appeal hearing) centred on the consents for wastewater discharge, and in particular, the method of disposal and the volume, heat, nutrient content of the wastewater, and the effects on the river of the discharge. Hydraulic aspects of the disposal system and the treatment station were also the subject of extensive technical evidence.

[18] The Waikato District Council and the Waikato Regional Council granted resource consents to take water from the Waikato River, and to discharge water (treated wastewater, cooling water, blow-down water, stormwater) to the Waikato River⁷.

[19] In the appeal hearing, Anchor Products sought that those consents be upheld, except to the extent of consequential reductions arising from the reduced scale of the cogeneration plant. It accepted that the limits on phosphorus concentration in the discharge might be reduced to an average of 57 kilograms per day, and a maximum of 70 kilograms per day, but resisted the reductions involved in the amended condition proposed by the Regional Council to 25 and 35 kilograms per day respectively.

C CONTRIBUTION TO COMMUNITY WELL-BEING

[20] The relationship between Waikato-Tainui and Anchor Products occurs within a complex set of social and economic inter-relationships that characterise the primary

⁶ For example, that at Waharoa.

⁷ Details of the resource consents granted are set out in the appendix to this decision.

sector of New Zealand. One aspect of this is the positive contribution that the dairy industry makes to the country's economy, and the particular contribution made by Anchor Products, which (it was asserted) would be enhanced by the proposed expansion at Te Rapa.

[21] The New Zealand dairy industry's exports represent about 30% of the world's total international free trade in dairy products, and its total export revenue (about \$6 billion in 1996/1997) is equivalent to 20% of the country's total export earnings.

[22] Mr J D Storey (Chairman of the NZ Dairy Group) estimated that the New Zealand Dairy Group will earn approximately \$3 billion of export revenue in 1997/1998. He testified that approximately half of the Group's total annual revenue is paid out to suppliers for milk, and that the rest is used to run the business, and to pay for such costs as wages, salaries, goods, and services.

[23] Recent research⁸ suggested that the Dairy Group employs some 4,000 people and contributes some \$8 billion annually to the economy of the greater Waikato and Auckland regions.

[24] The dairy industry as a whole is undergoing a period of consolidation, including the trend to megasites incorporating new technology, and the decommissioning of older, small factories.

[25] Anchor Products pointed to various positive community benefits which would result from the Te Rapa expansion project, including the following:

1. Milk is an eco-toxic substance, and it is preferable that it is processed and the products exported, rather than disposed of to waste. This requires capacity to process all the milk available.
2. The expansion of the Te Rapa factory would have economic benefits for the suppliers of milk and for other businesses (and their suppliers in turn), as well as for the company itself. The rural infrastructure and associated service towns rely on the continued viability of dairy businesses. There would also be significant economic consequences for the community if there is not sufficient capacity to process for export all the milk produced.
3. About 20% of the workers at the Te Rapa factory are Maori, and about 300 to 350 farms in Maori ownership supply the company in this area.
4. A significant number of local businesses are dependent upon the Dairy Group for their survival.

5. Anchor Products is proposing a management plan to preserve and enhance the remaining features of the Mangaharakeke Pa site.
6. New plantings of native plants are proposed alongside the gully project, available for traditional medicinal use, and increasing river-edge biodiversity.
7. Anticipated savings from the cogeneration plant would yield savings in costs of production which may "further enhance New Zealand's reputation as a low-cost dairy products producer" while having lower impact on the environment than that of the current coal-fired power-house.
8. The expansion would create 30 additional permanent jobs on the site.
9. Increased processing capacity at Te Rapa would allow closure of older less-efficient dairy factories in the region.

D

ADEQUACY OF APPLICATION

The issue

[26] The appellants questioned the adequacy of the application, the assessment of effects on the environment (AEE) and the technical data submitted with it. They asserted that complete technical information had been needed to enable their advisers to examine the proposal in detail. Questions were raised about the volumes of elements in the wastewater treatment and disposal system, and about discrepancies in estimates of nutrient content in the wastewater. A consulting engineer engaged by the appellants, Mr R E Hedgland, questioned whether it would be practicable to comply with the discharge permits. Criticisms were made about alleged inconsistencies between the application and the proposal as currently described.

[27] In response Anchor Products submitted that the function of the various application documents had been misinterpreted by the appellants, and that there was no legal requirement to provide the depth of technical detail expected, or for the proposal to remain exactly as described in the application documents throughout the application, hearing and appeal processes.

[28] Counsel for the appellants, Mr Cooper, submitted that to meet the requirements of section 88(4)(a), section 104(3)(b) and clause 1(b) of the Fourth Schedule, the actual effluent treatment system to be used ought to be described

⁸ Commissioned by the Dairy Research Institute.

and its capacity known with precision, and that the duty of consent authorities to have regard to the actual and potential effects on the environment of allowing the activity must necessarily embrace being satisfied that a proposed system will work (which requires consideration of its constituent parts) and will be able to comply with conditions necessary to mitigate adverse environmental effects.

[29] Mr RJW McCowan⁹ deposed that the intent had been to establish a detailed framework, or “envelope,” of environmental standards and requirements which would enable Anchor Products to undertake final detailed technical and engineering designs. He was not, for example, able to confirm the kind of reactors to be used.

[30] Mr Cooper submitted that the “envelope” approach to the assessment of effects did not comply with the requirement of the Resource Management Act, relying on section 88(4), the Fourth Schedule and section 104(3). He observed that the treatment system has not been designed for phosphorus removal, and that (according to Mr Macdonald¹⁰) it would need to be redesigned to provide for that; and that no detail had been given of the flow balancing method, the pilot trials having assumed constant flows.

[31] Counsel for Anchor Products, Mr Holm, responded by observing that the appellants had disclaimed any legal challenge to the adequacy of the AEE for the proposal, and submitting that the provisions of the Act do not impose an obligation on the applicant to complete detailed and final engineering designs before seeking consents, nor was there any obligation not to deviate from the AEE. He contended that the “envelope of effects” basis of the application does not conflict with the Act and is a reasonable and common approach for industrial projects involving large-scale engineering design. Counsel submitted that the statutory provisions referred to by Mr Cooper do not impose an obligation on an applicant to complete detailed and final engineering designs before seeking consents, and that there is no authority for the view that an AEE should have some binding effect on an applicant. He described Mr Hedgland’s approach as inflexible and pedantic.

The evidence

[32] The existence, and significance, of any inadequacy in the application should be apparent from the appellants’ technical evidence. The technical witnesses who testified on behalf of the appellants were a consulting environmental scientist, Dr B McCabe, a senior consulting environmental engineer, Mr Hedgland, and a consulting geotechnical and civil engineer, Mr M T Mitchell.

[33] In his evidence Dr McCabe addressed effects of nutrient discharges to the Waikato River, nutrient control measures that he considered are required to overcome adverse effects of river eutrophication, and controls on plant nutrients in the proposed discharge. Much of his evidence in chief concerned the existing nutrient loading of the Waikato River and its effects. He then considered the likely effects of nitrogen and phosphorus in the proposed discharge consented to by the Regional Council. In that section of his evidence he referred to information about the proposed treatment and the proposed discharge contained in the evidence of Mr P C Kennedy, a scientist who had been called to give evidence on behalf of Anchor Products. Dr McCabe felt able to give his opinions about the likely effects on the river of the proposed discharge, and his recommendations about the limits that should be set for concentrations of nitrogen and phosphorus in the discharge, and about the proposed discharge structure. There was no basis in Dr McCabe’s evidence for a finding that he had lacked information about the proposal necessary to enable him to make his professional assessment of the likely effects on the aspect of the environment the subject of his evidence, namely the waters of the Waikato River.

[34] Mr Mitchell’s evidence related to possible sites suitable for disposal to land of treated wastewater. He too was able to give the Court his opinions based on the Regional Council’s consent. His evidence does not assist us in deciding the adequacy of the application.

[35] It was Mr Hedgland who expressed concern about the adequacy of the technical information available. In cross-examination he accepted that there is scope for information given in an AEE to be modified later following consultations and consideration of submissions, but he considered that it should be limited to minor clarification. He raised four separate respects in which he claimed that the information was inadequate.

[36] The first respect was apparent discrepancies in references to the quantity of water to be taken from the river. The witness deposed to having calculated “water take figures ... considerably greater than” the amount for which the Regional Council had granted consent. He remarked that there had been no discussion in the application documents of the effects of the present ‘water take’, and went on to give his opinion that present and future flows would cause the velocity in the inlet channel to exceed by a considerable amount the limit set in the Regional Council consent (to prevent larval fish entrapment). He therefore predicted that the intake channel would require modification to achieve a reduction in velocity to comply with the limit, gave the opinion that such modification may impose an impact on the river, and proposed that the

⁹ General Manager, Engineering and Projects, for Anchor Products.

¹⁰ Mr G J Macdonald, a consulting engineer engaged by Anchor Products.

applicant should be required to submit details of compliance measures proposed so that the Trust Board could assess the impact of those measures on the river. In cross-examination the witness agreed that compliance with the conditions would provide the Regional Council with an effective monitoring of the quantities of water actually abstracted, and that the consent-holder would have the risk if it needed more water than it had consent to take. He also confirmed that the intake velocity limit is strict, that the consent-holder would have the risk of complying with that limit, and that standard engineering techniques could be applied to ensure compliance.

[37] The second respect in which Mr Hedgland raised inadequacy of information in the application was apparent discrepancies in the quantities of wastewater flows. He deposed that these have a significant impact on the total quantity of the discharge, on the efficiency of the discharge mechanism, “and possibly the viability of the plant itself.” He had considered supplementary evidence of Mr McCowan, and remained unclear about the quantities of stormwater and backwash water, and of concentrations of solids from chemical flocculation and chemical coagulants in the discharge. In cross-examination he accepted that in normal engineering practice there would be a contingency factor and a factor of safety, and that the system could be engineered for the outlet to meet the conditions of the discharge permit.

[38] Thirdly, Mr Hedgland observed that the system for treatment of strong wastes has not been chosen from sequential batch reactors, upflow anaerobic sludge blanket reactors, or a biological nutrient removal activated sludge system. He deposed that different treatment systems would produce different impacts and emissions, and referred to the importance of flow balancing and equalisation for consistent performance of biological reactors. Mr Hedgland stated that specific design data and technical details had not been provided, and emissions and impacts had not been quantified and assessed, in a manner which would allow full and open scrutiny and independent evaluation of performance predictions. The witness gave the opinion that a mean and upper limit effluent standard should be included in the consent conditions for various parameters¹¹ and, as there is a real possibility that excursions from the mean could occur for extended periods, the upper limit should be set at a level which does not cause environmental damage.

[39] The fourth inadequacy raised by Mr Hedgland related to the sludge that would be produced by the elements in the treatment system¹². He estimated that the

volumes of sludge that would be produced would be of the order of 40,000 cubic metres per year, observed that sludge handling, treatment and disposal can have significant environmental effects (citing odours, greenhouse gases, noise and leachate), and gave the opinion that more information is required to evaluate the feasibility of the proposal and determine the environmental effects of sludge management.

The law

[40] Section 88 of the Resource Management Act governs applications for resource consents. Subsection (4) sets out the information that is to be included in an application, subject to subsection (5)¹³. Section 88(4)¹⁴ provides:

Subject to subsection (5), an application for a resource consent shall be in the prescribed form and shall include -

- (a) A description of the activity for which consent is sought, and its location; and
- (b) An assessment of any actual or potential effects that the activity may have on the environment, and the ways in which any adverse effects may be mitigated; and
- (c) Any information required to be included in the application by a plan or regulations; and
- (d) A statement specifying all other resource consents that the applicant may require from any consent authority in respect of the activity to which the application relates, and whether or not the applicant has applied for such consents; and
- (e) ...

[41] Section 88(6) indicates the level of specificity required as follows:

Any assessment required under subsection (4)(b) or subsection (5)—

- (a) Shall be in such detail as corresponds with the scale and significance of the actual or potential effects that the activity may have on the environment; and
- (b) Shall be prepared in accordance with the Fourth Schedule.

[42] Details of matters that should be included in an assessment of effects on the environment are set out in the Fourth Schedule to the Act.

[43] The requirements of notice and the wide rights of public participation conferred by the Act are based upon a statutory judgment that decisions about resource management are best made if informed by a participative

¹¹ BOD₅, COD, total phosphorus, total nitrogen, and temperature.

¹² Dissolved air flotation, sequential batch reactors, upflow anaerobic sludge blanket reactors, and chemical reclamation facilities.

¹³ Section 88(5) (as substituted by section 44(2) Resource Management Amendment Act 1993) relates to discretionary and controlled activities, and provides that assessments of effects “shall address only those matters specified in a plan or proposed plan over which the local authority has retained control, or which the local authority has restricted the right to exercise its discretion, as the case may be.”

¹⁴ As amended by section 44(1) Resource Management Amendment Act 1993.

process in which matters of legitimate concern under the Act can be ventilated¹⁵. Adequate information for potential submitters is therefore integral to the functioning of the Act.

[44] In *AFFCO v Far North District Council (No 2)*¹⁶ the Planning Tribunal said¹⁷:

The proposed activity has to be described in detail sufficient to enable the effects of carrying it on to be assessed in the way described by the Fourth Schedule. The description is intended to include whatever information is required for a consent authority to understand its nature and effects that it would have on the environment. The description is expected to be full enough that a would-be submitter could give reasons for a submission about it and state the general nature of conditions sought. The application needs to have such particulars that the consent authority would need to be able to have regard to the effects of allowing the activity, and to decide what conditions to impose to avoid, remedy, mitigate adverse effects without abdicating from its duty to postponing consideration of details or delegating them to officials...

... Under this Act, a consent authority is expected to make a final decision, and if resource consent is granted, to impose conditions that will enable the grantee to assess their full effect before deciding whether or not to exercise the consent.

In summary, good resource management practice requires that sufficient particulars are given with an application to enable those who might wish to make submissions on it to be able to assess the effects on the environment and on their own interests of the proposed activity. Advisers to consent authorities and would-be submitters should not themselves have to engage in detailed investigations to enable them to assess the effects. It is an applicant's responsibility to provide all the details and information about the proposal that are necessary to enable that to be done. The proposal and the supporting plans and other material deposited for public scrutiny at the consent authority's office should contain sufficient detail for those assessments to be made.

[45] The AEE must be kept in proportion to the potential effects of the proposal. In *Newlove v Northland Regional Council*¹⁸, an application for water take from the Kaihu River, it was held (having regard to section 88(6)) that the

cost of more detailed research and assessment and design of the proposal would have been disproportionate and unnecessary.

[46] In *Epsom Normal Primary School Board of Trustees v Auckland City Council*¹⁹ the adequacy of the application was seen as a question of content (substance and gist) rather than of "legal niceties". A consent authority could not grant consent to matters which were not detailed in the application, as these matters would not have been brought to the attention of those likely to be affected.

[47] In *McIntyre v Christchurch City Council*²⁰ the Planning Tribunal said²¹:

Applicants for resource consent are required to assess the actual and potential effects that the proposed activity may have on the environment [s88(4)(b)]. The consent authority, and anyone who may be forming an attitude to the application, should be able to rely on such an assessment. For an applicant's environmental assessment to have its intended value, an applicant must expect to be held to the effects stated in it.

[48] In *Clevedon Protection Society Inc. v Warren Fowler Limited*²² the Court observed that the adequacy of an application is a matter of jurisdiction. The consent authority's jurisdiction is constrained by the contents of the original application (including documents) as a matter of fairness to submitters, and to those who would have been submitters if the application had not been limited.

Findings

[49] In this case there is no room for finding that the primary consent authority needed more information to understand the effects that the proposal would have on the environment, or to decide what conditions to impose. The joint committee (perhaps assisted by advisers) was able to prepare a full report dealing confidently with the main issues, and imposed an elaborate suite of conditions, many of them technical in nature. Nor is there room for concern about the scope of the consent authority's jurisdiction. It was not suggested that the application lacked sufficient definition for that purpose.

[50] Nor yet is there room for concern that the appellants and their advisers had not been able to identify from the application whether their interests might be affected by

15 *Murray v Whakatane District Council* [1997] NZRMA 433, 467; 3 ELRNZ 308, 317.

16 [1994] NZRMA 224; 1B ELRNZ 101.

17 [1994] NZRMA 234-5; 1B ELRNZ 113-4.

18 Planning Tribunal Decision A30/94.

19 Planning Tribunal Decision A11/95.

20 [1996] NZRMA 289; 2 ELRNZ 84.

21 [1996] NZRMA 317; 2 ELRNZ 122.

22 (1997) 3 ELRNZ 169.

the proposal. The appellants duly lodged a written submission, presented a full case to the primary hearing, lodged the present appeal, and again presented a full case in support of it. Two of their three technical witnesses were able fully to present their evidence in support of the appellants' case.

[51] Of course none of the foregoing precludes the possibility that the application was inadequate in respect of the subject-matter of Mr Hedgland's evidence. We now return to the four respects in which he found the information lacking.

[52] On the quantity of water to be taken, Mr Hedgland accepted that the consent-holder would be limited to the amount authorised, and to the inlet velocity prescribed. In our judgment, modification of the intake structure to enable compliance is a matter of detailed design, and we are not persuaded that the appellants were unable, through lack of that detail, to bring to the Court's attention any resulting adverse effects on the environment.

[53] We have not been persuaded, either, that the discrepancies in the details of the wastewater flows have a significant impact on the total quantity of the discharge, on the efficiency of the discharge mechanisms, or the viability of the plant. Like Mr Hedgland, we accept that that the discharge system could be engineered so as to meet the conditions of the discharge permit, and to have a contingency factor in the design, with a margin for safety.

[54] For commercial reasons, Anchor Products have not yet made a choice from the possible proprietary methods of treatment system. We accept that the different systems would have different impacts and emissions, and that biological reactors would require flow balancing. These too are capable of being provided for in the detailed engineering design, so as to ensure that the discharges are within the limits permitted. Mr Hedgland was able to give the Court his opinion about amendments to the conditions which he considered desirable. We find that the absence of a final choice from the short-list of treatment systems has not prejudiced the appellants.

[55] Mr Hedgland was also able, on the information available, to give his evidence on the likely environmental effects from the handling and disposal of sludge. However sludge is likely to continue to be disposed of by contractor off-site, as it is at present. Again we are not persuaded that the appellants have been prejudiced.

[56] In the case of a proposal of the scale and complexity as the present, it is unavoidable that there will be a tension

between the applicant's wish to avoid the cost of detailed design until it is known whether resource consents will be granted, and the opponents' wish to have full details so that any adverse effects on the environment can be identified and if possible quantified. In resolving such a tension, a judgment is needed based on the circumstances of the individual case.

[57] Having considered the circumstances of this case, we have concluded that the discrepancies and omissions identified by the appellants have not prejudiced them, or deprived the primary consent authorities or this Court of evidence necessary to enable the proposal to be considered and decided in accordance with the Act.

[58] We now return to the appellants' claim that a consent authority needs information in such detail as to be satisfied that a proposed system will work in conformity with consent conditions.

[59] In *Newlove v Northland Regional Council*²³, the appellants had raised the efficiency of the sprinkler irrigation system proposed. The Court found that the system proposed would be suitable, but that it was not necessary to look behind the water take application and consider the overall management of the farm that gave rise to the need to irrigate. The Court was satisfied that the applicants had given responsible consideration to alternatives to the proposed sprinkler system, had rejected these for sound management reasons, and held that the applicants were entitled to make management decisions about the farm.

[60] A consent authority may be concerned with how compliance is achieved where the method is directly related to controlling the effects of the proposed activity. The test is whether the method of achieving compliance could be controlled by conditions of consent. In this case, Mr Hedgland accepted (in cross-examination) that the treatment and disposal system could be engineered so as to comply with the conditions.

[61] In the *AFFCO* decision²⁴ (above) the Planning Tribunal held:

The Resource Management Act 1991 contemplates that where more than one resource consent is required for a proposal, applications for all the consents required should be made at about the same time. Indications of that may be found in the provisions for joint hearings and decisions by primary consent authorities (see sections 102 and 103) and by this Tribunal (see s270), and in references in the Act to integrated decision-making (see s31(a) and s88(4)(d)).

²³ See footnote 18.

²⁴ See footnote 16.

[62] The *AFFCO* decision was followed by the Environment Court in *Waitakere Forestry Park v Waitakere City Council*²⁵. After considering sections 88, 90, 91, 93, 102, 103 (in order to interpret section 91), the Court said²⁶:

The principle to be derived from the scheme of those sections is that:

“Good resource management practice requires that in general all resource consents required should be carefully identified from the outset and applications made so that they can be considered together jointly.” (*AFFCO v Far North District Council*, A6/94).

[63] The Court noted²⁷ that:

... the second limb of s91(1) is designed to allow a consent authority to defer a hearing of an application if a further consent application will give a better understanding of the proposed activity and its effects, these together comprising the “proposal”.

[64] If an applicant does not apply for all of the resource consents that are required, the Court may defer consideration of the application until such time as these applications are made. Section 91 was compared with the consent authority’s ability under section 92 to defer a hearing until further information is supplied, that power being restricted to circumstances where a better understanding of the activity (rather than the effects) is required.

[65] In that case the applicant was reminded²⁸ that:

Generally under Part III, the primary obligations are on the landowner to observe the provisions of the Act. The applicant for resource consent must, under s88(4)(a) include:

“a statement specifying all other resource consents it may require from any consent authority in respect of the activity to which the application relates...”

... there is no obligation on the Council to provide particulars.

[66] Returning to the present case, Mr Hedgland deposed that upflow anaerobic sludge blanket reactors generate considerable quantities of biogas which can have an impact on greenhouse gases, and observed that an application has not been made for a discharge to air from the anaerobic or aerobic phases of treatment. He also deposed that resource consents would be needed for discharge of sludge to land and discharges to air from the handling and treatment of sludge.

[67] The response was that effects would be dependent on the wastewater treatment methods and the sludge treatment and disposal techniques finally adopted.

[68] We accept that those details would be consequential on choices to be made in the detail design phase, and that if further resource consents are needed, they would need to be obtained. There is nothing in the evidence before us to indicate that the likely effects on the environment would be significant, or calculated to influence the outcome of the resource consent applications now before the Court.

[69] In summary we do not accept the appellants’ submissions about the inadequacy of the application and the AEE.

E RELATIONSHIP OF THE WAIKATO-TAINUI WITH THE WAIKATO RIVER

[70] The Waikato-Tainui people have a special relationship with the Waikato River which is of fundamental importance to their social and cultural well-being. The planning instruments (detailed later in this decision) also recognise the relationship between Waikato-Tainui and the Waikato River. The evidence brought by the appellants to demonstrate this relationship was not challenged. What was at issue was the significance to be given to that relationship in deciding the resource consent applications before the Court.

[71] A central tenet of this relationship is the metaphysical aspect of the Waikato River, its mauri, and associated metaphysical phenomena. Evidence was given which illustrated the appellants’ belief in profound spiritual powers connected with the overall identity of the Waikato River.

[72] Ms A R Parsonson, a Senior Lecturer in History at the University of Canterbury, gave evidence on “the history of the relationship of Waikato people with their river”. She deposed that generations of Waikato people have been kaitiaki of the river, and observed that the importance of the river to the people is expressed in whakatauki (proverbial sayings), pepeha (prophetic sayings), and waiata (songs - many old songs and many newly-composed for kapa haka groups in recent years). One of the whakatauki refers to the many bends of the river as it winds from Taupo to the Waikato Heads, and to the many chiefs of Waikato River:

He piko, he taniwha, He piko, he taniwha, Waikato
Taniwharau.

25 [1997] NZRMA 231; 3 ELRNZ 38;

26 [1997] NZRMA 236; 3 ELRNZ 44.

27 [1997] NZRMA 238; 3 ELRNZ 45; paragraph 3.6.

28 [1997] NZRMA 238; 3 ELRNZ 46; paragraph 4.3.

[73] Mr Hare Wakakaraka Puke, Chairman of the Tainui Maaori Trust Board, also referred in evidence to this proverb, although in fuller detail²⁹, as enshrining the history of Ngaati Waiere of Waikato. Mr Puke described the Mauri of the river, and explained that the development and desecration of sacred sites had tangible and intangible effects, which could be felt as an assault upon the spirit and the mind. He also referred to the traditional ‘cleansing’ powers of the river, which could cleanse and make whole the ‘mortal being and spirit’.

[74] Mrs Iti Rangihinemutu Rawiri is a member of the Te Awamaarahi Marae and a Trustee for Huakina Development Trust. Her evidence described the spiritual associations of the Waikato River, and emphasised the importance of that relationship for the Waikato people, including the healing and blessing powers of the River. She explained about the various taniwha whose appearances signify momentous happenings, and her belief that the Waikato River is a tuupuna. She expressed concern that this ancestor had been harmed by the various pollutants going into the river, damming and other desecration. Mrs Rawiri said that :

... when people abuse the River it is the same as people abusing our mother or grandmother. People must respect our river ancestor which must be put back to good health.

[75] Mr Te Motu-iti-o-rongomai-te-hoe Katipa is an assisting elder at Turangawaewae Marae in Ngaaruawaahia. He was born on the island Te Weranga o Okapu in the Waikato River, and moved from the island to Turangawaewae in 1948. Mr Katipa expressed his understanding of the spiritual aspect of the relationship with the river, which included aspects such as cleansing, blessing, healing, and as a place of prayer similar to a church. He too recognised the river as an ancestor, and commented that “it is a living thing and needs to be cared for”. Mr Katipa described some of the river’s sacred functions, including as a canoe pathway to Taupiri for burials, and the metaphysical aspect of the river as a guardian capable of forewarning the people.

[76] Overall, Mr Katipa’s concerns centred around the various undesirable things being put into the Waikato River, including sewage, fertiliser run-off, tip leachate and the Anchor discharges, and he deposed that these things are offensive to the Waikato people and their ancestors. He stated:

I want to see users of the river responsible for the long term health of the river. They should not just

add to upstream sources of pollution and claim that their own pollution is very small when compared with the flow of the river. The quality of the water must be improved and I believe that users of the river should be collectively responsible to ensure that this happens.

[77] Mr Shane Ringa Solomon is a research fellow with the Centre for Maaori Studies and Research at the University of Waikato, and a legal researcher for the Tainui Maaori Trust Board. Mr Solomon is also an assistant to Sir Robert Mahuta for the Trust Board’s claim to the Waikato River under the Treaty of Waitangi Act.

[78] Mr Solomon said in evidence:

Underlying the claim to the Waikato River is the Waikato-Tainui’s special relationship with the Waikato River. The existence of a special relationship between Waikato-Tainui and the River has long been recognised publicly, and in the report of the Waitangi Tribunal (Ngaati te Ata and Tainui Re Manukau) July 1985 (Wai 8), the Tribunal concluded (amongst other things):

It is difficult to over-estimate the importance of the Waikato river to the Tainui tribes. It is a symbol of the tribes’ existence.

The significance of the River to the Waikato people has been concisely and accurately expressed by Dr Michael King in his biography of Te Puea where he states:

More than any other in New Zealand, the tribes of the Waikato Valley are a river people. Five centuries of continuous occupations of its banks have embedded the River deep into the group and individual consciousness.

...

The life of the River became inseparable from the life of the people, and each took the name of the other.

The water has assumed a religious significance. The Waikato was addressed in prayer and oratory as a thing with a life and aura of its own; the spirits of the dead were believed to mingle and move with its currents; the people and their characteristics were described in proverbs in terms of the River’s features; and its stretches and bends were populated with guardians called Taniwha who showed themselves and intervened with human affairs when signposts of a supernatural order were needed. The River became a source of spiritual as well as physical cleansing.

²⁹ Ko Taupiri te maunga

Ko Waikato te awa

Ko Te Wherowhero te tangata

He piko he taniwha he piko he taniwha.

(Taupiri is the mountain, Waikato is the river, Te Wherowhero is the chief, On every bend there is a chief, on every bend there is a chief.)

[79] Mr Solomon also explained that for Waikato-Tainui, the Waikato River means the whole river, including the banks, beds, waters, streams and tributaries, vegetation and fisheries, flood plains and metaphysical being. He too indicated that the river is an ancestor, “and can be regarded as the mother of the Waikato-Tainui people.” Part of the special relationship with the river is the kaitiaki status of the Waikato-Tainui to the river, and Mr Solomon gave evidence which demonstrated that this responsibility is taken seriously, and includes financial and time commitments put into protecting the Waikato River.

[80] The physical aspects of the river as a traditional and important source of food and other resources (notably vegetable matter such as flax and medicinal plants) were described by Mr Puke, Ms Parsonson, Mrs Rawiri, Mr Katipa and Mr Solomon. These witnesses described the overall decrease in the clarity and quality of the river, the diminution in the variety of fauna and flora species, and the decline in the quality, quantity and types of the fish and eels that remain in the river. Mr Katipa also described the various historical economic aspects of the special relationship to the river, including flax harvesting, fishing and dairy farming, and Ms Parsonson’s evidence supported this.

F

EFFECTS ON THE ENVIRONMENT

Basis for decision

[81] Our consideration of the appeal is to be by full rehearing of the resource consent applications³⁰. Section 104(1) of the Resource Management Act 1991 governs consideration of such applications. Subsection (1) of that section directs that, subject to Part II, in considering a resource consent application the consent authority is to have regard to various matters listed in the subsection. Making that direction subject to Part II implies that the duty is to yield to the provisions of that part where there is a conflict between them. We have therefore considered whether there is anything in Part II which would conflict with our having regard to the relevant matters listed³¹. No party suggested that there is, and we have found none. We have therefore to have regard to such of the matters listed in section 104(1) as are relevant to the facts of this case. The first of them is any actual and potential effects on the environment of allowing the activity³². A number of effects were raised in the appeal hearing, and we now address them.

Water abstraction

[82] By their notice of appeal the appellants sought to have the water permits cancelled and the abstraction application declined. However at the appeal hearing counsel for the appellants announced that their concerns related to the quantity of the water to be taken, whether this has been reliably forecast by the applicant, and whether the intake velocities would have the effect of trapping fish. The appellants were concerned that, in order to minimise impacts on the river, the amount to be taken should be confined to that which is absolutely necessary.

[83] Accordingly we have to consider whether there would be adverse effects on the environment from the proposed taking of water from the river in two respects : the rate of abstraction, and effects on fish of the water intake.

Rate of abstraction

[84] Anchor Products currently holds a permit to take from the Waikato River 33,000 cubic metres per day at an abstraction rate not to exceed 500 litres per second. In practice the abstraction is in the order of 28,000 cubic metres per day.

[85] By its decisions on the current applications the Regional Council granted a water permit to take up to 32,000 cubic metres per day, and to take up to 10,000 cubic metres per day of that for the cogeneration plant. Following reduction in the capacity of the cogeneration plant, only 5,000 cubic metres per day is now sought for that purpose. The total abstraction sought is consequentially reduced from 32,000 to 27,000 cubic metres per day.

[86] A Regional Council resource officer, Mr HFX Keane, deposed that an abstraction rate of 32,000 cubic metres per day is equivalent to less than 0.3% of the low-water flow of the river at that point, and would not significantly affect other river users or the river ecosystem. The permits granted limit the rate of abstraction to a maximum of 500 litres per second with an maximum intake velocity of 0.15 metres per second. Mr Keane deposed that the present intake velocity had been measured by the Council and recorded at 0.1 metres per second.

[87] Of the four members of Tainui who gave evidence, only Mr Solomon referred directly to, and expressed a specific concern about, taking water from the river. It was

30 *Fleetwing Farms v Marlborough District Council* [1997] NZRMA 385, 391-2; 3 ELRNZ 249, 257-8; *Minister of Conservation v Whangarei District Council* Environment Court Decision A131/97, page 3.

31 See *Application by Canterbury Regional Council* [1995] NZRMA 110,126; *McIntyre v Christchurch City Council* [1996] NZRMA 289, 291; 2 ELRNZ 84, 88.

32 Resource Management Act 1991, section 104(1)(a) (as substituted by section 54 of the Resource Management Amendment Act 1993).

his evidence that Waikato-Tainui are offended to see the waters of their river being depleted. He reported their perception that there had been no conscious effort on the part of the applicant to reduce the quantity sought to be taken. However he accepted that Anchor Products had reduced quantity of water to be taken as a result of the reduction in the size of the cogeneration plant.

[88] Mr Hedgland gave the opinion that the water abstraction quantity for which consent had been granted is considerably less than that which would be required for the proposed process. He commenced with the hypothesis that there must be a balance between the quantities of water taken and water discharged, and assumed that the difference must be accounted for by the discharge of steam. By accepting a total discharge figure for waste water, condensates and cooling water of 16,420 cubic metres per day and deducting that figure from the total water take figure of 32,100 cubic metres per day, Mr Hedgland concluded the difference of 15,680 cubic metres per day represented the loss by discharge as steam. By adding this loss figure to the total waste-stream discharge of 26,540 cubic metres per day, Mr Hedgland predicted that in fact a total 'water-take' of 42,200 cubic metres per day would be necessary.

[89] Mr McCowan deposed that Mr Hedgland's assumptions were not valid. He explained that the water required to make up daily steam losses was treated to be demineralised and is therefore expensive to produce. It was, he testified, in practice restricted to no more than 20% of the quantity of steam produced. By reference to figures regarding steam production, Mr McCowan had calculated the maximum required for such make-up water would be 845 cubic metres per day. He also drew attention to the fact that water evaporated from the milk coming on site daily would amount to some 10,000 cubic metres per day and would form part of the low BOD discharge stream included in the total waste-stream discharge of 26,540 cubic metres per day.

[90] We understand the concern of the appellants that abstraction of water from the river should be limited to quantities needed, and that efforts should be made by industries such as Anchor Products to economise in the amounts taken. In this case, Anchor Products has proposed the abstraction consent be reduced to a site limit of 27,000 cubic metres per day, which is less than the present usage, and 6,000 cubic metres per day less than the existing consent. That reflects an appropriate attitude to economical use of the resource.

[91] Having considered the evidence of Mr Hedgland and that of Mr McCowan, we are not persuaded that the abstraction quantity of 27,000 cubic metres per day would

be significantly less than needed for the process. We suppose that Mr Hedgland's assessment had overlooked the matters referred to by Mr McCowan. In any event Anchor Products would be restricted to taking the quantities authorised.

[92] We find no basis in the evidence for concluding that the proposed abstraction, as such, of water from the river would have any adverse effect on the environment.

Effects of intake on fish

[93] Mr Hedgland gave evidence about the design and shape of the inlet structure, the intake water velocity, and the potential to entrain adult and larval fish. He stated that a typically accepted velocity guideline to prevent larval fish entrapment is 0.15 metres per second, and that this had been the figure set by the Regional Council as a condition of the consent. The witness deposed that present and future flows would require that velocity to be exceeded by a considerable amount.

[94] Mr Keane briefly described the intake structure and gave the opinion that although it has the potential to entrap aquatic biota, trout fry and fingerlings are reasonably well protected by a 3-millimetre mesh, and most fish are able to avoid entrainment with intake velocities not exceeding 0.15 metres per second. Mr Kennedy observed that velocities can be measured to show compliance with the council condition.

[95] We record that Anchor Products accepted the abstraction rate and velocity limits imposed by the conditions of consent; and that the conditions require monitoring of both intake velocities and abstraction rates. In the light of our finding about the quantity to be abstracted, the basis for Mr Hedgland's doubt about the ability to meet the velocity limits is eliminated.

[96] We find that the conditions meet the concerns of the appellants, and do not accept that there would be any adverse effect on fish or any other element of the environment arising from taking water through the proposed intake structure.

Constituents of the waste stream prior to treatment

[97] The resource consent³³ granted for discharge of contaminants included —

- (i) to discharge up to 31,000 cubic metres of treated dairy factory wastewater and cooling water per day at a maximum rate of 350 litres per second; and
- (ii) to discharge up to 3360 cubic metres of factory site stormwater per day at a maximum rate of 2800 litres per second,

³³ Discharge permit 970032.

both to land (in circumstances where it may enter groundwater) and then to the Waikako River...

[98] This consent is the main discharge permit. It includes up to 8,000 cubic metres per day of cooling tower blowdown water, cogeneration plant wastewater, condensate and stormwater. This figure however was based on the original cogeneration proposal which was for a plant that generated 150 megawatts of electricity. The reduction of the capacity of the cogeneration plant to 45 megawatts means that the discharge permit required for the cogeneration plant can be reduced by 1,500 cubic metres per day to 6,500 cubic metres per day, with a consequential drop in the total site discharge from 31,000 cubic metres to 28,500 cubic metres per day.

[99] The waste stream from the proposed capacity expansion would comprise a combination of various process wastewaters and wash waters, desludges and condensates, originating from the facility's frozen cream, AMF³⁴/AMMIX³⁵, fractionation and milk-powder plants.

[100] There are five different categories into which the waste streams may be divided, but not all of these would pass through the new waste-water treatment plant. The five categories can be summarised as follows:

- (a) Waste water - effluent from the milk reception area, separation plant, clean-in-place, evaporators and dryers.
- (b) Condensate/Low BOD₅ - cooling water blow down and condensates.
- (c) Stockfood - separated solids/sludge tankered off site.
- (d) Whey - separated milk waste generally tankered for offsite use or disposal.
- (e) Buttermilk - separated and generally tankered for offsite use or disposal.

[101] The final streams can be summarised as —

Wastewater	5770 cubic metres per day
Condensate/Low BOD	20770
Stockfood	345
Whey	70
Buttermilk	1000
Total	<u>27,955</u> cubic metres per day

[102] Of those waste streams, only the treated wastewater and the condensates and low BOD streams would be discharged to the Waikato River through the southern and northern gullies on the Anchor Products site. The other

waste streams are to be collected and tankered from the site for off-site use.

[103] Of the waste streams to be discharged, the waste stream characteristics and loads³⁶ would be —

	Flow(m ³ /d)	COD(kg/d) ³⁷	TKN(kg/d)	Fat(kg/d)
Wastewater	5,770	14,914	430	3596
Condensate/ Low BOD	20,770	175	12	17

Content of the discharge to the river

[104] The performance of the wastewater treatment plant would need to produce effluent which meets the following minimum requirements—

Effluent Parameter:	Minimum Criteria:
pH	6 to 9
BOD ₅ (24 hour composite)	< 50 g/m ³
BOD ₅ (mass load discharge)	< 2,500kg/day
Suspended solids (TSS 24 hour composite sample)	< 100 g/day
Suspended solids (TSS mass load discharge)	< 1,550 kg/day
Total Phosphorus	< 5 g/m ³
Total Kjeldahl Nitrogen	< 5 g/m ³
Turbidity	< 50 NTU

[105] At an early stage in the assessment of environmental effects of the proposal, Anchor Products' advisers had consulted with the Huakina Development Trust, which was the environmental arm of the Tainui Maori Trust Board and which had the mandate to address all resource management issues for the Waikato iwi. The subject of the consultations had included disposal of wastewater from the treatment plant in a way that would meet the cultural requirements of the tangata whenua. The Huakina Development Trust advised that the existing discharge pipe in the river should not be used, and recommended that instead two gully systems on the Anchor Products site should be used. As a result of the discussions with the Huakina Development Trust and with Nga Marae Toopu, a design was developed for discharge of treated wastes, stormwater, and cooling water to an infiltration bed at the head of the gully, from which water would then pass into the gully, which is to be lined with concrete and a channel filled with rocks and weirs, and would lead to a specially designed submerged rock-filled conduit discharge

³⁴ Anhydrous Milk Fat

³⁵ Ammix butter : AMF further processed by Scrape Surface Heat Exchange (SSHE).

³⁶ After completion of construction.

³⁷ The above figures are shown in terms of COD (chemical oxygen demand) which is the test commonly applied in the dairy industry to characterize waste strength. The BOD₅ can be interpolated from these COD values as BOD₅ is typically 65-70% of the COD value.

structure, discharging to the Waikato River. It was explained that the rocks would represent Papatuanuku, and that would meet the cultural requirements of the tangata whenua.

[106] The special features incorporated in the design in recognition of tangata whenua concerns included:

- (1) Initial infiltration system - to increase contact of treated wastewater with land.
- (2) Southern gully system to receive treated wastewater and provide for further contact of treated wastewater with land.
- (3) Erosion protection adjacent to the Mangaharakeke pa site
- (4) Northern gully system to receive stormwater and cooling water and provide further contact of that water with land.
- (5) Provision of the rock-filled conduit to ensure that the discharge does not take place through a pipe structure.
- (6) Cooling water monitoring and management to ensure that treatment chemical concentrations meet required standards at all times. (This includes provision for diversion of cooling water for treatment if necessary.)

[107] A comprehensive evaluation was made of the quality of wastewater to be discharged into the gully system to ensure that no adverse effects would arise from performance of the gully system, or from the ultimate discharge to the river.

[108] The gully system was designed to provide a hydraulic connection between the plant discharge point and the discharge structure. The design was based primarily on hydraulic considerations to ensure that the quality of the water in the gully system would be maintained at a high level consistent with the quality of effluent discharged from the wastewater treatment plant.

[109] The treated wastewater, which would be discharged at a rate of up to 5,770 cubic metres per day, would pass through the gully at a depth of about 70 millimetres. It would have high quality, consistent with anaerobic, aerobic and nitrification/denitrification unit operations incorporated in the plant. If the dissolved oxygen concentration in the wastewater entering the gully system is too low, anaerobic conditions might arise which in turn could lead to the occurrence of odours. Based upon the performance criteria characteristics of this type of treatment plant configuration, the dissolved oxygen concentration in the southern gully system is predicted to be in the order of 4 milligrams per litre. The dissolved oxygen concentration of the treated wastewater would be enhanced by aeration as it travels through the gully system. The discharge from the treatment plant will be distributed to

the top end of the gully where it will contact rocks in an infiltration area at the head of the gully. The flow would pass over and around rocks, which in practice would reduce the depth of the flow over the surface of the rocks to considerably less than 70 millimetres.

[110] The extent of re-aeration of the flow would depend on the depth and the velocity of the flow. As the flow travels over the rock surfaces, the shallow depth of the flow, and its turbulent nature, would enhance re-aeration of the discharge. Mr G C Venus, a consulting environmental scientist, gave the opinion that this would ensure that odours and associated nuisances would not arise due to the development of anaerobic or stagnant conditions.

[111] Elevated levels of BOD can result in oxygen depletion and the occurrence of odours. Tests were made using a standard model to indicate characteristics of BOD in freshwaters and showed that, under worst-case summer conditions with no heat dissipation of the wastewater and no re-aeration, the flow would still have a dissolved oxygen content of approximately 2.5 milligrams per litre. Mr Venus gave the opinion that this would be high enough to ensure that anaerobic conditions would not arise, but in any case re-aeration would ensure that actual dissolved oxygen concentrations would be increased above those predicted.

[112] The witness deposed that in practice only more complex, less easily degradable organics would remain in the treated wastewater, and these will require days to exert any significant BOD. He concluded that there would not be sufficient time for significant oxygen depletion to occur during passage from the treatment plant to the discharge conduit, and that nuisance odours and associated problems would not arise in the gully system.

[113] A final safeguard would also be available through the use of additional aeration of the treated wastewater at the treatment plant, if required, to ensure dissolved oxygen concentrations are maintained.

Phosphorus

[114] The condition imposed on the discharge permit relating to concentration of phosphorus in the discharge is:

- (vii) the total phosphorus concentration of the discharge as determined from a 24 hour composite sample shall not exceed 20 grams per cubic metre for the first 24 months from the exercise of this consent. Thereafter, the total phosphorus limit for the discharge may be reviewed as provided for in condition 21

[115] At the appeal hearing the Regional Council proposed this condition instead:

- 4(vii) The quarterly average mass load of total phosphorus in the final discharge as

determined from 24 hour composite samples shall not exceed 25 kilograms per day, nor shall the maximum load exceed 35 kilograms per day.

For the purpose of this condition each quarterly period shall begin on 1 January, 1 April, 1 July and 1 October each year.

[116] Anchor Products announced that it would accept a limit on phosphorus provided it can be linked to remedying or mitigating an adverse effect on the water quality of the Waikato River that is attributable to its discharge. It contended that no witness had been able to point to any credible adverse effect due to the applicant's proposed level of 57 kilograms per day in its discharge. At this level the phosphorus would represent about 5 to 6% of the total phosphorus in the river. However that amount of phosphorus would be well below the amounts in other discharges to the river, such as from the Hamilton City Council's sewage treatment plant. The respondent's water quality scientist agreed that even the latter discharge would have only minor effects which, he also agreed, would be negligible and undetectable.

[117] Counsel for Anchor Products also pointed out that Mr Keane had confirmed in cross-examination that the change of approach by the respondent on this matter was due to policy and not due to any identified adverse effect on the River from Anchor's proposed discharge and the phosphorus content in that discharge.

[118] The allowable phosphorus figures in the discharge permit are an obvious mistake. No one contended otherwise and the applicant expressly disavowed any intention of ever seeking such a high discharge. The amount of phosphorus contained in the proposed discharge has not changed. Anchor Products did not dispute that the discharge permit needed to be amended.

[119] The main potentially adverse effects on the River due to phosphorus identified by witnesses are growth of phytoplankton in the lower reaches of the river and other nuisances to those taking water supplies from the river. No link was established between the Anchor discharge and any adverse effect or nuisance in the river except as a contribution to the cumulative load of phosphorus in the river.

[120] The effect of phosphorus in the river on phytoplankton is addressed later in this chapter.

Capability of the discharge facility

[121] We have already described the proposed facility for discharging treated wastewater, and the reasons why that facility was adopted instead of a more conventional discharge pipe, similar to that currently in use.

[122] It was the case for the appellants that the concept of the rock-filled culvert is flawed. Mr Hedgland gave the

opinion that as designed, the outlet would not have sufficient hydraulic capacity, and as a result there would, at times, be bankside discharges. That was contested by Mr J M Crawford, whose evidence specifically addressed the hydraulic aspects of the gully systems and the final discharge structure. Like Mr Hedgland, Mr Crawford is an experienced professional engineer specialising in water and environmental engineering. Mr Crawford explicitly disagreed with Mr Hedgland's opinion about the hydraulic capacity of the proposed discharge facility.

[123] Mr Crawford stated that the hydraulic designs and concepts are preliminary at this stage. He considered that it would not be appropriate to complete full detailed designs at this stage of the project development, but sufficient to have progressed the design to ensure that the concepts will work and can be adequately engineered at the detailed design stage.

[124] In general the northern gully would convey discharges not requiring specific biological or chemical treatment, and the southern gully would receive the treated wastewater effluent from the proposed multi-stage wastewater treatment facility via a launder channel discharging to the top of the gully.

[125] For the northern gully, the design consists of a diffuse discharge area (cooling water cascade) at the top end of the gully to which low BOD condensates and cooling water waters would be discharged, and gabion weirs constructed at intervals along the gully floor, reducing the flow velocity to prevent scour of the gully floor. Stormwater would enter at approximately the level of the gully floor, flowing by gravity from the diverter station.

[126] The weirs would provide aeration to the flows as they cascade over them, and would provide some additional cooling of the flows. Mr Crawford deposed that for the purpose of design, a conservative approach had been adopted which assumed that no cooling would occur in the gully system, winter or summer. The gabion baskets would be permeable to water and would allow flow through them as well as over them. Any retention period would be reasonably short, but long-term ponding would be prevented by the porosity of the gabions.

[127] The southern gully would convey wastewater flow from the treatment plant to the confluence of the two gullies. The application of wastewater flows to the gully will be by way of a cascade system. This would serve to break up the flow enhancing dissolved oxygen concentration. The fall would be approximately 5 metres.

[128] As with the northern gully, the option exists to control the flow velocities down the gully using a series of gabion baskets as weirs across the gully. The gabions are highly porous, and would allow a certain proportion of the flow to pass straight through, though some upstream ponding would occur. Mr Crawford deposed that the

gabions have been designed to prevent flow around the ends, and if ponding were to occur to a hypothetical depth of 500 millimetres, then ponding of 50 cubic metres would occur with an average retention time of approximately 13 minutes and, at worst, in the order of 30 minutes.

[129] The proposed final stage of waste treatment is a sequencing batch reactor system. This discharges at high flow rates during each decanting phase of the treatment cycle. Mr Crawford testified that for this reason, flow balancing would be required.

[130] Cooling water, stormwater and wastewater effluent would combine at the confluence of the two gullies in a mixing zone some 60 metres upstream of the river's edge. The combined flow would then pass through a concrete liner to guard against erosion. That channel would discharge in a diffuse manner to a rock-filled trench which would continue out to discharge into the river beyond the immediate littoral zone. The channel would be constructed of a size that would cater for at least a 20-year return period storm event, and flows in the channel would be electronically monitored.

[131] A submerged rock-filled discharge would be constructed to convey discharge flows from the gully to the discharge area on the river bed. The trench would begin immediately downstream of the concrete channel, and would receive flows dropping vertically over large rocks with large intermediate void spaces.

[132] The rock-filled discharge structure has been designed to ensure that the point of discharge to the river is beyond the normal littoral zone, and that the discharge temperature should be at no more than 3 degrees above the ambient.

[133] The bathymetry of the river adjacent to the discharge point shows a ledge which would not be suitable as a long term discharge point, so the discharge has been designed to be 15 metres from the bank, where the depth is at a maximum. At that point the discharge would mix with a flow of at least 24 cubic metres per second before the discharge plume spreads to meet the bank.

[134] As the discharge water may be at a higher temperature than that in the river littoral zone, it would tend to rise out of the trench once under the river water level if it were not prevented from doing so. It would be prevented by wrapping the liner over the top of the rocks and placing earth ballast on this, ensuring that the discharge water is forced down to the deeper discharge point. The trench would have a size that would cater for maximum discharges of wastewater and cooling water. It would not have capacity to convey design stormwater flows, although a significant amount of stormwater would pass through it. Stormwater flows in excess of the trench capacity would be conveyed over Reno mattresses above the trench, which would armour the river bank and trench against scour. A

driving head of at least 2 metres would be available through the membrane for 90% of the time.

[135] Mr Crawford acknowledged that periodic flooding will occur in the Waikato River. He deposed that the membrane outlet would become hydraulically less effective as river levels increase, due to the decrease in hydraulic gradient available through the membrane. Much greater dilution of the cooling water at high river levels, combined with effective mixing in the flow through the vegetation on the berms, would result in minimal temperature increase in the river, and the need for the membrane would disappear while very high river levels prevail. The membrane would be buried over most of its length and scour calculations indicate there will be no general scour at the site in a flood of up to a 100-year return period. Protection against local scour at the membrane would be provided by rock-filled mattresses.

[136] The selection of appropriate design criteria for the permeability and porosity of the membrane infill was currently under investigation to finalise detailed design. However Mr Crawford deposed that he was confident that the selected values are conservatively selected to ensure that the membrane provides the required hydraulic capacity and self scouring velocities within the membrane.

[137] There was no dispute that river flooding and sedimentation could result in a lessening of the hydraulic effect of the outlet. In cross-examination Mr Hedgland agreed that for bankside discharge to occur, a variety of factors would need to coincide. The factors that would have to coincide for that to happen are:

- (a) the river being in flood (causing loss of head).
- (b) debris and sediment from the river blocking the outlet.
- (c) the discharge structure not being maintained resulting in a build up of sediment (clogging).
- (d) the dairy factory discharge being at maximum design flow (bearing in mind a contingency flow of 6,000 cubic metres per day and a safety factor of at least two would reduce this maximum flow).

[138] When asked in cross-examination whether there was any factor which could not be solved by engineering design or proper maintenance, Mr Hedgland agreed that engineering design and maintenance to comply with the discharge conditions would avoid such potential problems, and that there are engineering solutions which would deal with these factors and would enable the applicant to meet the requirements of the discharge consent.

[139] Dr McCabe claimed that bankside discharges would result in significant adverse environmental effects. However he relied on Mr Hedgland's predictions, and had no independent evidence to indicate that they would occur. Mr Kennedy, gave the opinion that there would be no adverse effects of the discharge on aquatic biota.

[140] On the issue raised about the capability of the discharge facility we find that :

- (a) River flooding concerns are not significant as the need for the membrane diminishes as the water depth and velocity increases over the berm and over the littoral zone of the river;
- (b) the effects during river floods would be minor;
- (c) there would either be no effects from sedimentation, or any effects could be remedied by flushing or cleaning out the structure;
- (d) concerns raised by Mr Hedgland could be fully addressed during the final detailed design.

Effects of phosphorus in river water on phytoplankton

[141] Phosphorus in the discharge from the Anchor Products plant would contribute to the total load of phosphorus in the river. We have now to consider whether there would be any actual or potential effect on the environment of the phosphorus content in the river supporting high concentrations of phytoplankton.

[142] Phytoplankton are freely-floating microscopic bodies which live in most water bodies. They respond to the addition of the important plant nutrients, nitrogen and phosphorus. Phytoplankton generally support the healthy functioning of aquatic ecosystems. However, high concentrations of nutrients often support high concentrations of phytoplankton, and excessive numbers of phytoplankton cells (often referred to as phytoplankton “blooms”) can cause problems for water supplies, aquaculture, ecosystem protection, and recreational and aesthetic enjoyment.

[143] Several water quality classes in the Third Schedule of the Resource Management Act 1991 contain a standard which requires that:

There shall be no undesirable biological growths as a result of any discharge of a contaminant into the water.

[144] Wastewater discharges which contribute large loads of plant nutrients to a waterbody need to be assessed to determine whether they cause undesirable biological growths.

[145] The Ministry for the Environment has prepared guidelines for the interpretation and application of the water

quality standard for undesirable biological growths³⁸. The Ministry recommends that in waters used for water supply, irrigation or industrial abstraction the quantity or biomass of phytoplankton³⁹ should not exceed 0.020 grams per cubic metre, to reduce the frequency with which filters in water intakes become blocked.

[146] The Waikato River is heavily enriched with plant nutrients. The sources of nutrients are both ‘non-point’ such as rural run-off and contributory streams and rivers, and ‘point sources’ such as Anchor Products wastewater discharge. The water quality scientist who gave evidence for the Regional Council, Mr W N Vant, estimated that non-point sources account for up to about 70% of the total nutrient load in the river, and point sources account for about 30%.

[147] During 1996-98 the average load of total phosphorus discharged to the river in the Anchor Products wastewater was about 25 kilograms per day. The total load of phosphorus in the river immediately upstream of Anchor Products at that same time was about 1020 kilograms per day. The existing Anchor Products discharge therefore increased the total phosphorus in the river by about 2 to 3%. The increase in phosphorus levels in the river due to that discharge would, in principle, increase the phytoplankton biomass in the river. However, Mr Vant accepted that the overall effect of the phosphorus which is currently discharged to the river in the Anchor wastewater, is minor.

[148] Mr Vant also attested that, of the two plant nutrients, levels of nitrogen have tended to decrease during the past decade while levels of the other, phosphorus, have tended to increase. The fact that chlorophyll *a* concentrations have tended to increase suggests that they are largely unaffected by the decrease in nitrogen, but instead they increased in response to the higher levels of phosphorus. In his opinion the overall increase in both total phosphorus and chlorophyll *a* during the past decade represents a deterioration in these aspects of river water quality.

[149] The discharge permit granted by the Regional Council allowed for a total concentration of 20 grams per cubic metre of phosphorus in the Anchor Products discharge. That would be equivalent to 620 kilograms of phosphorus per day. It was common ground that the limit of 20 grams per cubic metre had arisen from an error, and no party sought to support allowing that much phosphorus in the discharge.

[150] Mr Vant gave the opinion that such an increase in the load of phosphorus would have the potential to support

38 Ministry for the Environment 1992: Guidelines for the control of undesirable biological growths in water: *Water quality guidelines 1*.

39 The quantity or biomass of phytoplankton is measured as the concentration of the photosynthetic plant pigment chlorophyll *a*.

substantially-increased blooms of phytoplankton in the lower reaches of the river, including nuisance and toxic types of phytoplankton, especially species of blue-green algae or cyanobacteria, which can cause serious water problems for water users including toxicity and unpleasant tastes and odours in water supplies, blockages of water-supply intake filters and screens, and unsightly surface scums.

[151] Blooms of blue-green algae have generally been uncommon in the Waikato River. However, earlier this year blue-green algae bloomed at Lake Maraetai and Mr Vant testified that there is now evidence that phytoplankton growth in the river can be limited by the availability of phosphorus as well as nitrogen. He therefore considered that the aim should be to reduce both types of nutrient, not just nitrogen. To that end he considered that the consented load of phosphorus in the proposed Anchor Products wastewater is much too high, and should be reduced downwards. He considered that the figure should be no more than about 11 kilograms per day on average, but he conceded that in the meantime the average load of phosphorus should be limited to the load in 1996-98, namely about 25 kilograms per day, and he supported a condition proposed by Mr Keane to that effect.

[152] In cross-examination Mr Vant agreed that, in evidence he had given on a resource consent application on the Hamilton City sewage treatment plant discharge, he had testified that the sewage plant discharge contributed about 19% of the phosphorus in the lower Waikato River; that that contribution had no adverse effect on toxicity of water supplies; that he had no information on resulting blockages, or any specific tangible adverse effects on the river; and that the effects of increasing the phosphorus discharge from that source would be negligible and undetectable. He also testified that the contribution by the Anchor Products discharge to the total nutrients in the Waikato River at the Mercer Bridge is less than 2%, and smaller than the month-to-month variability in the phytoplankton biomass in the river.

[153] Mr Vant produced the decision of the Waikato Regional Council on the Hamilton City sewage works discharge, which required the consent-holder to implement nutrient removal in 5 years, although we were given to understand that the Hamilton City Council is appealing to the Environment Court about that (among other aspects of the decision).

[154] Mr Kennedy observed that there was no evidence to suggest that water supplies are adversely affected by toxic phytoplankton; and that Mr Vant's evidence about

blooms of blue-green algae had been based on the erroneous premise that Anchor Products had intended to discharge phosphorus at the rate of 20 grams per cubic metre set in the resource consent condition.

[155] In having regard to the possibility of any actual or potential effect on the environment from phosphorus in the proposed discharge, we have to include any cumulative effect which arises over time or in combination with other effects⁴⁰. We accept that if the total load has an adverse effect on the environment, then even a relatively small contribution to the phosphorus load of the river should not be ignored.

[156] We find that a total phosphorus load that, perhaps in combination with the nitrogen load, can result in formation of blue-green algae blooms in the river is itself an effect on the environment, and it is an effect that is adverse, potentially if not actually, in that the blue-green algae can be toxic.

[157] Because of the difficulty of controlling non-point source discharges of nutrients⁴¹, control of point-source discharges is the more significant, and all industries should be expected to take a share in reducing the total load.

[158] It will be necessary to decide what limit should reasonably be imposed on the proposed Anchor Products discharge, to avoid or mitigate an adverse effect on the environment from the total phosphorus load to which its discharge would be contributing. Anchor Products have accepted that the relevant condition should be subject to review after 24 months, because the Regional Council is reviewing its policy in relation to the long term management of nutrients in the Waikato River. We consider that to be a significant concession.

[159] Leaving aside the determination of the limits in the condition, it is clear that appropriate limits can be imposed on the amount of phosphorus contained in the proposed discharge. We find that there would be a potential adverse effect on the environment of the Waikato River of allowing the proposed discharge containing phosphorus at a concentration of 20 grams per cubic metre, and that with the imposition of an appropriate limit on the phosphorus content, that effect would be no more than minor.

Relationship of Maori with the river

[160] We have considered the relationship of Waikato-Tainui with the Waikato River, particularly in historical and traditional terms, and we have considered the effects on the river in physical terms, of the proposed taking and

⁴⁰ Resource Management Act 1991, section 3(d).

⁴¹ See, in that respect, *Te Awatapu o Taumarere v Northland Regional Council*, Environment Court Decision A 34/98.

discharge. In considering actual and potential effects on the environment of allowing the proposed activity, the term “environment” is given an extended meaning⁴² —

“Environment” includes —

- (a) Ecosystems and their constituent parts, including people and communities; and
- (b) All natural and physical resources; and
- (c) Amenity values; and
- (d) The social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) of this definition or which are affected by those matters.

[161] We have therefore to have regard to effects of allowing the proposed activities on the cultural conditions which affect the Maori community, and in particular how the effects of the proposal may have an impact on the present and future relationship of Waikato-Tainui with the river.

[162] Mr Puke in his evidence described the impact of development, the destruction of sacred sites and food resources as having had both tangible and intangible effects, and as having been an assault on the spirit and mind of his people.

[163] Mr Rawiri testified that the river’s spiritual and healing powers are as important today as they were in the past; that the Waikato River is still a source of spiritual well-being; and that the building of factories, the spilling of sewerage and rubbish, and the silt coming from erosion have badly harmed the health of the river which is their ancestor.

[164] Mr Katipa spoke of going to the river to be blessed and healed of ailments to the body, to be baptised and spiritually cleansed and to pray to the Almighty, such is the sacredness of the Waikato. He also listed undesirable things being put into the Waikato and attributed responsibility of the users to see that the quality of the water is improved. He deposed that to allow polluted waters to be discharged into the river was an offence to their ancestors.

[165] The tenor of the evidence of those witnesses was that, despite the present state of the river (which is deplored), the spiritual power, sacredness and standing of the river to Waikato-Tainui remains as strong as in the past. The effects of the present application were not addressed by these witnesses. However there was no suggestion that the Anchor Products proposal would affect this relationship between Waikato-Tainui and their river.

[166] It was Mr Solomon who stated that his evidence would address the appellants’ position on the application. He testified that it offends Waikato-Tainui to see the waters being depleted and polluted by users of the river. Any effluent or pollutants which are discharged into the river cause serious offence to Waikato-Tainui and constitutes an abuse of their ancestor, and an offence against and ignores their kaitiakitanga responsibilities.

[167] The witness gave the opinion that the Anchor Products proposal would further desecrate the waters of the river and consequently further damage the mana of Waikato-Tainui and their special relationship with the river. He asserted that there is no mitigation available to remedy this damage or its impact on the river.

[168] On the effects of the proposal on the relationship of Maori with the river, even the perception of contaminants flowing from the site into the river would cause offence. In that regard, Mr Solomon deposed, there is not a need for discernible physical adverse effects, nor would it depend on any particular concentration of contaminants, but any amount of contamination would constitute a serious adverse effect to the relationship of Waikato-Tainui, or at least some of them, with the Waikato River.

Summary of effects on the environment

[169] We can now collect our findings on the actual and potential effects on the environment of allowing the activities that would be authorised by the resource consents applied for by Anchor Products.

[170] We have found no adverse effects on the Waikato River from the proposed taking of water from it, nor adverse effects on fish from entrainment in the intake structure. The biochemical oxygen demand of the treated wastewater would, even in worst-case conditions, leave a dissolved oxygen content in the discharge, and would not have an adverse effect on the river. There was no issue about adverse effects of other contents of the discharge save for phosphorus, concerning which it was common ground that the Regional Council’s condition has to be replaced. There was not agreement about the limits on phosphorus which should be substituted, but appropriate limits can be imposed so that the effect on the river of that contribution to the total phosphorus load would be no more than minor. The discharge structure itself was specifically designed in consultation with the environmental arm of the Tainui Maori Trust Board so as to respond to the cultural requirements of the tangata whenua. The appellants’ claim that it would not have sufficient hydraulic capacity was

42 In section 2(1) of the Resource Management Act 1991.

not made out, and it is capable of being engineered to function without adverse effects on the environment. There would be an adverse effect on the relationship of Maori with the Waikato river in that many of them they have a deep spiritual respect for the river, and perceive any discharge into it as a serious effect, whether or not there is any discernible physical effect, and despite the design of the discharge and outfall structure to meet their cultural requirements.

G

LAND IRRIGATION ALTERNATIVE TO DISCHARGE

[171] Section 104(3) of the Act⁴³ provides —

- (3) Where an application is for a discharge permit or coastal permit to do something that would otherwise contravene section 15 (relating to discharge of contaminants), the consent authority shall, in having regard to the actual and potential effects on the environment of allowing the activity, have regard to —
 - (a) The nature of the discharge and the sensitivity of the proposed receiving environment to adverse effects and the applicant's reasons for making the proposed choice; and
 - (b) Any possible alternative methods of discharge, including discharge into any other receiving environment.

[172] The grounds of appeal include the claim that acceptable alternative methods are available for waste water disposal, and that inadequate consideration has been given to such alternatives by Anchor Products.

[173] Mr Cooper drew attention to matters which should be included in an assessment of effects on the environment and in particular⁴⁴ —

Subject to the provisions of any policy statement or plan, an assessment of effects on the environment for the purposes of section 88(6)(b) should include

- ...
- (f) Where the activity includes the discharge of any contaminant, a description of
- ...
- (ii) Any possible alternative methods of discharge, including discharge into any other receiving environment:

[174] Counsel submitted that the consideration of alternative discharges had not been adequately carried out, or presented at the appeal hearing, and that it was not for the appellants to demonstrate that land disposal is feasible but rather for the applicants to demonstrate that they have

properly considered, in terms of s 104(3)(b), “any possible alternative methods of discharge, including discharge into any other receiving environment.”

[175] It was Anchor Products' case that land disposal of the wastewater from Te Rapa had been investigated since 1989, and it had been concluded that it is not practicable at Te Rapa because of operational issues, potential land-use conflicts, and potential environmental and soil stability effects. In particular it was asserted that there is insufficient land available of a suitable type near the site, nor any assurance that Anchor Products would be able to acquire it or secure the right to dispose of wastewater on it; that land disposal can cause sodium overload, algal growths, odour, contamination of surface and groundwater, and conflicts with other land uses, especially residential.

[176] In section 7.4.3 of the AEE accompanying the application, land disposal of wastewater had been seen as an option requiring around 300 hectares of land and therefore not feasible at this site. In cross-examination, Mr Venus clarified the reference “at this site” in the AEE as being more properly expressed as “in relation to the proposed project.”

[177] Mr Venus gave evidence of the consideration which had been given to alternatives to disposal of discharges to the river. The only alternative he had considered was to dispose of treated wastewater to land. He reported that the New Zealand Dairy Research Institute had conducted studies on a number of sites in the Waikato region, including Te Rapa. As a result of these studies it had been concluded that, after allowance for buffer zones between adjoining properties, residential facilities, watercourses, and for areas of steep terrain, a site of approximately 450 hectares would be required for disposal of the wastewater from the Te Rapa plant to land. Mr Venus considered that such an area of suitable soils would only be available on the east side of the Waikato River. Mr McCowan considered that the only area with suitable soil types and undeveloped land far enough away from residential development which could be practically used for waste water irrigation was about 10 kilometres distant and near Gordonton on the east side of the river. For this alternative he anticipated environmental risks present in the length of pressure pipeline required, in crossing the Waikato River and in traversing private properties and public roads, and he foresaw risks of pipe failure and accidental raw wastewater discharges.

[178] This witness referred to the Anchor Group's experience with fixed wastewater irrigation systems at Hautapu, Litchfield, Reporoa and Edgecumbe, and of

43 As substituted by section 54 of the Resource Management Amendment Act 1993, and as if the Resource Management Amendment Act 1997 had not been enacted : see section 78(5) of that Amendment Act.

44 Resource Management Act 1991, Fourth Schedule, clause 1 (f)(ii) .

pressure now coming to bear on the Hautapu site from urban sprawl and life style development associated with near by Cambridge. He deposed that Anchor's experience showed that the potential contamination of ground waters with discharge of nutrients is an ongoing issue which, because of the potential for land- use conflicts, requires careful management. He considered that for the Te Rapa site this would be a very real environmental concern.

[179] For disposal of wastewater to land on the western side of the river, Mr Venus had considered the potential for land-use conflicts. Given the proliferation of lifestyle blocks with higher population densities now occurring to the north and east of Hamilton, he considered that this area is becoming less appropriate for large scale land irrigation systems. During the consent programme Anchor Products had reviewed the option of disposal to wood lot irrigation, and it had been concluded that an area of 150 hectares plus buffer areas would be necessary. Mr Venus testified that such an area could only be located on the eastern side of the river. His conclusion was that discharge to the river, given the high level of treatment proposed and the absence of associated adverse environmental effects on the river, was appropriate, in contrast with the disposal by irrigation option which has a range of practical, economical and environmental effects which make it less appropriate.

[180] In his evidence Mr Hedgland disagreed with the evidence of Mr Venus that soils in the vicinity of the factory site are Te Kowhai silt loam, which has a low infiltration capacity, and that the more suitable Horotiu Te Kowhai complex soils are located some distance away. He provided a copy of part of the New Zealand Land Resource Inventory Worksheet on which 5 soils-type areas had been highlighted. This plan shows that the soils of the factory site and for some 2 kilometres to the north-west, which includes the south-western part of the Perry sand works site, are Te Kowhai silt loam, which is described on the plan as 'low lying terraces, gley soils, slight wetness and peaty loam'. The balance of the Perry land is notated as recent pumiceous sand. To the west of the site and in a band parallel to the State highway the soils are described as 'well drained terraces- Horotiu sandy loam'. Immediately to the west again and in part straddling the railway, an irregular area extending from 3 to 4 kilometres north and west of the site is indicated as 'Flat terraces, mix well drained loams and gley soils - Horotiu - Te Kowhai complex', described by Mr Venus as suitable from an infiltration perspective. Across the highway opposite the application site and comprised of these latter two soil types there is an area of 80.6 hectares, between the highway and the railway, owned by the applicants, known as the Anchor farm, and presently used for dairy grazing. It was Mr Mitchell's evidence that this land had been previously mined for sand. The fifth soil type identified, Kaipaki peaty loam, lies west of the railway, from 1 to 3 kilometres west and south of the site, and is described as 'Plains and terraces - organic soils, expect slight wetness'.

[181] Mr Hedgland deposed that the sands of the quarry in the south-western portion of the Perry site are clean and highly permeable, and not low permeability Te Kowhai silt loam as shown on the soil inventory plan in his earlier evidence. The witness testified that he had confirmed that with what he described as three simplistic permeability tests, which were not intended to be precise, but which demonstrated that the sand has exceptionally high infiltration capacity. His evidence was that he had been told that the sands in the western side of this quarry were similar to those under the Anchor farm. He said it was his understanding this farm is some 6 to 7 metres above the river level and that there is a low permeability silt layer below the bottom of the farm basin which is underlain by permeable sands.

[182] Mr M T Mitchell, a consulting geotechnical engineer, gave evidence of investigations he had conducted on the Perry site to determine the sand mining resource available, and on his extensive experience over 20 years, concerning sand resources and permeability characteristics on numerous sites in the immediate vicinity including the Anchor farm site. He agreed with Mr Hedgland that there is clear evidence of Horotiu sandy loam and sandy soils in the immediate vicinity and near by the Anchor site, which have a high degree of permeability. He also agreed with Mr Hedgland's assessment that there is in excess of 1200 hectares of soils suitable for irrigation near the Anchor site on the west side of the river. No reliable evidence was given of the number of properties included within the above area, or of the areas of holdings, although Mr Hedgland was of the opinion that many would be of the same order as the Anchor site. There was no evidence either of the availability of any such land for purchase, or lease, or for long-term commitment to wastewater irrigation.

[183] In considering the area required for a land disposal option, Mr Hedgland gave evidence of his considerable general experience of effluent disposal, and referred to joint trials undertaken by the Meat Research Institute of NZ and the Forestry Research Institute on a nearby site at Horotiu. Those trials had included irrigation of both grass pasture and high density eucalyptus crops and had led to the conclusion that the irrigation of permeable alluvial sands adjacent to the river is satisfactory, and that eucalyptus tree crops are successful in these soils and with the irrigation of strong wastes.

[184] With regard to the present proposal, the appellants addressed the alternative of irrigation to land of only the proposed discharge from the wastewater treatment plant consisting of 5770 cubic metres per day of treated effluent. For this flow Mr Hedgland's estimates of land areas required (including buffer zones for various types of land use) were: for grazed pasture, 316 to 422 hectares; for high-density eucalyptus wood lot, 170 to 200 hectares; and for a third option of cut grass crop carried off-site, 172 to 230 hectares. The witness explained that a number of variables

come into consideration such as allowable nitrogen application rates and the hydraulic application rate. In supplementary evidence he gave further figures based on an effluent with a nitrogen content of 15 grams per cubic metre, application rates able to be accommodated on sandy soils, application for 290 days per year, and an annual rainfall of 1,200 millimetres. Estimated in that way, the areas (including buffer zones) for each land-use option became: grazed grass monitored, 135 hectares; unmonitored, 263 hectares; trees, 183 hectares; cut-and-carry grass, 79 to 66 hectares. The witness considered that the latter option could be accommodated on the Anchor farm site.

[185] Mr M B Chrisp, a planning consultant called to give evidence on behalf of Anchor Products, gave evidence about buffer zones. By Rule 40.5.2 of the Waikato District Plan, minimum set-backs for land disposal of dairy factory waste are in general 10 metres from any property boundary, and 150 metres from residences, schools, halls, marae, and community facilities. In addition the Regional Council imposes a minimum set back of 10 to 25 metres from watercourses as a condition of resource consent.

[186] The Anchor farm site is relatively long and narrow, is indented by a number of other properties, and has a watercourse centrally located along its full length with another side branch which traverse a number of properties towards the north before discharging to the Waikato River near Horotiu. Supposing a 25-metre buffer from both sides of the watercourse (which could well be a likely condition under the circumstances) and considering the need to achieve irrigation areas of a practical shape, then even leaving aside the proposed underpass on part of the site we could not be confident that the Anchor farm site would fully accommodate the intensive land-use option on a reliable long-term basis, even if an off-site user of the grass was assured.

[187] The only other land in the vicinity suggested as being available for irrigation purposes was the Perry property to the north. Mr Mitchell reported that, based on his discussions with Perry staff, part of their site could be made available. However it was Mr McCowan's evidence that discussions with Mr Brian Perry had indicated that they are not able to agree to disposal of effluent on their property, primarily because of the risk of contamination of their sand product. As well there is a proposal for a motorway spur affecting their property, to accommodate a realignment of Horotiu Bridge. In cross-examination, Mr Mitchell agreed he was aware of plans for a major motorway spur dissecting the Perry land, the route for which Transit were negotiating with Perrys, but that he believed construction of the motorway may be up to 20 years away.

[188] In summary, Mr Hedgland concluded that the disposal of the dairy factory wastewater by irrigation is technically feasible and that there is sufficient suitable land on the western side of the river for this to occur. That

conclusion relates to disposal of 5,770 cubic metres per day of the wastewater flow. However given the sentiments expressed by Mr Solomon regarding the attitude of Waikato-Tainui towards river discharges, there must be some reservation as to whether the full discharge sought of 28,500 cubic metres per day would not be the more appropriate figure for disposal to land to meet these concerns. In cross-examination Mr Hedgland agreed that his operational experience of disposal to land of dairy factory wastes was no match for that of Anchor Products.

[189] Having considered all the evidence on this topic (of which we have given a summary) we find that discharge of the wastewater to land would be a possible alternative. There would be considerable practical difficulties, and they could probably be overcome. If we had found that the proposed discharge to the Waikato River would have significant adverse effects on the quality of the water in the river, or would fail to recognise and provide for the relationship of Waikato-Tainui with the river, and their kaitiakitanga in respect of it, then disposal to land would deserve further consideration. However, we have found that, with an appropriate limit on the content of phosphorus, there would not be adverse effects on the river environment from the proposed discharge; and that the proposal has been developed and designed specifically to recognise and provide for that relationship and for the kaitiakitanga of Waikato-Tainui. We also find that the AEE included the possible alternative methods of discharge to land as a receiving environment, as required by the Fourth Schedule to the Act.

H

PLANNING INSTRUMENTS

[190] Section 104(1) of the Act also directs that in considering a resource consent application the consent authority is to have regard to any of various classes of planning instruments made under the Act that are relevant. The relevant planning instruments are the proposed Waikato District Plan, the proposed Waikato Regional Policy Statement, and the transitional Waikato Regional Plan.

Status of the activities

[191] Pursuant to leave granted under clause 17 of the First Schedule of the Act the proposed Waikato District Plan became operative on 6 December 1997, with the exception of provisions which are not relevant to this appeal. By that plan, the site is in the Dairy Industrial zone. The proposed developments are generally permitted activities in that zone, being involved with the processing and handling of dairy products. However, there are some elements which do not conform with the criteria for permitted activities and these are listed separately.

[192] The buildings which would house the new evaporators, the silos, the coolstores, and the extension to

the existing power house, are all controlled activities as they exceed the height requirements in the zone.

[193] The proposed drier would be a discretionary activity because it would exceed 50 metres in height. Under the general provisions of the plan the storage and use of hazardous substances, the earthworks, the work on recorded archaeological sites, and the effluent treatment systems, are all discretionary activities.

[194] By section 12.5.2 of the proposed district plan, ancillary activities to any permitted activities are also permitted activities. It was submitted by Mr Holm that the proposed cogeneration plant is ancillary to the processing and handling of dairy products on the site so it should be regarded as a controlled activity. The appellants did not contest that, but the District Council disputed that the cogeneration plant is ancillary to the dairy factory. It maintained that it is a non-complying activity, but deserving of resource consent as such.

[195] The heart of the District Council's case in that regard was that even with the reduced capacity, the cogeneration plant would have capacity to produce more energy than is needed by the dairy factory. However that overlooked that the cogeneration plant would produce both steam and electricity, and although one-third of the electricity produced may be surplus to the needs of the dairy factory, 100% of the steam would be used on site, so the majority of the production of the cogeneration plant would be consumed by the dairy factory.

[196] We find that the cogeneration plant would substantially be ancillary to the expanded dairy factory, and as such has status as a permitted activity in the Dairy Industrial zone.

[197] Finally the proposed grade-separated vehicle access, which is partly in the Rural zone, is not provided for in the district plan, so that aspect of the project is a non-complying activity.

[198] Under the transitional Waikato Regional Plan there is no provision for the proposed activities, so the proposal has to be treated as an unclassified or innominate activity under the transitional plan, and considered in the same way as discretionary activities.

Objectives and Policies

Waikato District Plan

[199] As mentioned above, the site is within the Dairy Industrial Zone. The zone provisions are set out in section 12 of the plan. Reason 12.3.1 records that the plan includes this zone in order to recognise the significance of the Te Rapa dairy processing facility, and to enable the people and communities of the district to provide for their social and economic well-being.

[200] We accept that the provisions of the Dairy Industrial Zone recognise the social and economic importance of the Te Rapa Dairy Factory, and the likelihood that an expansion will occur at some time in the future.

[201] Mr Chrisp deposed that the proposal had been developed in a manner which addresses the resource management issues identified in the objectives and policies for the zone. In particular the issues of visual amenity, traffic safety, and storage and use of hazardous substances had been addressed. He gave the opinion the proposed developments are consistent with the plan's objectives and policies for the zone.

[202] Mr Chrisp testified that all elements of the proposed developments on the Te Rapa site complied with the relevant standards as to height and yard requirements, and gave his opinion that this compliance satisfies the assessment criteria specified in the Dairy Industrial Zone.

[203] The appellants made no challenge to the activities for which land-use consent was sought from the District Council.

[204] However their counsel, Mr Cooper, drew attention to section 6 of the plan, which contains policies for Tainui at paragraph 6.2, of which policies 6.2.5 and 6.2.6 and their counterpart reasons at paragraph 6.3.9 and 6.3.10 may be relevant —

6.2 Policies for Tainui

...

6.2.5 Objectives 6.1.1, 6.1.2, and 6.1.3: To recognise the special relationship of tangata whenu with the Waikato River and the coastal environment of the District.

6.2.6 Objectives 6.1.1 and 6.1.3: To enhance and maintain the environmental quality of the Waikato River.

...

6.3 Reasons

6.3.9 Policy 6.2.5: "The river has always been and will always be, central to the historical, spiritual, and economic identify (sic) of the Tainui People" (Tainui Maori Trust Board's report of 29 May 1992 entitled "He Kaupapa a Rohe mo Waikato Whaanui").

6.3.10 Policy 6.2.6: The District Plan's policy to enhance and maintain the environmental quality of the river supports sections 6 and 7 of the Act which together support the purpose of the Act. the policy supports the work of Environment Waikato concerning the river.

Council is receptive to exploring the findings of investigations which demonstrate that there are practical and inoffensive alternatives to disposing effluent via waste water systems.

Resource consent applications which affect the river will be referred to the Iwi by the applicant.

[205] Section 51 of the plan includes an objective and policy which may be relevant to the proposed cogeneration plant.

Objective

51.1.2 Issue 51.0.2: To ensure that public works and utilities are provided in a manner which is sensitive to the amenity values of the District and avoids and/or mitigates any adverse effects on the natural and physical environment.

Policy

51.2.3 Objective 51.1.2: To encourage co-siting or sharing of facilities where this is technically feasible and the operations of the co-sited facilities are compatible.

[206] Mr Chrisp gave the opinion that the cogeneration plant was an example of co-siting complementary activities. He testified that the plant would comply with the bulk and location requirements for controlled activities, and the noise standards. The activity itself, being the generation of steam and electricity, is permitted within the Dairy Industrial Zone. The surplus electricity generation capacity will not result in additional adverse effects.

[207] Because the proposal has been designed to meet the cultural requirements of Waikato-Tainui in respect of the discharge of wastewater to the Waikato River, we find that in that and in all other respects it conforms with the objectives and policies of the Waikato district plan. Although the proposed grade-separated road access to the factory would be a noncomplying activity, we are satisfied that it would not be contrary to the objectives and policies of the plan, so the Court is not precluded by section 105(2)(b)⁴⁵ of the Act from granting consent.

Waikato Regional Policy Statement

[208] The Waikato Regional Policy Statement was notified in September 1993. Decisions have been given on all submissions and further submissions, and the period for lodging references with the Environment Court has ended.

[209] There are objectives and policies in the regional policy statement under the following headings:

- Tangata Whenua Relationship with Natural and Physical Resources
- Water Quality
- Efficient Use of Water
- Mauri
- Regional and Local Air Quality

- Storage, Transportation, Use and Disposal of Hazardous Substances
- Maintenance of Biodiversity
- Structures
- The Region's Heritage
- Maori Heritage

[210] Section 2.1.3 identifies the relationship of tangata whenua with the natural and physical resources as a significant resource management issue. It contains statements about the concept of kaitiaki, both as reflected in the Act, and as expressed by Maori in terms of the relationship that tangata whenua have with the resources. It is stated⁴⁶ that:

Tangata whenua will each have their own interpretation of the concept of kaitiaki, however, there are two important overriding principles for kaitiaki, firstly there is the ultimate aim of protecting mauri and secondly, there is a duty to pass on the resources to future generations in a state which is as good as, or better than the current state.

[211] No objectives or policies are associated with this section as it is the explanatory precursor to the objectives and policies referred to in section 2.1.5, which is also headed 'Tangata Whenua Relationship With Natural and Physical Resources'⁴⁷ —

2.1.5 Tangata Whenua Relationship With Natural and Physical Resources

...

Objective: The relationship which tangata whenua have with natural and physical resources recognised.

...

Policy One: Maori Culture and Tradition

Ensure that the relationship tangata whenua have with their ancestral lands, water, sites, waahi tapu and other taonga is recognised and provided for in resource management decision making.

...

Policy Two: Promote and Provide for Kaitiakitanga

Have particular regard to the role tangata whenua have as kaitiaki and provide for the practical expression of kaitiakitanga.

...

Environmental Results Anticipated

1. Ancestral lands, water, sites, waahi tapu and taonga recognised and provided for.
2. Outcomes which accommodate the cultural and spiritual values held by tangata whenua.

[212] Anchor Products maintained that the relationship Tainui have with the Waikato River has been recognised

⁴⁵ Resource Management Act 1991, section 105(2)(b), as amended by section 55(2) of the Resource Management Amendment Act 1993. By section 78(5) of the Resource Management Amendment Act 1997 this appeal has to be decided as if the 1997 Amendment Act had not been enacted.

⁴⁶ On page 17.

⁴⁷ Section 2.1.5 'Tangata Whenua Relationship with Natural and Physical Resources' has been challenged by AFFCO in a reference to the Environment Court.

and provided for in the resource consent application process by way of regular consultation, and the adoption of mitigation measures; and that the provisions for the preservation and management of the Mangaharakeke Pa site are one example of practical expression of kaitiakitanga in this development. In addition, the Huakina Development Trust had been consulted, and in response to their wishes, the gully system had been proposed to meet the cultural requirements of the Tainui people.

[213] Water quality is dealt with in section 3.4.5 which includes objective and policies:

3.4.5 Water Quality

...

Objective: Net improvement of water quality across the Region.

...

Policy One: Protection of Outstanding Water Bodies

Ensure the protection of significant characteristics of the quality of outstanding water bodies.

...

Policy Two: Other Water Bodies

Determine the characteristics for which other waterbodies are valued and manage those waterbodies to ensure that those characteristics are maintained by avoiding, remedying and mitigating adverse effects on water quality.

...

Policy Three: Riparian Management

The promotion of riparian management to manage the cumulative effects of point source and non-point source discharges of contaminants, and land uses which affect the margins and beds of waterbodies.

[214] In relation to water resources, paragraph 3.4.1 of the proposed regional policy statement, which is the overview of the Water chapter, specifically notes the spiritual significance to Maori of the water resources in the region⁴⁸. This introduction contains discussions of the concept of mauri, and of taonga as used in section 6(e) of the Act and in Article 2 of the Treaty of Waitangi.

[215] We accept that the Waikato River is an outstanding water body, to which Policy One applies. It was the case of Anchor Products that the proposed development would contribute to, and not be inconsistent with, the objective of ensuring the protection of significant characteristics of the quality of the river. Conversely it was the case for the appellants that the proposal would not be consistent with this objective, in particular because of concerns over phosphorus levels, although other nutrients (such as BOD and total nitrogen) would be reduced.

[216] The importance of cumulative effects on water quality is specifically recognised by the riparian

management policy. This is also relevant because of the issue about phosphorus levels.

[217] Section 3.4.7 relates to Efficient Use of Water, and includes the objective of obtaining greatest benefit from water taken from water bodies, and a policy to ensure that water taken from a water body is efficiently used. It was Anchor Products' case that the proposal includes a number of features to improve water use efficiency, including evaporators which allow for a closed-circuit water-cooling system, rather than the existing 'once through' system. Although the proposal would result in the doubling of the processing capacity of the Te Rapa site, the quantity of water taken and discharged would be no greater than that authorised by the resource consents currently held by the plant.

[218] Section 3.4.10 sets out specific objectives and policies in respect of mauri of water:

3.4.10 Mauri

Issue: Maori consider that the disposal of contaminants to water, has the potential to diminish the mauri of that water.

Objective: No net loss of mauri to tangata whenua.

...

Policy One: Effects of Contaminants

Ensure that the mauri of water will not be significantly affected by contaminants being discharged when making decisions about the use, development and protection of natural and physical resources.

...

Environmental Results Anticipated

1. The quality of water bodies maintained and enhanced.
2. Tangata whenua are satisfied that their concerns in regard to the mauri of water, are being recognised and are being appropriately addressed in the Region as a whole.
3. The relationship of tangata whenua with water resources is better understood and iwi concerns and values are considered in the management of water bodies.

[219] Mr Chrisp gave the opinion that the consultation undertaken by Anchor had facilitated the recognition of the importance of mauri, and the measures developed had ensured that the mauri of resources is not adversely affected. Mr Keane observed that the development entailed a "significant reduction in current nutrient loads" and that there would be ongoing consultation with tangata whenua.

[220] Section 3.6.3 contains policies on Air Quality, and there was no challenge to evidence that air quality would not be significantly affected by the proposal, nor would there be any adverse effects on human health, flora or fauna. The proposal is consistent with the objectives and policies in this section.

48 On page 59.

[221] There are specific policies⁴⁹ dealing with the avoidance of adverse effects in connection with the storage, transportation, use and disposal of hazardous substances. The evidence for Anchor Products that the storage and use of hazardous substances in connection with the proposal would be undertaken in a manner that minimises any risk to humans and the environment was not disputed. Likewise, the evidence that the proposal would have no adverse effects on biodiversity in the Waikato region, in line with the objectives and policies contained in section 3.11.4 was not disputed.

[222] The Te Rapa Dairy Factory is a regionally significant structure for the purposes of section 3.13.2 which includes an objective of maintaining the functional integrity of regionally significant structures, and a policy to recognise the need for such structures and provide for the maintenance of their functional integrity. The proposed developments are consistent with the continued use and sustainable management of the existing facility.

[223] On heritage matters, the statement⁵⁰ addresses natural heritage (including fresh water ecosystems and habitats) and cultural heritage (including natural features of cultural and historical significance and associations). Mr Cooper submitted that the heritage provisions of the proposed regional policy statement can be applied to the Waikato River, which is accordingly within the proposed regional policy statement's objective of protecting regionally significant heritage resources. This is underlined by the additional and separate objective of protecting heritage resources of significance to Maori⁵¹.

[224] Mr Chrisp considered both the region's and Maori heritage and deposed that measures had been incorporated into the proposal to ensure that resources of heritage value, and particularly the resources of heritage value to Maori, are protected from adverse effects. He gave the opinion that the proposed developments had been designed in such a manner as to be consistent with these objectives and policies.

[225] Mr Cooper reminded us that, in *Te Runanga O Taumarere v Northland Regional Council*⁵² the Planning Tribunal had acknowledged the importance given to the cultural needs of Maori in the relevant planning instruments. In summary, Mr Cooper submitted that the relevant objectives and policies (as noted above) in the proposed regional policy statement recognise and support the special relationship of Tainui with the river and they

contain policies and objectives which seek to protect both that relationship, and the quality of the water in the river. Counsel submitted that if the appellants are successful then that would be because the proposal would affect the special relationship of the appellants with the river, and because it is unsound in terms of its likely effects on the river. The implications of this would be that the result will be an improvement in the quality of the river, an objective thoroughly in accordance with the proposed regional policy statement, and the relevant provisions of the Act.

[226] We have found that there would not be adverse effects on the river environment of allowing the proposal. We accept and find that the Waikato River is an outstanding water body, and that Waikato-Tainui have a deep special relationship with it of a cultural and spiritual kind; and that the relationship would be impaired by activities which result in deterioration of the quality of the water of the river. We also find that the proposal has been developed and designed in ways that recognise and provide for that relationship, and for the kaitiakitanga of Waikato-Tainui, in accordance with the objectives and policies of the proposed regional policy statement. The extent of the wastewater treatment, the protection for the Mangaharakeke Pa, and the specially designed discharge facility, are all examples of that. Setting an appropriate limit on the content of phosphorus in the discharge, complementary with the limits on other contents of the discharge, would also recognise and provide for that relationship and for the kaitiakitanga of Waikato-Tainui. In short it is our judgment, like that of the primary decision-makers, that the proposal is consistent with the objectives and policies of the proposed regional policy statement.

Waikato Transitional Regional Plan

[227] The rules relating to the use and development of resources within the jurisdiction of the Waikato Regional Council are identified in the transitional Waikato Regional Plan. It was common ground that there are no relevant objectives, policies or rules in the transitional Waikato Regional Plan. The only aspect of the plan which has any bearing is the classification of the water in the Waikato River, being Class B waters (uncontrolled catchments).

J **APPLICATION OF PART II**

[228] In deciding a resource consent application for a discretionary activity or a noncomplying activity, a consent

49 In section 3.10.3.

50 In section 3.15.1.

51 Section 3.15.3.

52 [1996] NZRMA 77, 95; 2 ELRNZ 41, 71.

authority has to make a judgment under section 105(1)(c)⁵³ of the Act to grant or refuse consent. That section does not expressly direct that the judgment has to be made for the purpose of the Act stated in section 5, and in compliance with the directions in the other sections of Part II of the Act. However the general language of those provisions of Part II apply to the exercise of the consent authority's discretionary judgment; and we hold that they should be applied accordingly.

[229] The Resource Management Act has a single purpose⁵⁴. Consistent with that we hold that the provisions of sections 6 to 8 are subordinate and accessory to the primary or principal purpose of the Act. We therefore proceed to consider such of them as are applicable in this case, before coming to the discretionary judgment whether for that purpose the resource consents should be granted or refused.

Maori relationship, kaitiakitanga, and Treaty principles

[230] In this case the most important provisions are those directing recognition and provision for the relationship of Maori and their culture and traditions with their ancestral water⁵⁵; directing particular regard to kaitiakitanga⁵⁶; and directing taking into account the principles of the Treaty of Waitangi⁵⁷. The contents of the Waikato district plan and the Waikato regional policy statement, and the evidence summarised earlier in this decision, confirm that those provisions are applicable to the relationship between the Waikato-Tainui and the Waikato River.

[231] Principles of the Treaty of Waitangi call for the Crown and Maori to act reasonably and in good faith towards each other, and that is applied in resource management practice to expect proponents of development proposals which may affect Maori cultural or spiritual interests to consult with Maori about their proposals, and consent authorities to receive and have regard to advice about the effects of proposals on those Maori interests⁵⁸.

[232] In this case the consultation with Waikato-Tainui⁵⁹ on behalf of Anchor Products had tangible beneficial results. Both the intake structure for taking water from the

river, and the discharge structure for disposing of treated wastewater, were deliberately designed to respond to the cultural wishes of the Waikato-Tainui. In particular the evidence showed that the design of the discharge structure would not have been justified by engineering or environmental considerations, but only by a willingness by Anchor Products to meet their cultural requirements. In addition the reduction in the capacity of the cogeneration plant responded to the wish of Waikato-Tainui that the taking of water be limited to the minimum amount. The wastewater treatment plant is to be designed to limit the contaminants to be discharged to the river, consistent with the cultural requirements of Waikato-Tainui that it be fit for spiritual use, as well as the more pragmatic contents of the proposed regional policy statement. Moreover, Anchor Products has acknowledged that it respects the cultural and spiritual significance of the Waikato River to Waikato-Tainui; has undertaken to maintain a programme of continuous improvement of its environmental impact on the Waikato River and to enhance the quality of the river; has agreed to participate with Waikato-Tainui in a public education programme to promote environmental improvement of the Waikato River, and to encourage others to take part. Further, in an immediate and practical way, Anchor Products has undertaken protection of the site of Mangaharakeke Pa (on its property), and to provide access to it.

[233] All parties agreed that the condition about the phosphorus content in the discharge should be amended, and we intend to do so. With that amendment, and Anchor Products' acceptance of the other conditions imposed by the Regional Council, it is our judgment that the revised proposal before the Court recognises and provides for the relationship of Maori and their culture and traditions with their ancestral water, gives particular regard to kaitiakitanga, and takes into account the principles of the Treaty of Waitangi.

Protection from inappropriate development

[234] Functionaries are also directed to recognise and provide for other matters of national importance, of which those relevant in this case are protection of rivers and their margins, and outstanding natural features from

53 Resource Management Act 1991, section 105(1)(b) and (c) as amended by section 55(1) of the Resource Management Amendment Act 1993. By section 78(5) of the Resource Management Amendment Act 1997 this appeal has to be decided as if the 1997 Amendment Act had not been enacted.

54 *North Shore City Council v Auckland Regional Council* [1997] NZRMA 59, 94; 2 ELRNZ 305, 347.

55 Resource Management Act 1991, section 6(e).

56 Resource Management Act 1991, section 7(a).

57 Resource Management Act 1991, section 8.

58 See *Mason-Riseborough v Matamata-Piako District Council* (1998) 4 NZELR 31; *Tangiora v Wairoa District Council* Environment Court Decision A6/98.

59 By the Huakina Development Trust, being the environmental arm of the Tainui Maori Trust Board, and having the mandate to address all resource management issues for the Waikato iwi.

inappropriate use and development. We find that the Waikato River is an outstanding natural feature. We have found that there would be no adverse effects on the river from the proposed taking of water from it, nor from the proposed discharge of wastewater to it, save in respect of Maori cultural requirements, and in respect of phosphorus. We have found that the revised proposal recognises and provides for Maori cultural requirements and takes into account the principles of the Treaty of Waitangi. Amendment of the condition about discharge of phosphorus will address that. As a result, we find that the revised proposal, carried out in conformity with the conditions, would not be inappropriate use or development of the Waikato River or its margin.

Habitat of indigenous fauna

[235] Decisions on resource consent applications are to recognise and provide for protection of significant habitats of indigenous fauna⁶⁰. The Waikato River is such a habitat for fish. However we find that, with the intended amendment to the condition about discharging phosphorus, exercise of the consents now sought in accordance with the conditions would not adversely affect that significant habitat.

Efficient use & development of resources

[236] We are to have particular regard to the efficient use and development of natural and physical resources⁶¹. The appellants contended that efficient use and development of the resource represented by the Waikato River would be better served by the disposal to land of the part of the discharge represented by the nutrient-rich flow.

[237] In some cases recently the Environment Court has been given detailed evidence from economists and full submissions to assist it to decide whether the proposal before it represents the efficient use and development of natural and physical resources. The understanding of the scope and limits of section 7(b) is still developing. However in this case, the Court was not given an economic analysis of the application of that criterion to this case.

[238] However the amount of water to be taken from the Waikato River has been minimised by the revised proposal, and the effects of discharge to the River would be limited by the design of the proposed treatment plant, by the conditions imposed by the Regional Council, and by the

intended amendment to the condition about phosphorus. In addition the increase in milk-processing capacity is proposed to be gained by development of the existing Te Rapa dairy factory, rather than development of a greenfields site. In these respects we find that the proposal is consistent with the efficient use and development of the natural and physical resources represented by the river, the site, and its infrastructure (including location on the main highway network).

Other criteria

[239] The appellants contended that the proposed discharge to the Waikato River would not be consistent with the requirements of section 7 to have particular regard to the maintenance and enhancement of amenity values⁶², intrinsic values of ecosystems⁶³, recognition and protection of the heritage values of areas⁶⁴, maintenance and enhancement of the quality of the environment⁶⁵, and the finite characteristics of natural and physical resources⁶⁶.

[240] Our findings in those respects do not support a conclusion that is adverse to Anchor Products' revised proposal.

Conditions

[241] By section 108 of the Act, consent authorities are empowered to impose conditions on resource consents. In granting the resource consents sought by Anchor Products, the Regional Council and the District Council imposed conditions on each consent. Those conditions were accepted by Anchor Products, and with one exception, they were not challenged by any party at the appeal hearing.

Phosphorus limit

[242] The exception was condition 4(vii) imposed on the discharge permit⁶⁷ to authorise discharge of wastewater, cooling water and stormwater to land and then to the Waikato River. That condition was —

(vii) the total phosphorus concentration of the discharge as determined from a 24 hour composite sample shall not exceed 20 grams per cubic metre for the first 24 months from the exercise of this consent. Thereafter, the total phosphorus limit for the discharge may be reviewed as provided for in condition 21.

60 Resource Management Act 1991, section 6(c).

61 Resource Management Act 1991, section 7(b).

62 Resource Management Act 1991, section 7(c).

63 Resource Management Act 1991, section 7(d).

64 Resource Management Act 1991, section 7(e).

65 Resource Management Act 1991, section 7(f).

66 Resource Management Act 1991, section 7(g).

67 Permit No 970032.

[243] By Condition 21 the Regional Council reserved power to review certain limits of constituents in the discharge —

21 The Waikato Regional Council may give notice pursuant to section 128 of the Resource Management Act 1991 of its intention to review the ... total phosphorus limits after a period of 24 months from the exercise of this consent to confirm that these limits are an accurate assessment of discharge levels.

[244] It was common ground among the parties that the limit on the concentration of phosphorus in the discharge of 20 grams per cubic metre was inappropriate. It was also common ground that the limit should not be expressed in respect of the concentration of phosphorus in the discharge, but in respect of the maximum daily mass of phosphorus discharged. However the parties, and their witnesses, differed about what the limit on phosphorus should be.

[245] The Regional Council proposed the following replacement condition (iv)—

(iv) the quarterly average mass load of phosphorus in the final discharge as determined from 24-hour composite samples shall not exceed 25 kilograms per day, nor shall the maximum load exceed 35 kilograms per day.

For the purpose of this condition each quarterly period shall begin on the 1 January, 1 April, 1 July, and 1 October each year.

[246] A water quality scientist employed by the Regional Council, Mr W N Vant, gave the opinion that it is desirable that all loads of plant nutrients in the Waikato River decrease, and therefore that the future load of total phosphorus from the Anchor Products site should not exceed the present level, being about 25 kilograms per day on average, and that the loads of both phosphorus and nitrogen should be reduced by about the same extent. As the condition limiting nitrogen in the discharge would have the effect of reducing nitrogen to less than half the current load, he considered that the future load of phosphorus should be no more than about 11 kilograms per day, and if it is not practicable to reduce it to that extent immediately, in the meantime the average load should be no greater than the present level of about 25 kilograms per day. In cross-examination, Mr Vant deposed that 57 kilograms per day of total phosphorus in the discharge would be about 5 or 6 percent of the total phosphorus in the river.

[247] Dr McCabe gave the opinion that it would be prudent that a better than 70% reduction be achieved in both total nitrogen and total phosphorus discharges to the river over the growing season where technology allows such reductions to be achieved; and that provision should also be made to extend nutrient reduction in the winter months should this be necessary to achieve the target river water quality and algal biomass. He gave the opinion that the

maximum phosphorus loading from Anchor Products should be set at 5 kilograms per day, in keeping with a 70% reduction from all contaminant sources, to ensure that nuisance algal blooms do not occur in the lower river during the growing season. Dr McCabe also proposed that, to minimise impacts in the littoral weed beds, a ninety-percentile concentration for total phosphorus should be set at 0.16 grams per cubic metre.

[248] Anchor Products' position was that it would accept a limit on phosphorus provided it could be linked to remedying or mitigating an adverse effect on the water quality of the Waikato River attributable to its discharge, but submitted that the evidence did not demonstrate an adverse effect from discharge of 57 kilograms per day as proposed.

[249] Mr Kennedy proposed the following replacement condition (vii)—

(vii) From the time of granting of this consent up until the completion of commissioning of the new powder plant the following effluent quality criteria should apply to the final discharge to the Waikato River.

The annual average total phosphorus load (based upon the samples collected above) shall not exceed 27 kg per day as a 90 percentile.

From the time of completion of commissioning of the new powder plant for a period of 24 months, the following effluent quality criteria shall apply to the final discharge to the Waikato River.

The annual average total phosphorus load (based upon the samples collected above) shall not exceed 57 kg per day as a 90 percentile.

Thereafter, the annual mean value of the total phosphorus concentration of the final discharge may be reviewed as provided for in condition 21.

[250] Anchor Products proposed as an alternative that the Court impose an amended condition such as that sought by the Regional Council but modified so that the reference to 25 kilograms per day became a reference to 57 kilograms per day, and the reference to 35 kilograms per day became a reference to 70 kilograms per day.

[251] Anchor Products reminded us that 57 kilograms per day would be equivalent to about 5 to 6 % of the total phosphorus in the river, well below the amount discharged by the Hamilton City sewerage works (some 19%) which Mr Vant had agreed in cross-examination would have only minor effects, and would be negligible and undetectable.

[252] Our approach to the issue of the limits on the amount of phosphorus which may be included in the discharge to the river needs to be informed by a number of factors. It should be such as would sustain the potential of the river

to meet the reasonably foreseeable needs of future generations⁶⁸. It should safeguard the life-supporting capacity of the water of the river⁶⁹. It should avoid, remedy or mitigate any adverse effects on the environment⁷⁰. It should recognise and provide for the relationship of Waikato-Tainui and their culture and traditions with the river⁷¹, and have particular regard to kaitiakitanga⁷². Our approach should also allow, if possible, for managing the use of resources in a way and at a rate which would enable the dairy community to provide for their economic well-being⁷³. In that context, we have particular regard to the efficient use and development of resources⁷⁴.

[253] We start by recognising that it is common ground that there should be a limit on the amount of phosphorus that may be included in the discharge. Next we find that even the amount proposed by Anchor Products, would not on its own fail to sustain the potential of the river to meet the reasonably foreseeable needs of future generations, fail to safeguard the life-supporting capacity of the water of the river, or have any adverse effects on the physical environment. There are two reasons for further restricting the amount. The first is that it does not recognise and provide for the relationship of Waikato-Tainui with the river, not so much for any physical effects, but because of their cultural and spiritual attitude to the river (a topic on which we have given our findings earlier in this decision). The second is the cumulative effect of numerous point-source and non-point-source discharges of phosphorus into the river, which can lead to a total amount in the river which can lead to formation of blue-green algae blooms in the lower river. All industries should be expected to take a share in reducing the total load, even at some cost to providing for economic well-being, and to efficient use and development of resources.

[254] So even though the 57 kilograms per day that would be contributed by Anchor Products would be equivalent to only about 5 to 6 % of the total phosphorus in the river, and would have only minor effects, it is not to be neglected. As other industries which discharge nutrients into the river are required to reduce the amounts discharged, Anchor Products should also be required to do so. It is our understanding that this was the Regional Council's intent in condition 4(vii) by setting a limit for the first 24 months of exercise of the discharge consent, and reserving power to review the limit after that. By then, the extent of the reductions in the discharges from the major point-source

dischargers of nutrients to the Waikato River⁷⁵ should be known. Anchor Products could expect to have a pro rata reduction imposed on it. That would be consistent with the provisions of the proposed Waikato regional policy statement. However as its total contribution of phosphorus is relatively smaller, it would not provide a suitable case for setting the precedent.

[255] The other feature is that the Regional Council only announced that it would not support the phosphorus limit imposed by Condition 4(vii) of its decision a few weeks before the appeal hearing. That relatively late change of attitude by the relevant regulatory authority gives support to a graduated reduction in the phosphorus limit, rather than requiring a reduction now which may not prove to be consistent with the reductions required of the major point-source dischargers. To avoid any expression of opinion which might affect the outcome of proceedings in which the general reduction may be set after full consideration in the context of one or more major contributors, it is our judgment that the condition should continue to set a limit for at least the first 24 months of exercise of the discharge consent, and reserve power for the limit to be reviewed after that period has elapsed. Nothing in this decision should be read as an indication about what limit might be appropriate after the 24-month period has elapsed, or how it should be expressed. However Anchor Products have clear notice that the phosphorus limit is liable to be reduced after that period, and can prepare to be able to comply with a reduced limit, whether by additional treatment of the wastewater, or by disposal to land, or however.

[256] Accordingly we proceed to make our judgment about whether the resource consents should be granted or refused on the basis that if they are granted, the conditions imposed by the primary consent authorities would be attached to the consents, but Condition 4(vii) attached to Discharge Permit 970032 would be amended to read as follows—

The quarterly average mass load of phosphorus in the final discharge as determined from 24-hour composite samples shall not exceed 57 kilograms per day, nor shall the maximum load exceed 70 kilograms per day.

For the purpose of this condition each quarterly period shall begin on the 1 January, 1 April, 1 July, and 1 October each year.

The limits stated may be reviewed as provided for in condition 21.

68 Resource Management Act 1991, section 5(2)(a).

69 Resource Management Act 1991, section 5(2)(b).

70 Resource Management Act 1991, section 5(2)(c).

71 Resource Management Act 1991, section 6(e).

72 Resource Management Act 1991, section 7(a).

73 Resource Management Act 1991, section 5(2).

74 Resource Management Act 1991, section 7(b) and *Solid Energy v Grey District Council* Environment Court Decision A8/98.

75 Kinleith mill, Hamilton City sewage treatment works, and AFFCO Horotiu meatworks.

[257] In our judgment that condition would enable the dairy community to provide for their economic well-being, and make efficient use and development of resources while preparing to make its contribution to the needs of Maori people, and of kaitiakitanga, and of future generations of all the Waikato community, for a river containing water sufficiently free from nutrients that it is not liable to blue-green algae blooms. It would enable that contribution to be achieved at a rate that is consistent with major dischargers of nutrients to the Waikato River.

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JUDGMENT AND DETERMINATION

[258] We have now to make a judgment whether the resource consents should be granted or refused. The judgment is to be informed by the single purpose of the Resource Management Act set out in section 5, to promote the sustainable management of natural and physical resources. In making our judgment we have regard to the various matters directed by section 104, weighting them, where necessary, depending on the application of the provisions of Part II of the Act⁷⁶.

[259] Of the relevant matters identified under section 104(1), we consider first any actual or potential effects on the environment of allowing the activities. If the resource consents are exercised in compliance with the conditions, there would be no adverse effects on the physical environment. The adverse effect on the relationship of Waikato-Tainui with the river, and on kaitiakitanga, would be recognised, provided for and mitigated in four separate ways. The first is by minimising the amount of water to be taken, and design of the intake structure to meet their cultural needs. The second way is by treatment of the wastewater to be discharged to meet appropriate limits in the conditions, and design of the discharge structure to meet their cultural needs. The third is by provision for early review of the limits of contaminants in the discharge. The fourth way is by acknowledgements by Anchor Products of the deep cultural and spiritual significance of the Waikato River to Waikato Tainui, backed up by undertakings in support of enhancing the quality of water of the river, and about protection of Mangaharakeke Pa.

[260] We accept that those ways in which the cultural needs of the Waikato-Tainui would be recognised and provided for would not extend to avoiding all perception of contaminants flowing into the river, irrespective of physical effects (as described by Mr Solomon in his evidence).

[261] There is a possible alternative for discharging wastewater from the expanded dairy factory and cogeneration plant. Instead of discharging to the structure designed to meet the cultural needs of Waikato-Tainui and then to the Waikato River, it would be possible to discharge to land. That would avoid all perception of contaminants flowing directly into the river, but would have considerable practical difficulties, although they could probably be overcome.

[262] By the relevant planning instruments, the elements of the proposal that are not permitted activities are either controlled activities or discretionary activities, or being unclassified, fall to be considered as discretionary activities. The proposed grade-separated access would be a noncomplying activity. The revised proposal, if carried out in conformity with the amended conditions, would be consistent with the relevant objectives and policies of the relevant instruments, being the proposed regional policy statement and the district plan.

[263] We have applied the relevant directions of sections 6, 7 and 8 of Part II of the Act, and have concluded that the revised proposal, carried out in conformity with the amended conditions, would meet the directions of those provisions of the Act.

[264] We have also examined the conditions imposed by the Regional Council on the various resource consents. If the consents are granted, those conditions, with an amendment to the condition about the amount of phosphorus to be discharged, would be appropriate to attach to the respective consents, and would to the extent practicable avoid, remedy or mitigate any adverse effects of the activities on the environment.

[265] In short, the only matter that would not be fully provided for is the concern of Waikato-Tainui, expressed by Mr Solomon, about the perception of contamination of the river, irrespective of any perceptible physical effect. That could only be avoided by discharge of the wastewater to land, an option which would itself have considerable practical difficulties.

[266] We return to the purpose of the Act as defined, recognising that it is a single purpose, embracing all the elements set out in section 5(2), and that sections 6, 7 and 8 are subordinate and accessory to it. Section 5(2) provides —

In this Act, “sustainable management” means managing the use, development, and protection of

⁷⁶ Cf *Baker Boys v Christchurch City Council* Environment Court Decision C60/98, paragraph 109; and *Judges Bay Residents Association v Auckland Regional Council* Environment Court Decision A72/98, paragraph 443.

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.

[267] We find that the proposed expansion of the dairy factory would represent managing the use, development and protection of the natural and physical resources involved in a way and at a rate which would enable the Waikato dairy community to provide for their economic wellbeing while achieving the goals set out in paragraphs (a), (b) and (c). It would also enable the Waikato-Tainui people to provide for their cultural wellbeing because of the several respects in which the proposal has been designed to meet their cultural needs and the respects in which Anchor Products has given undertakings of substance in response to those cultural needs.

[268] Those respects in which the proposal would recognise and provide for the relationship of the Waikato-Tainui people with the river, and would enable them to provide for their cultural well-being address tangible effects on the river. Although they do not extend to avoiding the perception of contamination of the river, in the way referred to in Mr Solomon's evidence, we have found that the way suggested for avoiding that, by disposing of wastewater to land, has practical difficulties. It is our judgment that because of the community value of the proposed expansion of the dairy factory, and because the cultural interests of the Waikato-Tainui people would be provided for in so many other ways which avoid tangible harm to the river, the perceptions which are not represented by tangible effects do not deserve such weight as to prevail over the proposal and defeat it. We conclude that granting resource consents for the revised proposal, subject to the conditions incorporating the proposed amendment, would promote the sustainable management of the natural and physical resources involved.

269] Accordingly the Environment Court makes the following determinations —

- (a) That the resource consents granted by the District Council and the Regional Council are confirmed, subject to amendments consequential on reduction in the capacity of the proposed cogeneration plant to 45 megawatts, and to replacement of Condition 4(vii) of Discharge Permit 970032 with the following condition—

The quarterly average mass load of phosphorus in the final discharge as determined from 24-hour composite samples shall not exceed 57 kilograms per day, nor shall the maximum load exceed 70

kilograms per day.

For the purpose of this condition each quarterly period shall begin on the 1 January, 1 April, 1 July, and 1 October each year.

The limits stated may be reviewed as provided for in condition 21.

- (b) Save in those respects, Appeal RMA 662/97 is disallowed.
- (c) The question of costs is reserved. If the parties are unable to reach agreement on that question, memoranda may be lodged by 31 August 1998.

DATED at Auckland this 29th day of July 1998.

DFG Sheppard
Environment Judge

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APPENDIX

The resource consents granted following the primary hearings were:

- (a) Consents from **The Waikato District Council** for:

Capacity Expansion Project:

- (i) To construct, use and maintain a milk processing facility and related infrastructure including the storage and use of hazardous substances.
- (ii) To construct and use a grade separated access for the Te Rapa sites.
- (iii) To undertake works on two recorded archaeological sites.
- (iv) To undertake earthworks (including excavation, stock piling, filling and landscaping).
- (v) To construct and use effluent treatment systems within 10m of the property boundary and to erect erosion control structures within 20m of a watercourse.
- (vi) To construct and use temporary dams during constructions.
- (vii) To construct, use and maintain outfall/erosion control structures on the surface of the water.

Cogeneration Plant

- (i) To construct, use and maintain a cogeneration plant and related infrastructure including the storage and use of hazardous substances.
- (ii) To discharge waster water (being cooling tower blow down water, cogeneration plant

waste water, condensate and stormwater within 10m of the property boundary.

- (iii) To construct and use temporary dams during construction.

Electricity Transmission Line

- (i) To construct and operate a 110 kv electricity transmission line in the road reserves of State Highway 1, Horotiu Bridge Road, River Road and Lake Road.

- (b) Consents from **The Waikato Regional Council**

Capacity Expansion Project

Water Permits

- (i) (970027) to take and use up to 32,000m³ of water per day from the Waikato River for dairy processing and related activities on the Te Rapa dairy factory site.
- (ii) (970028) to dam and divert water within the site land-based wastewater treatment system (including, dairy factory wastewater, cooling water and stormwater).
- (iii) (970029) to divert and take and use groundwater to dewater the site for construction purposes.
- (iv) (970030) to take and use water from the Waikato River for construction purposes.
- (v) (970031) to temporarily divert part of the Waikato River within its margins for the purposes of constructing outfall/erosion control structures.

Discharge Permits

- (i) (970032) to discharge up to 31,000 m³ per day of dairy factory wastewater and cooling water and 3360 m³ per day of stormwater to land in circumstances where it may enter groundwater and then to the Waikato River.
- (ii) (970034) to discharge water taken from the ground for construction dewatering purposes, to land in circumstances where it may enter groundwater.
- (iii) (970035) to discharge stormwater to an unnamed tributary of the Waikato River on the western side of State Highway 1.
- (iv) (970036) to discharge stormwater to the Waikato River from the Te Rapa village area.
- (v) 970037) to discharge water associated with construction activities to the Waikato River.
- (vi) (970038) to discharge intake screen wash water to the Waikato River from the water intake structure.

- (vii)(970039) to discharge contaminants into the air from dairy processing and related activities including electricity and steam production for the milk processing facility.

Land Use Consents

- (i) (970040) to construct (including excavation, metal extraction, earthworks and other land and vegetation disturbance of the bed and deposition of substances), operate, maintain and upgrade outfall/erosion control structures in, on, under and over the bed of the Waikato River.
- (ii) (970041) to excavate and carry out metal extraction, earthworks and land and vegetation disturbance including activities less than 5m from the bed of the Waikato River.

Cogeneration Project

Water Permits

- (i) (970042) to take and use out of the daily site water limit of 33,000m³ up to 10,000m³ of water per day from the Waikato River for a cogeneration plant and related activities. (Note the reductions referred to above).
- (ii) (970043) to dam and divert water within the site land-based wastewater treatment system (including cooling water, condensate and stormwater).
- (iii) (970044) to divert and take groundwater to dewater the site for construction purposes.

Discharge Permits

- (i) (970045) to discharge within the daily site limit of 31,000m³ up to 8,000m³ per day of cooling tower blow down water, cogeneration plant wastewater, condensate and stormwater to land in circumstances where it may enter groundwater and thence to two unnamed tributaries of the Waikato River. (Note the reductions referred to above).
- (ii) (970047) to discharge water taken from the ground for construction dewatering purposes to land in circumstances where it may enter groundwater.
- (iii) (970048) to discharge contaminants into the air from the cogeneration plant and related activities.

Land use Consents

- (i) (970049) to convey electricity transmission lines over the Waikato River in the vicinity of the Horotiu Bridge.

DECISION NO A 04 /2000

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of an appeal under section 120 of the Act

BETWEEN **CONTACT ENERGY LIMITED**
(Appeal RMA 463/98)

Appellant

AND **THE WAIKATO REGIONAL COUNCIL**
and **THE TAUPO DISTRICT COUNCIL**
Respondents

BEFORE THE ENVIRONMENT COURT

Environment Judge D F G Sheppard
Environment Commissioner P A Catchpole
Environment Commissioner F Easdale

HEARING at Taupo on 9, 10, 11, 12, 13, 16, 17, 18, 19, and 20 August 1999, and 26, 27, 28 and 29 October 1999

APPEARANCES:

T P Robinson and S Daysh for the appellant
D J Taylor for the respondents
AFS Vane for the Taupo District Council as submitter, and for P A Henry
D G Kember for Taupo Hot Springs Limited and Akinra Holdings Limited
J S Auld for the Tauhara Middle Trusts
A Martin for the Minister of Conservation and the Tongariro Taupo Conservation Board (leave to withdraw)
A J Waters in person

INTERIM DECISION

INTRODUCTION

[1] Contact Energy Limited (Contact) has appealed to the Environment Court under section 120 of the Resource Management Act 1991 against decisions by the Waikato Regional Council and the Taupo District Council refusing resource consents needed for a proposed geothermal power station near Taupo. The original resource consent applications sought taking from the Tauhara Geothermal Field 57,000 tonnes per day of geothermal fluid, which would have enabled a power station with a capacity of 50 megawatts¹ and an associated binary plant of 20 megawatts.

[2] The applications were opposed by a number of submitters, including the Taupo District Council.² The District Council's participation as a consent authority in the joint committee with the Regional Council for the primary hearing of the applications was therefore by an independent commissioner.

[3] After having lodged this appeal against refusal of the resource consents, Contact reviewed its proposal and notified the parties of a reduction in the scale of the project. It was the modified proposal that was the subject of the Environment Court hearing on appeal.

[4] The Taupo District Council, in its capacity as submitter, took the principal part at the appeal hearing in opposition to the proposal. The primary consent authorities (the Regional Council and the District Council) also took an active part. Other opponents who participated in the hearing were the Tauhara Middle Trusts (which hold over 1635 hectares of land over part of the Tauhara Geothermal Field in trust for 2400 members of Tauhara hapu); Taupo Hot Springs Limited and Akinra Holdings Limited (which have interests in businesses that use geothermal energy derived from the Waipahihi Springs in the southern part of the Tauhara geothermal field), Mr P A Henry (a resident of Taupo who has interests in several businesses there), and Mr A J Waters (a retired roading engineer who has lived at Taupo since 1994).

[5] In this decision we distinguish the roles of the Taupo District Council as one of the primary consent authorities whose decision is challenged and as a submitter in opposition to the grant of the resource consents. We refer to the primary consent authorities together as 'the respondents'; and to the Taupo District Council in its role as submitter in opposition as 'the District Council.'

THE PROPOSAL

[6] The modified proposal was to take up to 20,000 tonnes per day of geothermal fluid, of which up to 14,400 tonnes per day would be used to extract 23 terajoules per day of heat and energy for a proposed power station with a capacity of 15 megawatts.

[7] The site for the power station is on the southern side of Centennial Drive, Taupo, close to the intersection with Rakaunui Road. Geothermal fluid would be taken from two existing production wells in the vicinity,³ and from other new wells as required. Geothermal fluid would also be made available to other industries in the Centennial Drive and Crown Road areas of Taupo.

[8] Up to 10,000 tonnes per day of water would also be taken from the Waikato River, at a site near the District Council's water supply intake.

[9] Up to 20,000 tonnes per day of separated geothermal water would be reinjected to the ground at up to three sites. A preferred reinjection well site lies to the west of the production area, on farm-land to the east of a scenic reserve adjoining the Waikato River. An alternative reinjection site lies to the east of the production area.

[10] The key resource consents needed are those for taking the geothermal fluid, for discharging into reinjection wells, and for land-use consent for the power station. Other resource consents are needed for discharge of contaminants to the air and into land, handling of stormwater, taking of river water, operating and maintenance of existing geothermal wells, structures over beds of streams, discharges of contaminants to land and water, and disturbance of beds of rivers and streams, and land-use consents for excavation earthworks and vegetation disturbance near beds of rivers and streams.

THE LAW

Resource Management Act

[11] The appeal, the resource consent applications, and the Court's jurisdiction all derive from the Resource Management Act, which provides the framework for our decision. The express purpose of that Act is stated in section 5:

- 5. Purpose** – (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

¹ In this decision, unless otherwise stated, values expressed in megawatts refer to megawatts electrical.

² The District Council made no submission on the land-use consent applications.

³ Identified as TH1 and TH2.

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.

[12] That section is the first provision of Part II of the Act. The following are subsequent provisions of that part which may be material in this case–

6. Matters of national importance – 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 following matters of national importance:

- ...
- (e) The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga.

7. Other matters– 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:
- ...
- (b) The efficient use and development of natural and physical resources;
- (c) The maintenance and enhancement of amenity values;
- (d) Intrinsic values of ecosystems:
- ...
- (f) Maintenance and enhancement of the quality of the environment;
- (g) Any finite characteristics of natural and physical resources:
- ...

[13] Section 88 provides for applications for resource consent. We quote relevant provisions of that section ⁴–

88. Making an application – (1) Any person may, in the manner set out in subsection (4), apply to the relevant local authority for a resource consent.

- (2) ...
- (3) An application may be made for a resource consent –
 - (a) For a controlled activity or a discretionary activity or a non-complying activity, under a plan or proposed plan; or
 - (b) Where there is no plan or proposed plan, for an activity for which a consent is required under Part III.
- (4) Subject to subsection (5), an application for a resource consent shall be in the prescribed form and shall include –
 - (a) A description of the activity for which consent is sought, and its location; and
 - (b) An assessment of any actual or potential effects that the activity may have on the environment, and the ways in which any adverse effects may be mitigated; and
 - (c) Any information required to be included in the application by a plan or regulations; and
 - (d) A statement specifying all other resource consents that the applicant may require from any consent authority in respect of the activity to which the application relates, and whether or not the applicant has applied for such consents; and
 - (e) ...
- (5) The assessment required under subsection (4)(b) in an application for a resource consent relating to a controlled activity, or a discretionary activity over which the local authority has restricted the exercise of its discretion, shall only address those matters specified in a plan or proposed plan over which the local authority has retained control, or to which the local authority has restricted the right to exercise its discretion, as the case may be.
- (6) Any assessment required under subsection (4)(b) or subsection (5) –
 - (a) Shall be in such detail as corresponds with the scale and significance of the actual or potential effects that the activity may have on the environment; and
 - (b) Shall be prepared in accordance with the Fourth Schedule.
- (7) ...

[14] Applications for resource consent have to be considered and decided by a consent authority under sections 104 and 105. We quote relevant provisions of those sections⁵–

104. Matters to be considered - (1) Subject to Part II, when considering an application for a resource consent and any submissions received, the consent authority shall have regard to –

⁴ As amended by section 44 of the Resource Management Amendment Act 1993.

⁵ Section 104 as substituted by section 54 of the Resource Management Amendment Act 1993; section 105 as amended by section 55 of the Resource Management Amendment Act 1993. Amendments made to those sections by sections 21 and 22 respectively of the Resource Management Amendment Act 1997 have not been incorporated in these quotations, because by section 78(1) of that Amendment Act, the resource consent application has to be decided as if that Act had not been passed, the primary hearing having commenced on 29 September 1997, before the commencement of the Amendment Act on 17 December 1997.

- (a) Any actual and potential effects on the environment of allowing the activity; and
- (b) ...
- (c) Any relevant national policy statement, New Zealand coastal policy statement, regional policy statement, and proposed regional policy statement; and
- (d) Any relevant objectives, policies, rules, or other provisions of a plan or proposed plan; and
- (e) Any relevant district plan or proposed district plan, where the application is made in accordance with a regional plan; and
- (f) Any relevant regional plan or proposed regional plan, where the application is made in accordance with a district plan; and
- ...
- (i) Any other matters the consent authority considers relevant and reasonably necessary to determine the application.
- ...
- (3) Where an application is for a discharge permit or coastal permit to do something that would otherwise contravene section 15 (relating to discharge of contaminants), the consent authority shall, in having regard to the actual and potential effects on the environment of allowing the activity, have regard to –
 - (a) The nature of the discharge and the sensitivity of the proposed receiving environment to adverse effects and the applicant’s reasons for making the proposed choice; and
 - (b) Any possible alternative methods of discharge, including discharge into any other receiving environment.
- ...

105. Decisions on applications – (1) Subject to subsections (2) and (3), after considering an application for–

- (a) A resource consent for a controlled activity, a consent authority shall grant the consent, but may impose conditions under section 108 in respect of those matters over which it has reserved control:
- (b) A resource consent for a discretionary activity, a consent authority may grant or refuse the consent, and (if granted) may impose conditions under section 108:

Provided that, where the consent authority has restricted the exercise of its discretion, consent may only be refused or conditions may only be imposed in respect of those matters specified in the plan or proposed plan to which the consent authority has restricted the exercise of its discretion:

- (c) A resource consent (other than for a controlled activity or a discretionary activity or a restricted coastal activity), a consent authority may grant or refuse the consent, and (if granted) may impose conditions under section 108.
- (2) A consent authority shall not grant a resource consent–

- (a) ...
- (b) For a non complying activity unless, having considered the matters set out in section 104, it is satisfied that –
 - (i) Any effect on the environment (other than any effect to which subsection (2) of that section applies) will be minor; or
 - (ii) Granting the consent will not be contrary to the objectives and policies of the plan or proposed plan; or
- (c) For a prohibited activity; or
- (d) For any activity described as a prohibited activity by a rule in a proposed plan once the time for making or lodging submissions or appeals against the proposed rule has expired and –
 - (i) No such submissions or appeals have been made or lodged; or
 - (ii) All such submissions and appeals have been withdrawn or dismissed...
- (3) For the avoidance of doubt, when granting a resource consent for a controlled activity under subsection (1)(a), the matters described in section 104 shall be relevant only in determining the conditions, if any, to be included in the consent.
- (4) After considering an application for a resource consent, a consent authority may grant the consent on the basis that the activity is a controlled or discretionary or non-complying activity, whether or not –
 - (a) The application was expressed to be for an activity of that kind; or
 - (b) That activity was a controlled or discretionary or non-complying activity, as the case may be, on the date the application was made.
- ...

[15] Because section 104(1)(a) directs a consent authority to have regard to any actual and potential effects on the environment of allowing the activity, we quote section 3, which describes the scope of the term “effect”,⁶ and we also quote the definition of the term “environment” in section 2(1).

3. Meaning of “effect”– In this Act, unless the context otherwise requires, the term “effect”, includes –

- (a) Any positive or adverse effect; and
- (b) Any temporary or permanent effect; and
- (c) Any past, present, or future effect; and
- (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.

2. Interpretation – (1) In this Act, unless the context otherwise requires, –

...
“Environment” includes–

⁶ Section 3 as amended by section 3 of the Resource Management Amendment Act 1993.

- (a) Ecosystems and their constituent parts, including people and communities; and
- (b) All natural and physical resources; and
- (c) Amenity values; and
- (d) The social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) of this definition or which are affected by those matters:

Identification of environment affected

[16] An issue arose about identifying, for the purpose of section 104(1)(a), the environment that would be affected by allowing the activity.

[17] Counsel for Contact, Mr Robinson, submitted that for this purpose the environment is that which currently exists. He contended that this includes the effects on it of past abstraction from the geothermal system, and effects of the exercise of consents currently in force. He also contended that this would include future effects of those activities, such as further subsidence resulting from past abstraction. Counsel sought to distinguish those effects from effects (such as subsidence) of future activities which, he accepted, should not be taken into account in identifying the environment that would be affected by allowing the proposed activity. Mr Robinson observed that this interpretation would not constrain the Regional Council's freedom of decision on future applications to renew the consents which expire in 2001 for abstraction of geothermal fluid for the Wairakei Power Station.

[18] Counsel for the District Council, Mr Vane, submitted that historic, existing and potential future effects at Taupo of exercise of consents at Wairakei do not provide an appropriate baseline for assessing the effects of the proposal. He presented four main arguments in support of that proposition. The first was that it cannot be presumed that the abstraction of geothermal fluid for the Wairakei Power Station will continue to be authorised after the current consents expire. The second ground was that the adverse effects on the Taupo community of existing abstraction pursuant to the rights expiring in 2001 have never been the subject of processes under the Resource Management Act 1991, the Town and Country Planning Act 1977 or the Water and Soil Conservation Act 1967. Thirdly, Mr Vane submitted that it has yet to be determined how the Wairakei-Tauhara thermal system should be managed to internalise adverse effects from abstraction. Finally, he submitted that granting consent to the present application would close off use of the Tauhara area for reinjection of waste fluids from Wairakei so as to avoid adverse effects at Taupo arising from the Wairakei operation.

[19] Counsel for Taupo Hot Springs Limited and Akinra Holdings Limited, Mr Kember, submitted that in

understanding the existing environment for assessing effects of a proposal, a distinction should be drawn between land-use consents and water and geothermal consents. He compared existing-use rights in relation to buildings, which are perpetual, and rights for taking of geothermal energy which, like the taking of water, have a defined term, and are not necessarily renewed. Counsel contended that if the effects of extraction of geothermal energy are progressive, it is legitimate to consider what the environment might look like if the existing taking rights are not renewed on expiry and the progressive effects stabilise; alternatively to treat the effects of the supervening proposal as exacerbating.

[20] Mr Kember contended that it could not have been intended that an applicant would be able to ratchet up its cumulative impact by appealing to the situation created by its existing activity as the status quo against which the effects of its incremental activity are to be measured. So he submitted that where the activity is an ongoing process and the effects of the applicant's own existing activity are continuing or progressive, the 'existing environment' must be read as the environment that might exist if the existing taking activity were discontinued.

[21] Contact did not contend that the environment should be defined as including future effects of future exercise of existing or future consents. Its case was confined to two classes of effect. The first class is the effects of what has already past, that is, the effects of abstractions from the geothermal system that have already been made. Recognising that it may take a lengthy period for the full effects of abstraction to become evident (so that the effects of past abstractions may continue into, and change in the future), this class includes treating as part of the future environment those continuing and changing effects of past abstractions. The second class is the effects of future abstractions that have already been authorised. Mr Robinson expressly disclaimed taking into account effects of future renewals of past or existing consents, or of other consents that might in future be granted, whether in place of existing consents or otherwise.

[22] We accept Mr Vane's submission that it should not be presumed that the present abstractions will continue to be authorised after the current consents expire. However since Contact expressly disavowed taking into account the effects of future consents, Mr Vane's point does not bear on the issue.

[23] For the present purpose we accept that the District Council was also correct in submitting that the adverse effects on the Taupo community of past and present abstraction under the consents which expire in 2001 were never the subject of public participation processes under the Acts listed. Even so, that abstraction was authorised

by law,⁷ and the abstraction is continuing pursuant to a deemed water permit under the Resource Management Act.⁸ If the enactments by which the abstraction was authorised did not provide for public participation processes, that does not detract from the facts that the abstraction was and is lawfully being carried on, and has already affected, and is likely to continue to affect, the environment. We do not accept that the absence of public participation processes justifies ignoring those effects in defining the actual and potential effects on the environment of allowing the proposed abstraction.

[24] The District Council's third point was that a method of managing the geothermal system so as to internalise adverse effects of abstraction has not yet been determined. We do not accept that this point has any bearing on identifying the environment for the purpose of considering the effects on it of allowing the activity the subject of these resource consent applications.

[25] The District Council's fourth point related to a hypothetical possibility of reinjecting in the Tauhara area waste geothermal fluid from the Wairakei Power Station with a view to reducing further ground subsidence effects of abstraction of geothermal fluids from the system. The Council contended that granting consent to the proposed abstraction from the Tauhara area would preclude that possibility from being implemented. To the extent that this is an argument against granting the consents sought, we address it elsewhere in this decision. However the possibility of reducing further subsidence by reinjection does not bear on the definition of the environment for the purpose of having regard to the effects of the current proposal.

[26] We now consider Mr Kember's submission that an applicant should not be able to ratchet up the cumulative effect of its activities, so that the environment should be treated as if the applicant's existing abstractions are discontinued. That submission places significance on the fact that it is the present applicant, Contact, that also operates the Wairakei Power Station for which the major abstractions of geothermal fluid from the Wairakei/Tauhara geothermal system are taken. For this purpose we accept the assumption that it is abstractions for that power station which are the main cause of the subsidence and other effects evident to the north and east of Taupo. However

the Wairakei Power Station has been operating since 1958, but it has only been operated by Contact since 1996. At least a considerable amount of the effects alluded to would have been caused by abstractions prior to Contact acquiring the station. In any event we hold that for the present purpose the identity of the applicant with the previous abstractions is not relevant. The purpose is to define the environment so as to gauge the effects on it of allowing the proposed activity. Whether features of that environment are the result of activities by the applicant, or by other actors, or by natural processes, has no bearing on defining the environment that may be affected by allowing the proposed activity

[27] We also accept Mr Robinson's contention that it would not make sense to take a historical state of the environment as a reference point, and disregard later changes that have been made to the environment and which are irreversible. For those reasons we do not accept Mr Kember's submission that the environment should be treated as if existing lawful abstractions were discontinued. That would not represent the reality, and would lead to irrational artificiality in the process called for by section 104(1)(a) of the Act.

[28] We consider that decision of the question should be based on understanding what is meant by the term "environment" in that provision: that is, a question of interpretation of the provision. We have already quoted the meanings ascribed to the terms "effect" and "environment" in sections 3 and 2 respectively.

[29] Counsel referred us to a series of recent judgments of the superior Courts dealing with the process of identifying effects on the environment for the purpose of deciding (under section 94(2)(a) of the Act) whether a resource consent application need not be notified. In the order in which the judgments were given, the cases are *Aley v North Shore City Council*,⁹ *Bayley v Manukau City Council*,¹⁰ *McAlpine v North Shore City Council*,¹¹ and *Lowe v Dunedin City Council*.¹²

[30] *Aley* concerned an application for land-use consent. A key question in that case was what is relevant when considering the 'environment,' and whether that expression can include what may be built as of right in terms of the district plan. Justice Salmon held that in context the phrase

⁷ *Re Geotherm Energy* [1989] 2 NZLR 22 (CA).

⁸ The authority for the major extraction of geothermal fluid for the Wairakei Power Station (Consent 693292) is an existing authority under section 21(2) of the Water and Soil Conservation Act 1967 which became a deemed water permit under the Resource Management Act 1991, section 386(1)(b).

⁹ [1998] NZRMA 361 (High Court).

¹⁰ [1998] NZRMA 396 (High Court); [1998] NZRMA 513 (Court of Appeal).

¹¹ High Court, Auckland, M1583/98; 18/11/98, Randerson J.

¹² High Court, Dunedin, CP51/98; 25/3/99, Panckhurst J.

“effects on the environment” must refer to the existing environment. Having quoted the definitions in the Act of “environment” and of “amenity values,” the learned Judge said¹³ –

Just because a plan allows the construction of buildings to a certain maximum height and bulk does not mean that advantage will necessarily be taken of those rights. If the nature of a proposal requires a discretionary activity consent application to be made an overall exercise of discretion under sections 104 and 105 an application of the principles in Locke and Rudolph Steiner could mean that full advantage might not be able to be taken of the maximum provisions set by the rules.

On this basis a consideration of the effect on the environment of the activity for which consent is sought requires an assessment to be made of the effects of the principles on the environment as it exists. The “activity for which consent is sought” is in the present instance the building that is proposed not just those aspects of the development which have had the effect of requiring a discretionary activity consent.

[31] In delivering the judgment of the Court of Appeal in *Bayley*, Justice Blanchard quoted those passages from Justice Salmon’s judgment in *Aley*, and said¹⁴ –

We would add to the penultimate sentence “or as it would exist if the land were used in a manner permitted as of right by the plan”.

[32] In his judgment in *McAlpine*, Justice Randerson said of that passage in the Court of Appeal’s judgment in *Bayley*¹⁵ –

I must confess to some difficulty in reconciling these additional words with Salmon J’s comments in Aley which proceed on the basis that, in the case of an unrestricted discretionary consent application, the whole development is to be considered and not just those aspects of the proposal which require consent... The addition of the words suggested by the Court of Appeal appears to qualify Salmon J’s conclusions to the point of negating them if they are intended to apply to unrestricted discretionary consent applications. The Court of Appeal’s judgment at pp 522-523 suggests that the additional words may have been intended to apply only to restricted discretionary consent applications. Certainly it was in that specific context that the Court of Appeal’s remarks were made.

[33] However in *Lowe*, which concerned a noncomplying activity, Justice Panckhurst described the process to be followed in this language¹⁶ –

As recognised in Bayley it is essential to begin further a consideration of what was lawfully being done on the site prior to the extensions, or what could be done there as of right.

[34] In *King v Auckland City Council*,¹⁷ Justice Randerson remarked that in principle the Court of Appeal’s approach is to apply to both unrestricted and restricted discretionary activities, and observed that there may well be practical difficulties in applying *Bayley* in other cases.

[35] We have to consider how those authorities guide the interpretation of the term “environment” in section 104(1)(a) in relation to the application for consent to abstract geothermal fluid. That application is not classified as a restricted discretionary activity. However there is no suggestion that in identifying the environment there are any activities permitted as of right by a plan that should be taken into account. Rather the issue is whether activities authorised by the deemed water permit should be taken into account. That permit is currently being exercised, so we do not need to consider the application to this case of the remark by Justice Salmon that the existence of permitted activity rights under a plan does not mean that advantage will necessarily be taken of those rights. Therefore we do not need to attempt to resolve the uncertainty about the scope of the Court of Appeal’s remarks that was identified by Justice Randerson, or to overcome the difficulty in applying them.

[36] Mr Robinson cited a land-use decision in which the Environment Court had followed the approach endorsed in *Aley*.¹⁸ He also referred to *Arrigato Investments v Rodney District Council*¹⁹, a decision about a noncomplying subdivision in which the Environment Court had held that for the purpose of deciding whether the effects of the activity were minor, the effects are to be assessed against the background of the entire situation at the time of the application environment.²⁰ The Court said –

The ‘entire situation’ includes the whole of the circumstances and includes a consideration of the evidence having regard not only to the existing environment but also to the credible or likely variations to that existing environment in the light of existing resource consents and/or evidence relating to a development as of right.

¹³ [1998] NZRMA 377.

¹⁴ [1998] NZRMA 522.

¹⁵ Page 9.

¹⁶ Page 17. (It is not evident from the Panckhurst J’s judgment in *Lowe* that Randerson J’s judgment in *McAlpine* had been referred to Panckhurst J.)

¹⁷ High Court Auckland CP519/99; 1 December 1999, Randerson J.

¹⁸ *O’Brien v Upper Hutt City Council* Environment Court Decision W91/99.

¹⁹ Environment Court Decision A115/99.

²⁰ Citing *Lowe v Dunedin City Council* (High Court, Dunedin CP51/98; 25/3/99, Panckhurst J).

*...the words ‘the environment as it exists’ must as a matter of common sense include any likely changes to that environment in the immediate or near future. Whether or not any such changes are likely us a matter to be determined from the evidence. Clearly hypothetical or fanciful activities, as opposed to credible activities based on the evidence, should not be considered.*²¹

[37] Mr Robinson also cited decisions on appeals about resource consents within regional councils’ jurisdictions where the Environment Court had assessed the effects on the environment as it existed.²² In addition, counsel referred to a 1991 decision of the Planning Tribunal on an appeal under the Water and Soil Conservation Act 1967 about taking geothermal fluid from the Wairakei reservoir.²³ Criticism had been made of the use of a mathematical model of the system which assumed continued taking from the reservoir for the Wairakei Power Station, as there was a question whether some of the existing abstraction was authorised. The Tribunal recorded that it would be inappropriate to express any view about that, and said²⁴ –

... the existence of the power station and the established use of geothermal fluid from Te Mihi to supplement that from the borefields so as to produce electricity to its capacity, provide a sufficient basis for foreseeing continued future taking of sufficient fluid to generate 157MWe at the Wairakei Power Station. We repeat, that is not to say that the rights to do so should be granted. But it is to say that a grant is capable of being foreseen. It should not be ignored for the purpose of assessing the effect of the present application.

[38] For the present purpose we have reached an understanding of the term “environment” in section 104(1)(a) that would be consistent with the definition of that term in section 2, with the authorities of the superior Courts, with the way in which they have been applied by the Environment Court, and with the approach taken by the Planning Tribunal in the case last mentioned. We refer to the environment on which the actual and potential effects of allowing the proposed abstraction are to be considered. We hold that consideration is to be given to the effects on the environment as it actually exists now, including the effects of past abstraction of geothermal fluid from the system, whether by Contact or anyone else. In considering the effects in the future of allowing the proposed abstraction, we hold that we have to consider the environment as it is likely to be from time to time, taking

into account further effects of past abstraction, and effects of further abstraction authorised by existing consents held by Contact or by others, including the deemed water permit which is to expire in 2001, and the water permit to abstract fluid at Te Mihi that is to expire in 2013.

[39] In short, we largely accept the submissions of Contact on this point, and we do not accept the submissions of the District Council, Taupo Hot Springs Limited and Akinra Holdings Limited. The interpretation we have adopted addresses the distinction, referred to by Mr Kember, between land-use consents (which are perpetual), and water permits (which are for fixed terms). As in the 1991 Planning Tribunal decision cited by Mr Robinson, we intend no implication about the decision of future applications for abstraction from the geothermal system,

[40] We accept that in practice there may be difficulty in distinguishing future effects on the environment that are caused by abstractions which are part of the baseline environment, from those which would be caused by the proposed abstractions that are the subject of the resource consent application now before the Court. However the difficulty of making the findings required should not affect the correct interpretation of the statutory provision.

Standard of proof

[41] The District Council submitted that to grant the consents, the Court must have a high degree of assurance and certainty about the extent, location and probability of adverse effects and that the effects can and will be avoided or remedied, or very substantially mitigated. The respondents contended that the applicant had not produced the compelling evidence required to satisfy the Court that the potential impact of the effects will not occur. Counsel for the Tauhara Middle Trusts submitted that because there is not enough detailed scientific knowledge about the southern part of the Tauhara Geothermal Field to be able to predict its performance as a result of the drawdown of fluid from the northern part of the field, a very conservative approach is called for.

[42] Those submissions, and the response to them on behalf of Contact, were said to have to do with the standard of proof to be applied by the Court in deciding this appeal. Having considered the submissions on this topic, we have concluded that they do not relate to the standard of proof of facts on which findings have to be made. Rather, we

²¹ Paragraphs 91 and 92, page 50.

²² *Auckland City Council v Auckland Regional Council* Environment Court Decision A28/99; and *Kaikaiawaro Fishing Co v Marlborough District Council* Environment Court Decision W84/99.

²³ *Geotherm Energy v Waikato Regional Council* Planning Tribunal Decision A58/91.

²⁴ Page 32, last paragraph.

consider that they are arguments relevant to the exercise of the discretionary judgment under section 105(1) to grant or refuse the consents sought. We will address those submissions in that context, later in this decision. On the question of standard of proof as such, we adopt the submission of counsel for the respondents, Mr Taylor, that in these proceedings there is no burden of proof on any party, only an obligation on a party who asserts a fact to present evidence in support of it, and the standard of proof required is on the balance of probabilities, and should reflect the gravity of the situation.²⁵

RELEVANT PLANNING INSTRUMENTS

Waikato regional policy statement

[43] By section 104(1)(c), the consent authority is to have regard to any relevant regional policy statement or proposed regional policy statement. The relevant proposed regional policy statement is that for the Waikato region. At the time of the appeal hearing, there was one reference about the content of the proposed regional policy statement outstanding. Since then, that reference has been withdrawn, and the instrument can be regarded as operative.

[44] The policy statement refers to two classes of geothermal systems: development systems and protection systems. However it does not classify individual geothermal fields— that is left to the regional plan. The Wairakei-Tauhara geothermal system is classified in the proposed regional plan as a development system.²⁶

[45] The regional policy statement contains this relevant objective and policy²⁷ –

The variety of characteristics of the regional geothermal resource maintained. [sic]

...

Policy 4: Allow use and development of Development Geothermal Systems while avoiding, remedying or mitigating effects on the characteristics of the regional geothermal resource.

[46] Mr M W Brockelsby, who is responsible for managing the Regional Council's regulatory functions in relation to geothermal operations, gave the opinion in evidence that the proposal is not consistent with Policy 4 in that there is insufficient assurance that the adverse effects of the proposal would be adequately avoided, remedied or mitigated. In cross-examination the witness explained that this view was premised on there being insufficient certainty

about the level of effects. He agreed that if the Court concluded that his concerns about uncertainty in that regard were unfounded, it would follow that the proposal is consistent with the regional policy statement.

[47] The policy referred to by Mr Brockelsby seeks to avoid, remedy or mitigate effects *on the characteristics of the regional geothermal resource*. At the hearing of this appeal the opponents made much of claimed adverse effects on the environment of allowing the activities proposed. However no party or witness suggested that the modified proposal (for abstracting up to 20,000 tonnes per day of geothermal fluid) would have any effects on the variety of characteristics of the regional geothermal resource.

[48] The regional policy statement also promotes the concept of a 'single tapper' for development fields on the basis that sustainable management is promoted by unified management that will optimise use of the resource. Mr Brockelsby conceded that it would be difficult to achieve this policy in respect of the Wairakei-Tauhara system, (because at the time of the hearing Mercury Geotherm held consents to abstract 11,800 tonnes per day of fluid from it for the McLachlan Power Station at Poihipi Road). However the witness conceded that Contact is in an advantageous position in this regard, as it manages the vast majority of the reservoir use of the system. In cross-examination he agreed that in terms of the single tapper policy, further development by Contact is at least not inconsistent with that policy.

[49] The regional policy statement also contains objectives and policies relevant to downstream uses of, and recovery of resources from, waste geothermal water, reduction of biodiversity (which Mr Brockelsby considered could result from induced changes to surface geothermal features), and efficient use of resources to produce energy.

[50] Mr M B Chrisp, an environmental planning consultant, deposed that because of the primacy of regional policy statements in the hierarchy of planning instruments under the Act, considerable weight should be placed on its provisions. That primacy derives from provisions that regional plans and district plans are not to be inconsistent with the relevant regional policy statement.²⁸

[51] The witness concluded that apart from the taking and discharging of geothermal fluid, all other aspects of the proposal are reasonably benign in terms of environmental effects and would not be inconsistent with the regional policy statement.

²⁵ *Trans Power v Rodney District Council* Planning Tribunal Decision A85/94.

²⁶ Proposed *Waikato Regional Plan*, Method 7.1.3.1.

²⁷ Section 3.7.2

²⁸ Resource Management Act 1991, sections 67(2)(c) and 75(2)(c)(i).

[52] In respect of the single tapper policy, this witness deposed that due to the combination of the legally authorised use and development of the deep geothermal resource for energy production by Contact and its predecessors, and its access to land overlying the most productive sector of the Tauhara part of the system, that policy can only effectively be exercised by confirming Contact as the co-ordinating party.

[53] Mr Chrisp's opinion was that the policy framework of the regional policy statement—

sets a clear resource management mandate for the continued use and development of defined development geothermal systems within the Waikato region, such as the Wairakei-Tauhara Geothermal System

[54] That opinion was not challenged and we accept it and find that the proposal is consistent with that instrument.

Transitional Waikato regional plan

[55] By section 104(1)(d) the consent authority is to have regard to any relevant objectives, policies, rules, or other provisions of a plan, a term which includes the transitional Waikato regional plan. This instrument comprises a collection of rules prepared under legislation repealed by the Resource Management Act 1991. The provisions that are relevant are general authorisations under the Water and Soil Conservation Act 1967 for taking and discharging water and contaminants. Because they authorise only relatively small quantities, resource consents are required for the abstractions and discharges associated with the current proposal. The resource consents are innominate or unclassified, and are to be considered as if discretionary activities.²⁹

Proposed Waikato regional plan

[56] The detailed methods and rules to give effect to the objectives and policies of the regional policy statement are in a proposed regional plan, which is at an early stage in its development. Over 500 submissions related to the geothermal section of the proposed plan, and decisions on submissions have not yet been issued.

Classification of activities

[57] The resource consent applications were made by Contact in September 1996, and the primary hearing of them started in September 1997. The primary decision was given in April 1998, and Contact's appeal to the

Environment Court was lodged in the following month. The Regional Council notified the proposed regional plan in September 1998. The question therefore arises whether the proposed regional plan is relevant for the classification of activities of the kinds that the proposed regional plan would control.

[58] Contact submitted that it is, by reference to the Resource Management Amendment Act 1997. Section 88A of that Act provides that where classification of an activity is altered after a resource consent application was made, as a result of notification of a proposed plan, the application is to be processed and completed as an application for the type of activity specified in the plan or proposed plan existing at the time the application was made. However section 78 of that Amendment Act provides that where a resource consent application had reached the stage of a hearing having commenced, the principal Act continues to apply as if the Amendment Act had not been enacted. The Amendment Act commenced on 17 December 1997, after the primary hearing of the application had commenced. Accordingly Contact maintained that section 88A is not applicable, and that the Court should apply the proposed regional plan to determine the status of the regional resource consent applications under appeal.

[59] That was not contested by any of the other parties. However Mr Brockelsby remarked that the rules of the proposed plan as notified (by which certain activities would be permitted activities) have been "submitted against", and the submissions have not yet been decided. He understood the effect of section 19(1) of the Act to be that those activities are to be considered as requiring resource consent under sections 13, 14 and 15 as innominate activities.

[60] Section 19(1)³⁰ provides—

19. Changes to plans which will allow activities

– (1) Where—

- (a) A new rule, or a change to a rule, has been publicly notified and will allow an activity that would otherwise not be allowed unless a resource consent was obtained; and
- (b) The time for making or lodging submissions or appeals against the new rule or change has expired and –
 - (i) No such submissions or appeals have been made or lodged; or
 - (ii) All such submissions have been withdrawn or rejected and all such appeals have been withdrawn or dismissed –

then, notwithstanding any other provision of this Act, the activity may be undertaken in accordance with the new rule or change as if the new rule or

²⁹ *Te Aroha Air Quality Protection Appeal Group v Waikato Regional Council (No 2)* (1993) 2 NZRMA 574; *Tutton Sienko & Hill v Canterbury Regional Council Planning Tribunal Decision W100/95*.

³⁰ As amended by section 5(1) of the Resource Management Amendment Act 1996.

change had become operative and the previous rule were inoperative.

[61] We do not accept that this subsection has the effect described by Mr Brockelsby. In paragraphs (a) and (b) the subsection describes two cases. Subparagraphs (i) and (ii) of paragraph (b) are alternative conditions of the case described in paragraph (b). Because the word “and” appears at the end of paragraph (a), it is only where the cases described in both paragraphs are applicable that the operative part of the subsection (in the words following paragraph (b)(ii)) becomes effective.

[62] As we understand the position from his evidence, the proposed plan as publicly notified contains new rules that would classify certain activities as permitted activities. They are activities that would, by operation of sections 13, 14 and 15, otherwise not be allowed unless resource consent is obtained. However by being classified as permitted activities they would be allowed, so the case described in paragraph (a) of the subsection is applicable.

[63] We also understand from Mr Brockelsby’s evidence that those rules have been “submitted against,” that the submissions seek amendment to the rules so that the activities to which they apply would not longer be permitted activities, but would require resource consent. We also understand from his evidence that those submissions have not yet been decided. So neither of the conditions described in subparagraphs (i) and (ii) is met, and the case described in paragraph (b) is not applicable. Since both paragraphs (a) and (b) need to be applicable for the operative part of the subsection to take effect, we hold that it does not take effect in this case.

[64] Accordingly we accept the submissions for Contact, and hold that the activities for which resource consent was sought from the Regional Council are to be classified in terms of the proposed regional plan, as notified.

[65] In terms of the proposed plan as notified, the Wairakei-Tauhara system is classified as a development geothermal system,³¹ and sustainable management of the resource is interpreted by the plan to mean—

Extraction of high enthalpy fluid in a way and at a rate which maintains the flow of this fluid for future generations, while avoiding, remedying and mitigating any associated adverse effects.

[66] Taking and discharging over 500 tonnes per day of geothermal fluid would be a controlled activity if stated standards and terms are met. However the proposal does not meet all the standards and terms, and it was common

ground that the proposed taking and discharge are classified as discretionary activities. Other activities involved in Contact’s proposal which require resource consent under the proposed regional plan are also classified as discretionary activities.

Other relevant provisions of the proposed regional plan

[67] Surface waters in the application area are classified in the proposed regional plan as Waikato Surface Water class, the management purpose of which is to—

... maintain existing aquatic life, ecosystems, aesthetic values and suitability of water for human consumption (after treatment).

[68] The plan sets standards about effects on aquatic life, water temperature, colour and clarity, discharge of suspended solids and effects on potability. These are the subject of submissions which have not yet been decided.

Taupo district plan

[69] The District Council has not yet notified a district plan prepared for the Taupo district under the Resource Management Act 1991. In the meantime the transitional district plan continues to be parts of the district schemes prepared under the Town and Country Planning Act 1977 of the former Taupo Borough and the former Taupo County.

[70] The modified proposal would affect land in nine different zones. The Taupo District Council in its capacity as consent authority acknowledged that the transitional district plan intended to provide for geothermal energy development in the area, and that the proposal is not contrary to the objectives and policies of the plan. Most of the proposed land-use activities are permitted activities in terms of the transitional district plan. The District Council’s Manager of Planning and Regulatory Services deposed that in most respects the land-use element of the proposal is little different in character from the industrial activity currently operating near the site of the proposed plant.

Cross-boundary questions and s 105(2A)

[71] As already mentioned, the proposal includes activities in nine separate zones; and in one part of one zone (the Farm and Farmlot zone) the proposed activities are discretionary activities, and in another zone the activity (maintenance of existing wells for monitoring) is a noncomplying activity.

[72] Contact acknowledged that the general practice is to bundle all relevant activities and assess them by

³¹ Method 7.1.3.1

reference to the most stringent classification applicable under the relevant district plan, citing *Bird v South Canterbury Car Club*³² and *Aley v North Shore City Council*.³³ However it submitted that where a proposal crosses zone boundaries, that approach is not applicable, and that the classification should be considered separately for each zone. Contact contended that this method had been adopted by the Court in *Moody v Wellington City Council*³⁴ and appeared to have been adopted in *Bird v South Canterbury Car Club*. Mr Robinson argued that this method is sound because each zone has its own objectives and policies which require separate consideration.

[73] The effect for this case would be that only the activity to be carried on in the Rural zone (monitoring existing wells) would be classified as a noncomplying activity. Because the adverse effect of that activity on the environment would be minor, the test in section 105(2A) would be met, and consent could be granted.

[74] In the alternative, if all land-use activities have to be considered as noncomplying activities, it was submitted that the district plan recognises and provides for geothermal development within the application area, being a permitted activity in 8 of the 9 zones where activities would occur. It was contended that on this basis the land-use activities are not contrary to the objectives and policies of the plan.

[75] *Aley's* case did not involve a proposal extending across different zones. Rather, discretionary activity consent was required in respect of non-compliance with parking requirements, occupation of part of the site designated as proposed service lane, and non-compliance with car-park screening requirements. Justice Salmon confirmed for the Resource Management Act regime the practice that a proposal has to be treated as one activity, not a hybrid involving different classes of consent. The learned Judge gave two reasons: first, that a hybrid concept would add unnecessary complication; and secondly that adopting a hybrid approach would have the result of limiting rights of objection.

[76] In *Moody v Wellington City Council* the Environment Court had to consider a subdivision of land where the access was in an open space zone and residential lots in an outer residential zone. It was contended that the two sites should be treated as if they were bundled together in the more stringent of the zones. The Court did not agree with that approach, stating that it would be unfair to the subdivider to have the provisions of the open space zone applied to prevent subdivision of the land zoned outer residential.

[77] The Environment Court decision in *Moody* was given earlier than the judgment of the High Court in *Aley*, so the Environment Court did not have the benefit of Justice Salmon's reasoning. In any event, they are not in conflict. The relevant passage in *Aley* concerned the *classification* of the status of the resource consent application, that is, the proposal was to be treated as wholly a discretionary activity, even though it needed resource consent only in the respects already mentioned. In *Moody*, the question was not the classification of the proposal, but the process of considering it. The Court considered the elements in each zone separately, according to the provisions of the plan applying in that zone.

[78] We accept that the classification of the status of the land-use aspects of Contact's proposal has to be wholly one, not a hybrid. The most stringent status is that the maintenance of the well TH3 is a noncomplying activity in the Rural zone. Accordingly the land-use activities have to be treated as a noncomplying activity. However in deciding the appeal we must, of course, consider the various elements by reference of the provisions of the zones in which they are to be located. To do so would not offend Justice Salmon's reasoning. It would not add to the complexity of already complicated legislation, but would avoid the artificiality of the process that the Environment Court sought to avoid in *Moody*. Nor would it limit rights of objection, as the opponents have had full opportunity to present their cases in opposition to all elements of the proposal.

Application of section 375

[79] Contact submitted, in reliance on section 375 of the Act, that although they are not public utilities, pipelines for supplying geothermal fluid and river water for the project would be permitted activities. Mr Robinson referred to *World Services v Wellington City Council*³⁵ in which the Planning Tribunal had treated classification of a receiving pole for a direct radio signal as a public utility as relevant to classification of the pole and associated activities as a permitted use. Counsel argued that the Tribunal had not explained why that should be relevant, and contended that section 375 should be given its ordinary and natural meaning.

[80] We quote section 375 of the Act³⁶ –

375. Transitional provisions for public utilities–

(1) Subject to subsection (2), every district plan or any proposed district plan constituted under section 373 shall be deemed to include–

³² Planning Tribunal Decision C27/94.

³³ [1998] NZRMA 361 (HC).

³⁴ Environment Court Decision W31/98.

³⁵ Planning Tribunal Decision W90/93.

³⁶ As amended by section 171 of the Resource Management Amendment Act 1993.

(a) A rule that each of the following is a permitted activity throughout the district:

...

(ii) Household, commercial, and industrial connections to gas, water, drainage, and sewer pipes:

(iii) Water and irrigation races, drains, channels, and pipes and necessary incidental equipment:

...:

(vi) Pipes for the conveyance or drainage of water or sewage, and necessary incidental equipment including household connections:

...

(2) The application of this section may be excluded or modified at any time in accordance with the First Schedule.

(3) This section shall cease to have effect in a district on the date that the proposed district plan for the district become operative, not being a proposed district plan constituted under section 373.

[81] The question here is whether section 375(1)(iii) and (iv) apply to the pipes for conveying water and geothermal fluid for the project. The heading to the section refers to public utilities but the proposed pipes would not be public utilities.

[82] By section 5 of the Interpretation Act 1999, the meaning of an enactment is to be found from the text and in the light of its purpose; and headings to sections may be indications of the meaning. Examination of the text of section 375 shows that Parliament expressly applied the section to household, commercial, and industrial connections to gas, water, drainage, and sewer pipes, and to household drainage and sewage connections, none of which are public utilities. We therefore conclude that although the heading of section 375 refers to public utilities, the section is not limited to public utilities. To the extent that this conclusion may be inconsistent with the decision in *World Services v Wellington City Council*, that derives from the replacement of the Acts Interpretation Act 1924³⁷ by the Interpretation Act 1999.

[83] Accordingly we hold that the section is capable of applying to pipes for water and geothermal fluid for Contact's project. We also hold that, in the absence of provision made under the First Schedule of the Act excluding or modifying its application, the district plan is deemed to contain a rule by which those proposed pipes are permitted activities throughout the district.

Other relevant provisions of district plan

[84] Geothermal power generation (or words to that effect) is classified as a permitted activity in all the relevant

zones except the Industrial Manufacturing zone and the Rural zone. As mentioned already, the only activity proposed in the Rural zone is operation and maintenance of existing wells. Permitted activities in the Industrial Manufacturing zone include industrial processes that are not included in Part A of the 2nd Schedule of the Clean Air Act and that comply with other performance standards of the zone. The only activity proposed in that zone is the construction and operation of geothermal-steam supply pipes. We have already stated our finding that by section 375 of the Act the district plan is deemed to contain a rule by which the pipes are permitted activities throughout the district. The outcome is that the land-use activities proposed require resource consent in three respects only. The first is for operation and maintenance of existing wells in the Rural zone. (The existing well in that zone (TH3), is not proposed to be connected to the power station.) The second is that for the part of the application area in the Farm and Farmlet zone which lies to the east of the area identified on the relevant planning map as Tauhara Geothermal Field (where a backup reinjection well and associated pipes are intended) geothermal energy extraction is a discretionary activity. The third respect in which resource consent may be required is for buildings, structures and excavations if the temperature of the ground measured 1 metre below the surface is more than the ambient temperature. The criteria for granting consent (as controlled activities) are that the site is stable, safe and free from adverse geothermal effects at the time and is likely to remain so in the future. Buildings are not allowed where the temperature at that depth is more than 60 degrees Celsius above the ambient.

[85] There are a number of designations of land within the application area. Some of them are not sufficiently defined in the transitional district plan, and the public authority responsible is not identified in some cases. Where designations are adequately defined and the responsible authority identified, the written consent of the authority will be needed for works in, on, under or over designated land, for works that would prevent or hinder the project or work to which the designation relates.³⁸

[86] The District Council suggested that Contact's proposal would hinder the Council's project for a bypass road. However there is no designation in the district plan for that work, and indeed no requirement for a designation for it has been made.

[87] The written consents required for works affecting designated land are not resource consents as such. They do not need to be obtained at the same time as resource consents. Because Contact's proposal is for a purpose other than the designated purposes, it is the other provisions of

³⁷ By section 5 of the Acts Interpretation Act 1924, headings and marginal notes were not to affect the interpretation of an Act.

³⁸ Resource Management Act 1991, section 176(1)(b).

the district plan which govern whether the proposed activities are to be allowed or not.³⁹ To the extent that the requiring authorities can be identified, and that the designations are adequately defined in the district plan, Contact would be able to seek written consents from them if the resource consents sought by this appeal are granted.

SUFFICIENCY OF INFORMATION

[88] The respondents raised as an issue whether sufficient information had been placed before the Court in terms of section 88 of the Act. Counsel for the respondents referred to the appellant's intent to carry out monitoring and investigation. He submitted that much of the investigation and monitoring involves work of a nature and type that could, and should, have been undertaken prior to making the application. Mr Taylor referred in particular to monitoring suggested by Dr M J Grant, much of which Contact proposes would be carried out if the consents are granted. Counsel observed that once consent is granted it cannot be recalled, yet information which is obtained in the monitoring and investigation phase might well show that consent should never have been granted in the first place.

[89] The evidence relevant to that submission was that of Mr M W Brockelsby, the Regional Council's official responsible for managing its regulatory functions in relation to energy-related operations, including geothermal operations. In cross-examination that witness agreed that the application met the test in section 88. Rather he considered that there was not sufficient information to provide certainty as to effects, and that was why the application had originally been declined. Mr Brockelsby agreed that the point is another way of saying that consent should not be granted, rather than being a discrete jurisdictional issue.

[90] Counsel for the Tauhara Middle Trusts submitted that there is not enough detailed scientific knowledge about the southern part of the Tauhara Geothermal Field to be able to predict its performance as a result of the drawdown of fluid from the northern part of the field. The Trusts contended that if Contact wishes to develop the northern part of the field, it should first have to undertake detailed exploration work to determine the geophysical nature of the southern part of the field, and the nature of the interconnection between surface features and deeper aquifers in both parts.

[91] Mr Auld submitted that information is the key to the reliability of the model to predict future events, and

that Dr Allis's hypothesis could only be tested by drilling a deep well in the southern part of the field. Counsel for the Trusts also contended that because the proposed extraction of geothermal fluid would amount to mining the heat from the geothermal structure, there needs to be a much better understanding of the entire resource (from drilling wells to map the geological strata) than at present.

[92] On the suggestion on behalf of the Trusts that a deep well be drilled in the southern part of the field, Mr Robinson remarked that the suggestion may be connected with the Tauhara Middle 15 Trust's plans for its own geothermal power station in that area.

[93] Even where an applicant has provided the information required by section 88, further information may sometimes be required to enable those who might wish to make submissions to be able to assess the effects on the environment and on their own interests.⁴⁰ Opponents of proposals often claim that more information is needed before a sound decision can be made. They are sometimes right, in that when further information is obtained, it becomes evident that the proposal does not deserve consent. We also understand that proponents of a proposal do not wish to spend on investigations any more than they have to, until they know whether they will obtain resource consents at all. The issue becomes one of judgment in the circumstances of each case.

[94] The responsibility for that judgment falls on the applicant, which carries the risk that on the information before it, the consent authority may find that it is not persuaded that the resource consent should be granted. The applicant has then to decide whether to appeal, or to obtain further information and apply again, or to abandon the project.

[95] If consent is granted to works that will provide opportunities to gain more information, a consent authority is likely to require that those opportunities are taken and the further information made available. Monitoring the effects of the exercise of resource consents is routinely required, as is the identifying of contingency measures that might be implemented if the effects are materially worse than those expected.

[96] In this case the relevant consent authority accepted that Contact had provided the information required by law. Mr Brockelsby agreed that the question whether there is enough information about the likely effects is a matter that goes to the ultimate judgment whether consent should be granted or refused.

³⁹ *Ibid*, section 176(2).

⁴⁰ *Affco v Far North District Council* [1994] NZRMA 224; 1B ELRNZ 101.

[97] There is generally not enough information about underground aquifers to enable predictions of the response and resultant effects to be made with any certainty. Consent authorities have to make judgments on the information before them and having regard to all the relevant provisions of the Act.

[98] That is the heart of the issue here. As their cases at the appeal hearing demonstrated, the respondents and the Trusts were able to assess the effects on the environment and on their own interests as well as anyone could. We do not consider that the Court should refuse to give a decision on the merits for want of further information. Rather we should make a judgment on the resource consent application, bearing in mind the cases for the respondents and the Trusts that there is not sufficient information to justify findings that would support granting consent for the abstraction and reinjection of geothermal fluid.

MAORI ISSUES

Relationship

[99] It was the case for the Tauhara Middle Trusts that the Tauhara hapu have a special relationship with the Tauhara geothermal resource, which they regard as a highly valued taonga. They seek exclusive and undisturbed possession of the resource; they do not wish Contact to have access to any more of what counsel described as “the limited and non-renewable geothermal resource from the Wairakei/Tauhara geothermal system”; but they recognised that their claim to possession of it is not a matter for the Environment Court to decide.

[100] Counsel for the Trusts, Mr Auld, presented a submission that in determining what is sustainable for a resource which is a taonga of Maori, consideration is required of whether it is sustainable from a Maori perspective, and that only Maori can answer that question. However in answer to a question from the Court, counsel accepted that in this appeal, as a matter of law, the Court has the decision whether the proposal amounts to sustainable management of natural and physical resources as described by section 5 of the Act.

[101] An environmental resource planner called on behalf of the Trusts, Mr T Tutua-Nathan, asserted that any geothermal development must be consistent with tikanga Maori, and relied on section 14(3)(c) of the Resource Management Act 1991. He deposed that Contact had not provided for the protection of Ngati Tuwharetoa interests and rangatiratanga over water and taonga such as geothermal resources. He explained that Ngati Tuwharetoa

were not opposed to certain developments of geothermal resources, so long as they are in accordance with their tikanga and kawa.

[102] The witness urged that tikanga Maori be recognised and provided for in four ways. The first was by exercise of kaitiakitanga, a matter we will address separately. The second way was for the Court to require Contact to provide appropriate training for tohunga selected by Ngati Tuwharetoa to better understand new technologies and innovations, so they can be informed and more actively involved in proposals to develop geothermal resources. The third way was for the Court to require that tohunga selected by Ngati Tuwharetoa are involved at all levels of the proposed development to provide cultural and spiritual expertise and advice. The fourth way in which Mr Tutua-Nathan urged that tikanga Maori should be recognised and provided for was that Court require that the Tuwharetoa Maori Trust Board receive and have opportunity to fully consider and be consulted on all relevant information, data and environmental impacts reports relating to baseline study and any changes to natural phenomena which occur over time; and any peer-review panel include 50 percent representatives of the iwi.

[103] Mr Tutua-Nathan’s claim, in reliance on section 14(3)(c), that the taking of geothermal fluid had to be in accordance with tikanga Maori was not the subject of any submission by counsel for the Trusts. Mr Robinson submitted that Mr Tutua-Nathan’s evidence in that regard had been based on a misreading of the section, that Contact was entitled to rely on section 14(3)(a), and that section 14(3)(c) does not apply to the present applications.

[104] We quote the relevant passages of section 14(3) of the Resource Management Act 1991⁴¹ –

14. Restrictions relating to water– (1) No person may take, use, dam, or divert any–
(a) Water (other than open coastal water); or
(b) Heat or energy from water (other than open coastal water); or
(c) Heat or energy from the material surrounding any geothermal water –
unless the taking, use, damming, or diversion is allowed by subsection (3).

...

(3) A person is not prohibited by subsection (1) from taking, using, damming, or diverting any water, heat, or energy if –

(a) The taking, use, damming, or diversion is expressly allowed by a rule in a regional plan and in any relevant proposed regional plan or a resource consent; or

...

⁴¹ Resource Management Act 1991, section 14(3), as amended by section 12 of the Resource Management Amendment Act 1993.

- (c) In the case of geothermal water, the water, heat, or energy is taken or used in accordance with tikanga Maori for the communal benefit of the tangata whenua of the area and does not have an adverse effect on the environment

[105] The effect of subsection (3) is to describe cases that are exceptions from the general prohibition in subsection (1). Because the paragraphs in the subsection are separated by the word “or,” each case is independent of the others.

[106] We have already found that the Wairakei-Tauhara geothermal system is classified by the proposed regional plan as a development geothermal system, and that the taking of geothermal fluid proposed by Contact is classified by that plan as a discretionary activity.

[107] By this appeal Contact is pursuing its application for resource consent for the proposed taking. If the resource consent is granted, the taking would be expressly allowed by a resource consent. Contact would be entitled to rely on section 14(3)(a) as authority for the taking, as an exception to the general prohibition in section 14(1). It would not be entitled to rely on section 14(3)(c), because the case described in that paragraph is not applicable to its taking of geothermal fluid.

[108] We therefore accept Mr Robinson’s submissions in this regard and hold that section 14(3)(c) has no application to the case. Accordingly we do not accept Mr Tutua-Nathan’s claim that Contact’s proposals are required to be done in accordance with tikanga Maori.

[109] We refer to Mr Tutua-Nathan’s desire that Contact be required to provide appropriate training for tohunga to better understand new technologies and innovations so they could be informed and more actively involved in geothermal proposals. In cross-examination the witness agreed that there is a member of Tuwharetoa who is a student completing a PhD degree course studying the Tokaanu geothermal field, although he was not aware that the student is sponsored by Contact.

[110] The case presented to the Court by counsel for the Tauhara Middle Trusts, Mr Auld, did not include seeking a condition about training tohunga. Although it might have been Mr Tutua-Nathan’s personal opinion that such a condition was desirable, it is not evident to us that the witness had appropriate knowledge and authority to advocate it on behalf of the Trusts. Further, we doubt whether such a condition would be for a resource management purpose, or that it would fairly and reasonably relate to the proposed abstraction and reinjection.⁴² For

those reasons we do not accept that such a condition should be imposed.

[111] Section 6(e) of the Resource Management Act directs functionaries, as a matter of natural importance, to recognise and provide for the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga.

[112] We consider that if the resource consents are granted, the relationship between Maori and the Tauhara geothermal field could well be recognised and provided for by conditions allowing for exercise of kaitiakitanga in provision of information and offering advice on Maori cultural and spiritual matters. However the conditions would reflect the position at law that decisions about the use of the geothermal resource are made by the consent authority appointed under the Resource Management Act 1991 (or by this Court on appeal). It would not be appropriate for the Court to presume that the claim by Tuwharetoa to rangatiratanga over the resource will be successful. That is not for the Environment Court to decide.

[113] We have also considered Mr Tutua-Nathan’s opinion that any peer-review panel include 50 percent representatives of the iwi. It is our understanding that Contact has proposed a peer-review panel to provide technical advice to the Regional Council which is independent both of Contact and of other stakeholders. Similar bodies have been provided in respect of major projects, such as mining cases, where independent specialist expertise is appropriate to provide assurance for the general public. The members of such a body are not representative of any stakeholder, but act independently in their professional responsibilities.

[114] We consider that the witness misunderstood the role of a peer-review panel. We hold that to require that half the members be representatives of one of the stake-holders would negate the purpose of the peer-review process. We do not accept the witness’s opinion in that regard.

Kaitiakitanga

[115] It was the case of the Tauhara Middle Trusts that members of the Tauhara hapu act as kaitiaki of Mt Tauhara and of the Tauhara Geothermal Field, and that this includes customary authority over the resource. Mr Auld announced⁴³—

The Trusts therefore seek a determination from the Court that if the appellant is granted consent it be obliged to enter into a meaningful

⁴² *Newbury District Council v Secretary of State for the Environment* [1981] AC 578, [1980] 1 All ER 731; *Tesco Stores Ltd v State for the Environment* [1995] 2 All ER 636.

⁴³ Submissions for Tauhara Middle Trusts, page 7, paragraph 22.

relationship with the trusts as kaitiaki of the mountain, in a way as will give due recognition to the mana whenua of the hapu.

[116] The Trusts sought that recognition of their kaitiakitanga be expressed in their having a future involvement in the management of the resource in consultation with those who exploit it, so there may be active protection of the taonga, and to “ensure that the time-frame of any exploitation is culturally acceptable.”⁴⁴

[117] Mr Tutua-Nathan testified that kaitiaki are decision-makers over taonga within their areas of manawhenua, and that kaitiakitanga includes the right to make decisions over all levels of development of the taonga in accordance with their tikanga. He deposed that this would require the use of appropriate rituals and karakia to inform and seek permission from atua, and to placate them.

[118] In response to the claims by the same witness that Contact has duties to provide for Tuwharetoa interests and rangatiratanga, Mr Robinson submitted that there is no authority for such duties, and that the Court cannot transfer its decision-making function to the iwi.

[119] Section 7(a) of the Act directs functionaries to have particular regard to kaitiakitanga. That has to be read in context of an Act which entrusts decisions on sustainable management of natural and physical resources to particular classes of consent authorities. We hold that the Court cannot meet a claim by kaitiaki to make decisions that is inconsistent with the scheme of the Act which provides for decisions to be made by regional councils and district councils.

[120] As mentioned earlier, we consider that if the resource consents are granted, particular regard may appropriately be given to the kaitiakitanga responsibilities of the Tauhara iwi in respect of the Tauhara geothermal field. That could be done by conditions requiring that they are provided with information, and allowing for them to offer advice about Maori cultural and spiritual matters relevant to the exercise of the resource consents. Although it would not be appropriate to prescribe detailed conditions, it is to be expected that the consent-holder would co-operate to a reasonable degree in allowing the performance by kaitiaki of rituals and offering of karakia on property occupied by it for the purpose of exercising the resource consents. In addition, Mr Carey stated in cross-examination by Mr Auld that Contact was open to the possibility of Maori taking part in a monitoring regime. That was not pursued by the Trusts at the appeal hearing. However there may be room for the kaitiakitanga responsibilities of Tauhara hapu to be recognised in such a way too.

[121] In practice, the Tauhara iwi would need to agree on an identified person or persons to whom the consent-holder could send the information, who would have the mandate to offer a single stream of advice on behalf of them all, who might liaise over cultural and spiritual observances, and who would be available to take part in monitoring.

Treaty principles

[122] Counsel for the Tauhara Middle Trusts submitted that consultation by Contact with Maori had been insufficient. He acknowledged that Contact had endeavoured to open lines of communication with the Tauhara hapu, and that it had been frustrated in its efforts to identify a group who not only claim, but also actually have, a mandate to represent them. Mr Auld announced that at a meeting convened on 6 August 1999, the Tauhara hapu had mandated Mr Tutua-Nathan to be their representative to consult with Contact, and authorised him to give evidence in this Court.

[123] It was Contact’s case that it had made repeated endeavours to consult with the Tauhara hapu, and had been frustrated by an inability to identify anyone with a mandate to speak for the hapu. Mr Tutua-Nathan confirmed that proceedings in the Maori Land Court about representation of Tauhara hapu on geothermal matters remained unresolved.

[124] In his testimony Mr B S Carey, Contact’s Geothermal Resource Manager, gave a detailed account of Contact’s attempts to consult with tangata whenua over the current proposals. Following a meeting in mid 1995, there were at least three hui in that and the following year at which Contact sought to outline, and answer questions about, the details and effects of the project, to seek to understand cultural and resource management issues associated with the project from the perspective of tangata whenua, and to explore opportunities to work together. The hui on 30 September 1995 had appointed a committee (the Wharekawa Investigation Committee) to represent Tauhara hapu in further discussions. Meetings had been held with the committee and with Mr N Wall, Chairman of several Maori land trusts with interests in Mt Tauhara and land near the mountain. Mr Wall challenged in the Maori Land Court the mandate of the committee to represent the Tauhara hapu.

[125] The Wharekawa Investigation Committee was disbanded at about the time of the primary hearings of the resource consent applications by Contact and by the Tauhara Middle 15 Trust. Then a representative group was established as a result of discussions between Tauhara hapu representatives and the Maori Land Court about the need

⁴⁴ Ibid, page 8, paragraph 24.

to mandate a group to deal with geothermal matters at Tauhara. Contact met with representatives of this group several times over the latter part of 1998 and early 1999. The group worked to set up a trust to be called Nga Hapu O Tauhara Middle Charitable Trust, but it became apparent that this new trust did not have the support of several of the Tauhara hapu.

[126] Contact had returned to the representative group that had been in discussion with the Maori Land Court, to seek clarification about who had the mandate to discuss geothermal matters with Contact. Representatives of the group advised Contact that the mandate needed to be clarified.

[127] Mr Carey testified that Contact has a commitment to consult with Tauhara hapu on the issues associated with the Tauhara geothermal field, and expressed the conclusion that Contact's attempts to consult with Tauhara hapu had been frustrated due to lack of mandate.

[128] Mr Carey was not cross-examined about the detail of his evidence about Contact's attempts at consultation. Mr Tikitu-Nathan had not been present in Court when Mr Carey gave his evidence, and in cross-examination he agreed that he had not read Mr Carey's evidence. We accept Mr Carey's testimony in that regard as reliable.

[129] Section 8 of the Resource Management Act 1991 requires that functionaries are to take into account the principles of the Treaty of Waitangi. One of the principles of the Treaty is that of consultation. It was consistent with that requirement that Contact undertook its commitment to attempt to consult with tangata whenua over the subject proposal. It identified, apparently correctly, the Tauhara hapu as being tangata whenua with whom it should consult. The testimony of Mr Carey is eloquent evidence of its correct understanding of the purpose of consultation, and of its persistence in attempting to carry out its duty in that regard.

[130] It is not for us to comment on the lack of unified response on behalf of the Tauhara hapu to Contact's attempts to consult with them, and we refrain from doing so. All we have to do is to make a finding on Contact's actions. In that regard we find that Contact made appropriate attempts to consult with tangata whenua over its project, and that the reason it was not able to achieve more was not due to any failing on its part. We also find that in doing so Contact, for its own benefit and to ensure that the consent authority was adequately informed, was respecting the Treaty of Waitangi and the Treaty principle of consultation. In our judgment the circumstances of this case do not support any claim of failure to take into account the principle of the Treaty of Waitangi about consultation with tangata whenua.

DEFERRAL OF CONSIDERATION

Grounds for deferral

[131] The District Council submitted that the Court should defer a decision of the appeal. It contended that consideration of the consents sought should be made in the context of a close examination of how the extraction and reinjection activities in the whole field might best be managed, particularly to avoid adverse effects on the environment at Taupo. Mr Vane observed that this might be done in the context of applications for renewal of consents for the Wairakei geothermal field. He argued that to grant the consents now would make a pre-emptive piecemeal increment to existing effects and permanently establish those effects, particularly subsidence at Taupo arising from extraction from the deep Wairakei reservoir. Counsel urged that decision of the current applications for the purpose of the Resource Management Act 1991 calls for consideration of more than the economic use of the geothermal resource. In particular he suggested that the best management of the Wairakei-Tauhara geothermal resource might be to repressurise the Tauhara field by mass reinjection. Counsel observed that the Court could not know that in this case.

Expiry of Wairakei consents

[132] The submission for deferral of decision of the appeal was opposed by Contact which claimed that although some of the Wairakei abstraction consents expire in 2001, the others do not expire until 2013. Contact acknowledged that there is provision for review of conditions in the year 2000, but submitted that the scope of the review does not extend to include the quantity of fluid that may be extracted. It also claimed that the terms of the consents for the McLachlan Power Station expire in 2011 and 2013. Contact submitted that irrespective of the expiry of some of the Wairakei Power Station consents, there will continue to be substantial abstraction of geothermal fluid from the Wairakei Field.

[133] Contact acknowledged that it would be desirable that the Wairakei-Tauhara geothermal fields are managed as a single entity. The regional policy statement seeks that outcome but acknowledges that with the present multiple users, the system cannot be managed in a unified manner. Contact submitted that similar issues arise with other resources, such as multiple abstractions from, or discharges to, a river. It urged that it is not open to a consent authority to defer an application before it in order that it might be considered together with future applications for renewal of expiring consents.

[134] Mr Robinson submitted that with a competitor's application to develop the Tauhara Field waiting appeal

hearing, it would be unfair to take a different approach to Contact on the basis that Contact has consents to utilise the Wairakei Field which it will need to renew in the relatively near future. Counsel relied on the decision of the Court of Appeal in *Fleetwing Farms v Marlborough District Council*⁴⁵ in which the Court emphasised the obligation of a consent authority to consider and make timely decisions on applications as they are received.

Uncertainty about effects

[135] Contact also joined issue with the District Council on deferral on the ground of uncertainty about the effects of the proposal. It submitted that a 'no risk' regime is not compatible with the statutory purpose of sustainable management,⁴⁶ and that it is for the Court to make a judgment of the significance of any risk. Counsel cited cases in which the Court had considered application of a precautionary approach⁴⁷, and submitted that the Court should consider the evidence to be presented on Contact's behalf about the nature and scale of potential effects, possible mitigation measures, and the conditions it proposed for monitoring and review of conditions.

[136] Mr Waters contended that because it is not clear that the effects of development of the Wairakei geothermal field had been foreseen, one can have little confidence in the current predictions, particularly because of the paucity of information about the geological structure underlying Taupo town and its immediate environs. He also contended that the possibility that pressure gradients may be generated and the resultant pressure decline propagated out to the resistivity boundary (with consequent surface deformation and subsidence) cannot be ruled out. He observed that building distortion may be caused by only a few centimetres of subsidence, and pointed out that it would be difficult to attribute effects of that kind to extraction of geothermal fluid rather than the cumulative effect of small tectonic movements which occur naturally in the Taupo region.

Decision refusing deferral

[137] For this purpose we assume (without deciding) that granting the consents sought would pre-empt desirable management of the Wairakei-Tauhara Geothermal System. Even so, Contact was entitled under the Resource Management Act to make its resource consent applications, and it was entitled to bring this appeal against the respondents decisions of those applications. If the Court were to defer a decision on the appeal that would have the

effect of refusing to decide an appeal that Contact was entitled to bring. That would not be consistent with the right to appeal.

[138] Contact had the choice of when to make its applications. If its choice had the effect that its applications might be opposed on the grounds advanced by the District Council, that was part of the considerations relevant to the exercise of that choice.

[139] The Act contains several indications of an intention that resource consent applications should be processed promptly, even expeditiously.⁴⁸ We also accept that, as held by the Court of Appeal in *Fleetwing Farms*,⁴⁹ Contact is entitled to have its resource consent applications decided prior to the later application by the Tauhara Middle 15 Trust, on which an appeal to the Environment Court is awaiting hearing.

[140] We consider that the appropriate course is for the matters raised by the District Council to be considered (to the extent that they are found to be relevant and deserving of weight) as grounds for refusing the resource consents sought by the appeal. In that way the judgments involved, including if appropriate the application of the precautionary approach, can reflect the uncertainty about the effects of exercise of the consents. However we hold that it would not be consistent with the scheme of the Act for the Court to defer a decision of the appeal on the grounds relied on by the District Council.

ENVIRONMENTAL EFFECTS

[141] We have now to consider carefully any actual and potential effects on the environment of allowing the activity.⁵⁰ The effects on the environment alleged by the opponents of the proposal which are likely to be crucial in the outcome of the appeal are those of subsidence of ground surface, hot ground, heat flow, changes in surface water, changes in seismicity, hydrothermal eruptions, and effects on biota. Other alleged effects that also deserve consideration are those on continuity of supply of geothermal fluid or heated water for tourist and visitor facilities, and other effects on the tourist and visitor business of Taupo; and claimed effects on a proposed bypass road.

[142] To provide a basis for consideration of those alleged effects, we set out our findings about the Wairakei-Tauhara geothermal system, the Tauhara geothermal field, and the existing effects on the environment of previous

⁴⁵ [1997] NZRMA 385.

⁴⁶ *Aquamarine v Southland Regional Council* Environment Court Decision C126/97.

⁴⁷ *McIntyre v Christchurch City Council* [1996] NZRMA 289; *Shirley Primary School v Telecom Mobile Communications* [1999] NZRMA 66.

⁴⁸ See the time limits in sections 95, 97, 101 and 115; and in respect of appeals, see section 272(1).

⁴⁹ *Fleetwing Farms v Marlborough District Council* [1997] NZRMA 385; 3 ELRNZ 249.

⁵⁰ Resource Management Act 1991, section 104(1)(a).

development of geothermal resources, particularly abstraction of geothermal fluid for the Wairakei Power Station.

Wairakei-Tauhara geothermal system

[143] The Wairakei-Tauhara geothermal system comprises the Wairakei geothermal field (which lies to the west of the Waikato River and has an area of about 25 square kilometres), and the Tauhara geothermal field (which lies to the east of the Waikato River and has an area of about 40 square kilometres).

[144] There is low resistivity between the Wairakei and Tauhara fields. When development of the Wairakei Geothermal Field started, there was a reduction in the pressure levels in the deep geothermal aquifers of the Tauhara Geothermal Field. As a result it is generally understood that the two fields are connected at depth, so that artificial disturbance of the system in one field can have effects in the other field, and they are described together as the Wairakei-Tauhara Geothermal System. However it is also accepted that there are several upflow zones feeding the system.

[145] Geothermal fluid is taken from the Wairakei Geothermal Field for two power stations. The Wairakei Power Station (owned and operated by Contact) which commenced operations in 1958, has an installed capacity of 161 megawatts, takes 140,000 tonnes per day of geothermal fluid, and currently reinjects about 50,000 tonnes per day.⁵¹ The McLachlan Power Station (which at the time of the appeal hearing was operated by Mercury Geotherm Limited in receivership) has an installed capacity of 55 megawatts, has consent to take up to 11,800 tonnes per day,⁵² and is currently taking about 4,800 tonnes per day of fluid from the shallow steam zone.

Tauhara Geothermal Field

[146] The Tauhara Geothermal Field is located to the east of the Waikato River and west of Mt Tauhara, north of Lake Taupo. It lies beneath, and to the east and north-east, of Taupo township, and has an area of about 40 square kilometres.⁵³ Historically, surface expressions of the geothermal field were geysers and chloride springs on the banks of the Waikato River, steaming and hot ground, several hot springs, and seeps of hot water along the foreshore of Lake Taupo at Waipahihi.

[147] This surface activity has been influenced by taking of geothermal fluid for the Wairakei Power Station, the

lowering of the Waikato River level for hydro-electrical generation, and other land-use developments. The Tauhara geothermal field no longer contains any high chloride springs, sinter-producing springs, geysers or vigorous fumaroles. There is steaming ground where geothermal springs once flowed beside the Waikato River, and at higher elevations to the east there are springs with lower chloride concentrations and large areas of steaming ground and weak fumaroles.

[148] The Tauhara Geothermal Field has been used as a source of heat for many years. There are several hundred wells drawing from shallow aquifers within the field for industrial, commercial and residential purposes, including the Taupo Native Plant Nursery.

[149] There is no electricity generating station currently taking geothermal fluid from the Tauhara field. Proposals in the early 1990s for a new station were not pursued. In August 1996 the Taupo District Council and Mercury Geotherm Limited applied for resource consent to take up to 120,000 tonnes per day of geothermal fluid from the northern part of the Tauhara Geothermal Field for an electricity generation plant producing 110 megawatts of electricity. However that application was withdrawn in September 1997.

[150] In February 1997, the Tauhara Middle 15 Trust applied for resource consent to take up to 66,000 tonnes per day of geothermal fluid from the Tauhara field. The proposal has since been reduced to taking 22,000 tonnes per day. The revised proposal is still current and an appeal against refusal of the resource consents is to be heard following issue of this decision.

Historic and existing effects in Taupo

[151] Various changes in the environment in the Tauhara geothermal field in and around Taupo township are ascribed to the abstraction of geothermal fluid from the Wairakei geothermal field for the Wairakei Power Station, to lowering of the river level, and changes in land-uses. Because these changes are part of the environment which stands to be affected by exercise of the resource consents sought by Contact, we state our findings about the main changes in respect of heat flow, subsidence of ground, and horizontal ground movement.

[152] The respondents urged that these effects are significant because they show that the possibility of adverse effects on the environment is not just theoretical, in that adverse effects of geothermal development have already

⁵¹ Of that 50,000 tonnes per day, about 15,000 tonnes per day is reinjected on the eastern side of the Waikato River.

⁵² The consent includes a constraint on the quantity of steam that may be taken as a proportion of the total amount of fluid taken.

⁵³ The area is inferred from resistivity surveys.

occurred in recent times in this very locality, and since then the town has expanded in that direction.

Heat flow

[153] The main areas of surface thermal activity of the Tauhara field are in an area of about 10 square kilometres between the western edge of Mt Tauhara and the Taupo urban area; and the main area of boiling, chloride springs and geyser activity occurred at Spa Sights adjacent to the Waikato River. Dilute chloride-bicarbonate springs occur along the Waipahihi foreshore of Lake Taupo and in the southern Taupo area. Predominantly sulphate-low-chloride waters occur at higher elevations between the Spa Sights and Waipahihi hot spring zones. Urban development now overlaps some areas of activity.

[154] Aerial photographs taken in the 1930s indicate that the principal areas of thermal activity were in existence in those days, prior to the start of development of the Wairakei geothermal field.

[155] The heat output of the Tauhara field increased from about 100 megawatts (thermal) to about 200 megawatts (thermal) by the early 1980s due to increased steam heating caused by drawdown from the Wairakei development, and the heat output is generally now in decline. The increase in heat output raised the temperatures of the northern springs and many domestic boreholes by up to 60 degrees Celsius, but since 1980, temperatures have generally stabilised or decreased in the upper aquifer. Temperatures in some domestic boreholes in the urban area of Taupo (near Crown Park) declined by up to 40 degrees in the 1980s, as the effects of steam heating waned. There have been long term declines in temperatures in the Kathleen and AC springs since 1990, and there have been variations in the timing of the heat flow peak, so that the Otumuheke Spring, and Bore 3880 in Puia Street near the golf course, continued to increase in temperature until the mid 1990s. In general the total heat flow from steam-heated ground at Tauhara has been gradually declining since the peak between 1970 and 1980, but there have been increases in heat flow since 1975 at several small thermal areas between the Broadlands Road scenic reserve and Mt Tauhara, which are now venting steam visibly.

[156] The increase in heat flow that commenced in the 1960s caused an expansion of steaming ground. In general this was in or near areas where there was already steaming ground. The total steam flow is currently declining, but there are areas still expanding. Two hydrothermal eruptions occurred in pre-existing thermal areas the Broadlands Road pony club area in 1974 and 1981.

[157] Mr C J Bromley, a consultant geothermal scientist called by Contact, deposed that steaming ground is transitory in nature, and large changes in individual steam features, including eruptions, can be triggered by minor causes such as an atmospheric pressure low, blockage of a

subsurface vent, or heavy rainfall after a prolonged dry period. He gave the opinion that this appeared to have been the trigger for both eruptions in the pony club area.

[158] In 1950 the Spa Sights area consisted of about 60 thermal features. There had been a general decline in geyser activity there over the period from 1940 to 1958, and that is attributed to lowering of the river level for flow control. In the early 1960s, hot chloride fluids ceased discharging there, and a pool containing dilute chloride water at 75 degrees disappeared during the 1980s. A developing boiling zone in the aquifer created enhanced steam upflows which caused an expansion in steam-heated thermal areas at Spa Park and Hells Gate. A group of mostly steam-heated springs (AC, Kathleen and Otumuheke) which discharged from a higher level aquifer showed changes from 1964: a steady increase in temperature, a decline in chloride concentration, and an increase in sulphate concentration. In different decades each of them reached a maximum temperature, and then levelled off, gradually declined or varied according to flow rate changes. These changes are ascribed to deep pressure drawdown as a result of production at Wairakei.

[159] In comparison, the temperature, flow-rate and chemical measurements from the Waipahihi Source Spring have shown little change from the 1960s, indicating that the dilute chloride waters in the southern Waipahihi area have not been significantly affected by pressure drawdown from Wairakei. Recent decline in chloride concentrations in that spring is directly associated with dilution by increased rainfall recharge of the groundwater aquifer.

[160] Declines in the water level of domestic hot-water bores have been observed, and are attributed to a combination of delayed rainfall effects, varying lake levels, and a general long-term decline in the water level in the upper aquifer, probably due in part to loss to the lower aquifer through internal flows in domestic bores or new fractures, and cessation of upflowing geothermal water.

[161] There have been resulting changes in geothermal biota with some sites showing increases in thermotolerant biota (associated with increases in steam-heated features or hot ground) and some showing declines or disappearance of such biota (associated generally with decreases in geyser and hot spring activity).

Subsidence

[162] Subsidence of the ground surface can be monitored by comparing the results of levelling surveys at known benchmarks at successive times. Systematic relevelevelling surveys have been carried out at benchmarks adjacent to roads traversing the northern Tauhara Geothermal Field since the early 1970s. Before that, subsidence monitoring included only a few benchmarks in the Tauhara field, so the subsidence pattern has to be inferred from those surveys.

[163] The results show some subsidence of the ground surface in the Tauhara field as early as 1960. During the 1960s and 1970s, the maximum rate of subsidence occurred to the west of the Waikato River. Since then, the rate of subsidence there has halved, but the rate has doubled on the eastern side of the river.

[164] The maximum accumulated subsidence between 1960 and 1999 is 1.1 to 1.4 metres. Additional benchmarks were installed in 1986 to improve the resolution of the subsidence measurement. Surveys in 1994 and 1997 showed two maxima within the subsidence area (at 67 millimetres per year and 47 millimetres per year) with the main area of subsidence extending northwest towards the Waikato River. The most recent survey, in March 1999, showed similar results, with the comparative rates being 69 millimetres per year and 48 millimetres per year.

[165] That extent of subsidence is not necessarily all attributable to pressure losses due to abstraction of geothermal fluid for the Wairakei field. Long-term tectonic deformation may have affected the comparisons, so the extent of subsidence that can be attributed with certainty to Wairakei development may be some 10 to 20 millimetres per year less than the values given. Even so, the rates of subsidence at the northern Tauhara field during the mid 1990s typically range up to 50 to 70 millimetres per year, with rates at two benchmarks of 116 millimetres per year and 73 millimetres per year.

[166] The main area of subsidence in the Tauhara geothermal field is mostly located north of the Taupo urban area. There is a centre of subsidence near Spa Hotel, another near the intersection of Rakaunui Road and Centennial Drive, and another near the intersection of Crown and Invergery Roads. The rates of subsidence around the northern edge of the town are less than 20 millimetres per year.

[167] Dr Allis predicted that up to 1 metre of further subsidence will occur in the Tauhara area up to the year 2025, whether or not Contact's present proposal proceeds. Changes in production at Wairakei would have no immediate impact on that.

Horizontal ground movement

[168] Horizontal ground movement has also been occurring since the early 1960s, at a rate of up to 30 millimetres per year. Like the rate of subsidence, the rate of horizontal ground movement is expected to decline gradually.

Impact of changes

[169] There was little evidence of any significant direct effects of the subsidence. Mr J N F Mitchington, the District Council's Resources Engineer, gave the opinion that while local in nature, the effects had 'downstream' impact on

the whole community as they influenced the daily functions of public and private use of land, housing, industry, education, recreation and infrastructure development. In particular the former county and borough councils had included in their district schemes controls identifying geothermal areas and regulating the percentage of building coverage or impervious surfacing and excavation, and requiring venting. That had limited use of the worst affected land.

[170] Mr Mitchington also testified that during the early stages of the 'geothermal pulse' a series of watermain failures had occurred in the Elizabeth Street and Crown Road area. He also deposed to public safety being an issue, describing fumaroles that appeared in the golf course and Spa Hotel and AC Baths area, hydrothermal eruptions in the vicinity of the pony club and in Spa Thermal Park, boiling mud near the AC Baths and Carters sawmill.

[171] The witness referred generally to the weakening of buildings, poles and fences, the collapse of materials in common use, and the possibility of ground collapses and eruptions in the residential area. More particularly he stated that the effects on buried installations such as water and drainage pipes, building foundations and road subgrades were more severe because it was more difficult to dissipate the heat from them. Damage had also occurred to buildings with foundations laid directly on the ground, with failure of the concrete slab, the timber framework and in the linings. Pumiceous material under buildings lost strength and had to be removed from under foundations and replaced. Enclosed spaces had to be vented and suspended floors used, or forced venting applied under slab floors. Some buildings at Tauhara Primary School had had to be partly rebuilt more than once.

[172] The witness also described damage to public utilities. Deep side drains or sub-grade venting were used to dissipate heat from under road carriageways, but neither of those methods were practical in residential streets where repeated works were needed; concrete kerbs crumbled, utility services had to be reticulated overhead to prevent damage to cables but the poles were prone to failure at ground level. Asbestos cement watermains had to be replaced using more expensive materials. Concrete stormwater pipes and manholes also degraded, and sanitary drains mostly use materials that are also vulnerable to ground heating. Underground fuel installations had to be replaced above ground to avoid evaporation and flammability risk. Private services which failed were seldom replaced with more expensive materials, and repeated failures were not uncommon.

[173] Mr Mitchington also stated that Centennial Drive has suffered loss of camber and drainage problems in the vicinity of the golf club; that the speed value of the road has been reduced, and that a rebuild will be necessary to regain safety on the curve adjacent to the golf course. The witness may have intended to imply that these effects were

the result of subsidence resulting from geothermal development, but he did not ascribe the effects to that or any other cause.

[174] Mr Mitchington also described effects of scalding water issuing from cold taps, and steaming toilet bowls; hot and dangerous lawns; accidents resulting in severe burns; and animals falling into fumeroles, or being caught in surface collapses.

[175] Mr Mitchington stated that more recently there had been considerable development in the area that had previously been affected by heating of ground. That development included subdivision for industry and residential use, erection of public and private buildings (including schools), development of infrastructure and creation of significant recreational assets being sports grounds and an indoor stadium. Roads and infrastructure services alone in the area of influence have an estimated replacement value of \$3.5 million. As the effects of the geothermal pulse reduced, very little of the building stock and infrastructure development incorporates protection against geothermal effects.

[176] The District Council's Manager of Planning and Regulatory Services, Mr C Keogh, questioned what he perceived as an assumption that the effects of existing activity have no more than minor impact on the environment, and gave the opinion that this has not been verified. In particular he deposed that rates of subsidence in the Centennial Drive and Spa Hotel area have been significantly greater than the trend modelled by Dr Allis, and parts are settling at significant and highly variable rates over very short distances. He considered that Dr Grant's evidence to the contrary may be in error, but agreed that at a technical level he did not have the expertise to determine what is significant in that context.

[177] Mr Keogh was asked in cross-examination whether the effects caused by Wairakei provide a baseline from which to assess future effects. He answered in the negative, referring to possible future restoration of a natural equilibrium. However when asked what technical expertise he relied on for that evidence, he agreed that it was not technically supported, and that he did not have technical expertise in scientific disciplines relevant to assessing causes and effects of geothermal development. On his statement that the impact of the existing effects had not been verified, the witness was asked about whether the applications by Electricity Corporation in the early 1990s had analysed the effects of Wairakei production. He answered in the negative, but when he was asked whether he had read the assessments of environmental effects prepared for those applications, he replied that he had not;

when he was asked about repeated infra-red surveys which were in the public domain, he was aware of only one; and when asked about Dr Allis's evidence about the extent and effects of horizontal ground movement, he gave his understanding that it did not really qualify as an assessment of that effect.

[178] We have stated our understanding of the state of the environment which stands to be affected by the project. The geothermal features are under constant change, and this is likely to continue even if the project does not proceed. We do not find persuasive Mr Keogh's opinions about restoration of a natural equilibrium; about increasing rates of subsidence; or about lack of verification of the past effects.

Reliability of models

[179] There was an issue between Contact and some of its opponents about the reliability of computer models of the geothermal system and field in assessing likely effects of the project. Two computer models are involved: the O'Sullivan model and the Allis model (which is to some extent derived from the O'Sullivan model). In considering that issue we start by summarising the evidence about them; then we summarise the criticisms of their reliability by the opponents; then we consider the evidence on the topic; and then state our findings on it.

Contact's models

[180] Contact called as a witness Dr M J O'Sullivan, an Associate Professor in the Department of Engineering Science at the University of Auckland. Dr O'Sullivan has been carrying out research on geothermal fluid dynamics and computer modelling of geothermal fields for 25 years, has published numerous scientific papers on geothermal modelling and has been involved in collaborative research projects with respected American institutions.

[181] A computer model of the Wairakei-Tauhara geothermal system had been developed over a number of years under Dr O'Sullivan's supervision, to enable Contact to make predictions about the likely future behaviour of the system. As the understanding of the geothermal system has improved and further data were accumulated, the representation of the system has been refined. The model is now a three-dimensional representation of the natural processes that occur underground in the system, using 118 columns, each divided into 16 layers, resulting in a total of 1515 blocks⁵⁴. The process for development of the model included calibration against comparisons with measured field data of the natural state of the system, refinement, and testing the sensitivity of the performance to the choice of parameters.

⁵⁴ Some model blocks are removed from the top layers to give a better representation of the topography.

[182] Dr O’Sullivan deposed that the model of Wairakei-Tauhara is probably the most detailed and best calibrated model so far of any model of a geothermal field. There is good agreement between the model temperatures and field data for production zones at Wairakei and Tauhara, although not for the area between them near the Waikato River. Calibration for past history of the system showed very good agreement in respect of production enthalpy, good agreement in most cases for pressure declines, and general agreement on decrease of surface flows. The model enabled inferences about the existence of a high permeability connection between Wairakei and Tauhara at elevations between –655 metres and –355 metres, and a tight permeability cap isolating the deep zone from the surface at Tauhara.

[183] Dr O’Sullivan acknowledged that because it consists of quite large blocks, the model cannot be expected to produce accurate predictions of small-scale detail: it can simulate the performance of groups of wells, but may not accurately predict the performance of every individual well in the system. However he gave the opinion that the model is suitable for carrying out future scenario studies to test the response of the geothermal system to the proposed development.

[184] The witness reported that his modelling study showed that the difference in pressure drawdown in the deep production zone at Tauhara over the next 50 years compared with no development is 2 bar; that the proposed development would cause little change in the pressures, temperatures and vapour saturations in the shallow zones and little difference to the surface fluid and heat flows at Tauhara, and that the Tauhara Field easily provides sufficient energy to support the proposed Tauhara development for at least 50 years.

[185] Contact also called as a witness Dr R G Allis, Chief Scientist at the Energy and Geoscience Institute of the University of Utah, who had been engaged in developing numerical modelling of subsidence at Wairakei, Tauhara and Ohaaki geothermal fields. His model for Tauhara required assumptions about the compressibility and permeability of near-surface geological units. The results had been compared with the 30-year subsidence trends at three benchmarks representative of the maximum subsidence zone of the field. The subsidence predictions had used the trend in pressure predicted by the O’Sullivan reservoir simulation. The result was that the proposed development would slightly decrease the potential subsidence, because reinjection would help to stabilise pressures.

The cases for the opponents

[186] It was the case for the respondents that the model is not sufficiently refined to predict surface effects. Rather it attempts to describe conditions in the deep aquifer, the pressure from which surface effects are driven.

[187] Counsel for the respondents reminded us that a geothermal resource in its natural state is dynamic, and because it exists at depth it cannot be observed and measured in a way that allows great precision. Further, effects of abstraction may not be manifested for a long time, and may occur in unpredictable ways and at some distance from the place of abstraction. Cause and effect can be difficult to determine, and may be more a matter of scientific judgment than demonstrable fact. Prediction of behaviour of a geothermal field in response to abstraction and reinjection of geothermal fluid rests not so much on empirical knowledge but on extrapolation from what limited knowledge does exist. It is qualitative, not quantitative.

[188] The respondents contended that the appellant’s evidence on effects is not independent of the model but based on the assumption that the model will correctly predict the field’s response. Because knowledge of the shallow zone geology is limited, surface effects cannot be predicted with the degree of assurance required in that the town of Taupo overlies the field and would be vulnerable.

[189] Mr Taylor contended that the application’s dependence on the model is near total; that the model was not developed to show surface effects, and the presence of the town means that the model has to “get it right first time” which is not in its nature. There is no scope for the model being calibrated or fine-tuned when effects on substantial portions of a town have to be considered, and it would be unacceptable to take any significant degree of risk on a trial and error basis. The crucial difference is between what a modeller would call a good match and what the Court regards as acceptable proof of effects.

[190] The District Council presented the general proposition that modelling cannot predict with certainty effects arising from extraction and re-injection of geothermal fluids.

[191] It was the District Council’s case that there is not enough knowledge about the surface aquifers and about the southern part of the Tauhara field to allow reliable prediction of the effects of draw-off. The District Council maintained that essentially the O’Sullivan model remains a model of the deep reservoir. It contended that an extensive programme of investigation and monitoring is needed (including a detailed levelling survey across the whole field), and the results used in development of the model giving finer vertical detail in the upper layers, finer horizontal detail (smaller blocks), and calibration against gravity changes.

[192] The District Council was also critical of the modelling work carried out by Dr Allis. Mr Vane argued that it uses a wait-and-see approach, is based on insufficient benchmarks (especially in the Taupo township) monitored over a long period, and lack of detail and localised knowledge of the geology of the upper aquifers. He argued

that the Allis subsidence modelling and interpretation is a generalised guess based on inferred generalised and averaged information about the shallow aquifers, and cannot provide a basis for reliable prediction of localised subsidence arising from local variations in the properties of the underlying mudstones.

[193] Mr Waters deposed that modelling has its limitations, claiming that “it is simply a form of simulation and an aid to guessing”, and relying on an opinion expressed by a Dr AJ Pearce that computer modelling is “this shadow-boxing surrogate for (real) science.”⁵⁵

Evidence about the models

[194] In cross-examination by Mr Taylor, Dr Allis testified that the pressure trends needed to fit the subsidence rate changes had been different in detail from the general trend predicted by the O’Sullivan model. The witness stated that he had used the O’Sullivan model pressure trend as a guide to the pressure changes in the vicinity of the compaction zone, and had modified it to fit the observed data. He confirmed that future predictions also use that as a guide.

[195] In cross-examination by Mr Vane, Dr Allis explained that the three benchmarks had been taken as representative of the whole of the subsidence area (an area of about 1 kilometre by 2 kilometres), and that although there were two local areas where the present subsidence rates are higher than those at the benchmarks, the trends would be similar. He also explained that the uncertainties in the subsidence predictions should be able to be reduced if better information of pressure trends in the area is obtained.

[196] Dr A Watson, Director of the Geothermal Institute of the University of Auckland, who was called by the Regional Council, drew attention to sources of uncertainty in the conceptual model from which the mathematical models had been developed. First, he observed that the information available to deduce the lowest layers of the reservoir comes from 5 deep wells, and that the interface between the geological layers is not a flat sheet but a complicated curved surface that is not capable of accurate definition by only 5 wells

[197] Secondly he observed that the layers are interwoven and fragmented, and do not have uniform permeability or porosity. Cuttings from drilling do not provide as much information about them as do cores. Thirdly he deposed that there is uncertainty about the extent and permeability of breccias encountered between the upper and middle aquifers. The witness remarked that these uncertainties prevent complete understanding of the flow paths in the reservoir.

[198] Of the O’Sullivan mathematical model, Dr Watson observed that the entire volume within a block is represented by a single point at its centre, with no variation or properties or parameters throughout its volume, so the degree of detail is controlled by the number and size of blocks. He also observed that with so many parameters to vary, it may not be possible to arrive at a unique set of values for each, as several different combinations could produce the same match with the field data, and there would be no means of deciding which was correct, especially because at Tauhara there is little data to tune the model. The witness deposed that for a development near an urban area, small scale detail is required to provide reliable estimates of the magnitude of local environmental effects. In summary, the witness concluded that the expectations of the reservoir model are too great and that some effects that might be important have only been lightly considered. However he acknowledged that the general picture of the reservoir and its response to the proposed development presented in the scientific evidence is probably correct.

[199] In cross-examination Dr Watson accepted that Dr O’Sullivan had done the best job he could with the data available, that he had no criticism of what he had done, but the issue was at the very difficult end of computer modelling, the prediction of surface effects.

[200] Of the Allis model, Dr Watson observed that the differences of subsidence with and without the development are probably well within the margins of uncertainty on the estimate.

[201] Dr M A Grant, a geothermal reservoir consultant called by the District Council, testified that it is normal practice to build computer models of geothermal fields. He gave the opinion that the existing models of Tauhara are adequate in respect of the reservoir, but weak in relation to surface effects; and that greater precision requires more detailed representation of the surface structures.

[202] Dr Grant deposed that a computer model provides greater confidence and can eliminate a range of possibilities, even if it does not identify a correct picture.

[203] Dr Grant gave the opinion that the block sizes in the upper layers are too large and coarse and require finer horizontal and vertical detail to predict localised surface effects; that is, it requires enhancement to adequately represent shallow aquifers. A micro-gravity survey across the entire Tauhara area would provide a good way to track migration of underground fluids.

[204] In particular Dr Grant described Dr Allis’s model as “more of an explanation than a prediction”, that it

⁵⁵ The context of the quotation from Dr Pearce was not given.

overestimates shallow pressure changes, and underestimates the formation compressibility, so that future predictions will underestimate future subsidence. In cross-examination by Mr Robinson he gave the opinion that it is possible that the error is significantly larger than Dr Allis had estimated. He also deposed that the existing level of monitoring is insufficient to document unequivocally the existing changes, let alone discriminate those due to a new development at Tauhara.

[205] Dr Grant had reported that although Dr Allis's model implied that subsidence should now be levelling off, it is accelerating in some areas, showing that the subsidence is not well understood and existing models do not provide reliable predictions. However having now heard the evidence, Dr Grant modified his evidence, accepting that the rate of subsidence appeared to have been the same as in the past and the higher values had been measured in places not previously measured.

[206] Dr Grant was asked by Mr Vane to comment on Dr O'Sullivan's opinion that the effects of the project would be so minor that extra modelling effort is not required. Dr Grant's answer described the additional modelling work which he recommended, which he described as "a significant amount of work". However his response did not address directly Dr O'Sullivan's opinion, the subject of Mr Vane's question, that the effects would be so minor that the extra modelling effort was not required. In response to a question by the Court, Dr Grant deposed that in respect of the modified proposal to take 20,000 tonnes per day, the extra monitoring effort would be practically the same as for the original proposal, so for the smaller proposal the overhead of that monitoring would become relatively larger.

[207] In response to a question by Mr Kember, Dr Grant gave the opinion that further monitoring and finer definition of the model would enable reliable prediction of what might happen around Waipahihi that would have some value. He was not sure that drilling a deep well there would be sufficiently desirable to be worth the cost. In examination by Mr Robinson, Dr Grant stated that he agreed that the representation in the O'Sullivan model of the southern part of the Tauhara field was consistent with his view as to the structure of the southern part of the field. He agreed that the principal reason one would wish to drill a deep well in that part of the field would be to establish whether or not a development would be possible.

[208] Asked in cross-examination what experience he had himself in subsidence modelling, Dr Grant replied: "None, however the mathematical models involved are very simple and easily understandable." He deposed that he had produced many models of pressure change in an aquifer

when fluid is produced or reinjected from geothermal wells, which are in their form very similar.

[209] Dr Grant told the Court that he proposed additional monitoring and modelling with the intent of improving the level of confidence. On a scale of 10 between zero and ultimate confidence, he evaluated Contact's case at between 6 and 7, and his proposal between 8 and 9.

[210] Mr Brocklesby acknowledged that modelling is widely accepted as a valid and appropriate tool for the purpose of determining the likely effects of geothermal developments, but questioned the degree of reliance that should in this case be placed on conclusions about effects drawn from the results of modelling. He deposed that modelling alone does not deliver an adequate degree of certainty of effects where the consequences of getting it wrong are as significant as they are in this case, citing underestimates of pressure decline, of surface heat flow at Karapiti, and poor match in respect of temperature and depth in some wells. The witness gave the opinion that the model is capable of significant errors, is at best a coarse predictive tool, and that Contact's case about effects was based on modelling results and can only be as reliable as the modelling on which they are based.

Findings about the models

[211] Mr Vane quoted this passage from a Planning Tribunal decision about mathematical models of the Wairakei geothermal field—

We consider that their true value has been as tools used by persons qualified to interpret them to inform their own opinions about the probable effects of the proposed taking.⁵⁶

[212] We adopt that statement. It is the context in which we address the respondents' claim that Contact's evidence was not independent of the models. Contact did not seek to rely on the outputs of the models as such. Rather, Mr Robinson submitted that the significance of the modelling evidence was not that it is totally accurate in its own right, but that it is consistent with the conclusions Dr Allis and Mr Bromley reached on their analyses of the data available. Contact was entitled to present that evidence and have its case judged on that basis.

[213] The features which contribute to the value of a model include the quality and detail of the field data that are used to develop and calibrate it, and the degree of refinement of the model itself (for instance in the size of the blocks). There was no contest that if more wells had been drilled and relevant data from them used in developing the O'Sullivan model, and if more benchmarks had been used

⁵⁶ *Geotherm Energy v Waikato Regional Council* Planning Tribunal Decision A58/91, page 32.

in more successive levelling surveys and the measurements used in developing the Allis model, those models would have been more valuable than they are. Likewise if the O'Sullivan model had smaller blocks near the surface, and had used more field data about groundwater, it would have been more valuable too.

[214] An expert witness giving opinion evidence on a matter such as the effects on the environment of geothermal development has to apply professional judgment to all the facts available. The witness's understanding and interpretation of a model can assist in the making of the judgment, and the forming of the opinion. The witness has to exercise responsibility in deciding the extent to which the opinion can be assisted by model.

[215] This is not a case where there were better models available for the witnesses to use. Nor is there room for finding that the models incorporated flaws so that they should not have been used. The witnesses would not have been justified in ignoring the models on the basis that if more field data had been available, better models might have been produced. Neither Dr Watson nor Dr Grant claimed that Contact's witnesses should have ignored the models. The value of bringing to the Court's attention the limitations on the models was to emphasise the uncertainty inherent in the predictions of effects, rather than to criticise the expert witnesses for using them to assist in the formation of their opinions about the effects of the project.

[216] We accept that to the extent that the expert opinions are based on the models, they should not be given complete confidence. In the end the Court has to make its own finding. It is not entitled to avoid that responsibility on the basis that there is uncertainty, but it can take that uncertainty into account.

Subsidence

[217] Dr Allis has been a geothermal scientist for 22 years, has had extensive experience of the Wairakei-Tauhara geothermal system, and has been studying and publishing material on geothermal subsidence since the early 1980s. He gave evidence about the development of his model of the subsidence history of the Tauhara field, following a relevelling survey in 1997. Predictions of future subsidence had been made assuming that the Wairakei development continues as at present, and comparing the subsidence if Contact's Tauhara project proceeds and if it does not. In his evidence Dr Allis did not avoid the combined uncertainties, nor did he merely report on the output of the model, but gave his "best estimate" of the magnitude of uncertainty.

[218] Dr Allis had used measurements at benchmarks that he considered representative of the subsidence area of the Tauhara field and that had a long history of measurements. It was his evidence that by 2030 the area around Benchmark AA1/14 (by Huka Falls Road, west of the Waikato River)

will have subsided by 2 metres (plus or minus 1 metre); and that the total subsidence near Benchmarks BM54 and AA80 (by a bend in Centennial Drive, and at the intersection of Centennial Drive and Rakaunui Road respectively) will be 3 metres (plus or minus 1 metre) by then. Dr Allis added that if there is no development of the Tauhara field, the predicted subsidence in those areas will be 5 to 10 centimetres greater by 2030 compared with that predicted with Contact's development. He acknowledged that the difference is small compared to the uncertainties, and stated that the uncertainty should be able to be reduced if better information becomes available about pore pressure trends in the area.

[219] In cross-examination Dr Allis agreed that his model had used the O'Sullivan model as a guide to pressure changes, and had altered it to fit observed data; that the 1997 benchmarks used for levelling surveys to measure subsidence had been mainly north of Tauhara Road (previous levelling having shown that the Tauhara subsidence zone was in that area); and that there were no data about the pressure in the deep reservoir under Taupo town itself. He also stated that it is still possible that pressure changes could occur in the south of the Tauhara field, but the weight of the evidence strongly pointed to that not being the case. He confirmed his opinion that the subsidence effects due to the proposed development would be very small.

[220] Dr O'Sullivan gave the opinion, based on his modelling, that the predicted subsidence trends would not be significantly affected by Contact's proposed development. He also predicted that without the Contact development, there would be slightly greater subsidence (0.05 to 0.1 metre).

[221] Professor Watson concluded that a development including an extraction of 20,000-25,000 tonnes per day of geothermal fluid "should produce a significant and measurable but acceptably low impact." He had not distinguished effects caused by Tauhara development alone, distinct from the effects of the Wairakei operation; nor had he drawn a distinction between the effects of Wairakei operations to date and those effects which might be drawn in the future. He explained that it would be very difficult to separate out the effects because subsidence due to Wairakei is ongoing and has yet to be experienced.

[222] Dr Grant deposed that the maximum subsidence at Tauhara is about 60 millimetres per year, and that injection of waste water into a steam zone would reduce pressure and exacerbate any subsidence. He deposed that the development of localised subsidence that had not been predicted beforehand showed the presence of a previously unrecognised mechanism and indicates a need for caution. However he did not himself offer any opinion about the extent of ground subsidence attributable to Contact's proposed development.

[223] Dr Grant agreed that by and large future subsidence should be expected by and large where it currently occurs, although it need not follow the current pattern. He accepted Dr Allis's evidence that subsidence rates along Centennial Drive had been nearly constant through the 1990s.

[224] Contact submitted that Dr Grant had not drawn a distinction between past Wairakei effects and effects of proposed development; and that the Court must make a judgment, based on its analysis of legal framework, as to the extent to which it can rely on Dr Grant's conclusions.

[225] Mr Robinson also submitted that Dr Grant had accepted that the report he produced had been based on a misreading of the subsidence information which the District Council had provided to him, and that the evidence he had given on subsidence had to be qualified accordingly. In his evidence-in-chief Dr Grant had said:

... the development of localised subsidence, which is related to drainage commencing in the late 1980s, and was not predicted beforehand, shows the presence of a previously unrecognised mechanism and indicates a need for caution.

[226] In cross-examination by Mr Robinson, Dr Grant was asked about that passage—

... was that the subsidence that commenced in the late 80s, drainage or both? I think the accurate statement would be it commenced earlier and was recognised in the 1980s.

Dr Allis gave evidence that the subsidence at certain benchmarks and the instance being BM54 at the golfcourse corner being recorded since the 1960s, so your view is that both drainage and subsidence had commenced in the 60s if not earlier but not been recognised before the 1980s? Yes.

Yesterday you stated that the most recent subsidence contour map didn't demonstrate acceleration of the subsidence, is that a correct statement of your position? Yes.

Dr Allis gave evidence that subsidence rates at the benchmarks along Centennial Drive have been nearly constant through the 90s, do you accept that? I haven't inspected the data of his plots to verify that, but I accept his statement.

So on that basis there would appear to be no evidence of accelerated subsidence in the area in recent times? I wouldn't comment. I would want to inspect the plots one by one before answering that.

So we should read the references to acceleration in your evidence with that qualification? Yes.⁵⁷

[227] We are not persuaded that Dr Grant's answers in that cross-examination showed that Dr Grant had accepted that his evidence had been based on a misreading of the subsidence information. Rather, it shows that the witness was not willing to testify that there is no evidence of subsidence accelerating in recent times until he had had the opportunity to inspect one by one the plots of measurements referred to by Dr Allis.

[228] In his evidence Mr Keogh suggested that Dr Grant had been wrong in his analysis of the subsidence data. That was based on Mr Keogh's own analysis of a series of subsidence contour maps. Mr Keogh professed no relevant training or experience which would qualify him to give opinion evidence as an expert on technical matters to do with measurement of ground subsidence. To the extent that his opinions differed from Dr Grant's on this topic, the latter is qualified, the former is not. We accept Mr Robinson's submission that Mr Keogh tended to confuse the role of an expert witness with that of an advocate. Dr Grant's opinions were capable of assisting the Court, and to the extent that they address subjects outside the area of his professed expertise, Mr Keogh's opinions were not.

[229] From his analysis of the evidence Mr Brockelsby observed that the proposed development would have about a ten percent greater effect on pressure reductions than would occur solely as a result of the Wairakei drawdown, and that the restraint on subsidence resulting from reinjection would only be in the area of the reinjection site.

[230] Mr A J Waters expressed concern about risk of subsidence, expressing little confidence in Contact's predictions in the absence of proven correlation, and referring to paucity of detailed data about the geological structure (and the location of the resistivity zone boundary) underlying Taupo town and its immediate environs. He considered that there is a possibility that a pressure decline generated by extraction of geothermal fluid may result in surface deformation and subsidence out to the resistivity boundary; and he described effects on buildings likely to result from only a few centimetres of subsidence. He agreed that the cumulative effect of small tectonic movements over time could result in similar minor damage to buildings, and that it would be difficult to attribute responsibility.

[231] Mr Waters relied on his experience as a roading engineer that considerable variation can be expected in below-surface materials and that despite testing and sampling, unforeseen local conditions will almost

⁵⁷ Notes of evidence pp 133, 134.

invariably be encountered. He concluded that there will always be uncertainties and inaccuracies in predicting how underground materials are likely to behave.

[232] We accept that on the present state of knowledge no-one can confidently predict the effects of Contact's proposal on ground subsidence. Therefore our finding has to be made on the basis of the opinions of the expert witnesses, making allowance for the uncertainties. We have found Dr Allis's opinions persuasive, given the extent of his own professional experience studying the Tauhara field and subsidence effects, and the allowances he made for uncertainties. We also found the opinions of Drs O'Sullivan, Watson and Grant helpful. On the totality of the evidence on the topic, we find that Contact's project would not be likely itself to cause any significant adverse effect by way of ground subsidence, either considered alone or cumulative on the subsidence attributed to the drawdown for Wairakei.

Hot ground and heat flow

[233] Dr Allis gave his reasons for the opinion that he gave that the proposed development is unlikely to cause significant near-surface changes, with any changes in thermal activity being so small that they may not be measurable with the routine monitoring presently being carried out. Dr O'Sullivan explained why he had come to the opinion that the surface heat flow would be similar with or without the project. Dr Watson agreed that the increase in heat flow would be very small compared with that of the 1970s. Dr Grant deposed that without mitigation, some increase in steam flow might be expected, and this would occur in the same areas and patterns as before.

[234] It was the respondents' case that because an increase in surface heat flow is not projected to start until 2020, it is very difficult to predict the area that is likely to be affected, the size, scale and intensity of the effect, and the extent of development of the town in the intervening 20 years; and that expansion of steaming ground would be an effect which, even if of low probability, would have a high potential impact.

[235] On the point about development of the town in the next 20 years, we find it difficult to understand how the development of the town in the Tauhara geothermal area would be responsible regardless of the outcome of this appeal. The significant environmental effects of past abstraction for the Wairakei Power Station, and the natural features of the area, should raise questions about its suitability for urban development.

[236] There is uncertainty about the increase of surface heat flow and hot ground that would result from Contact's proposal. Even so, there is no basis for a finding that there is even a low probability that the project would cause high impact in respect of heat flow or hot ground, whether alone

or cumulative on effects of drawdown resulting from abstraction for the Wairakei Power Station. We do not find it persuasive to take a situation of inherent uncertainty and then construct a hypothesis for which there is no evidence of a plausible mechanism on the basis that it is of low probability but high potential impact.

[237] It is our judgment that this would not be a realistic attitude for the Court to take on the evidence before us. Rather it is our finding that, even though predictions cannot be reliable in detail, the heat flow and hot ground effects on the environment of allowing the activity would not be more than minor.

Surface water changes

[238] Mr Bromley gave the opinion that the additional effects of the proposed development on the near-surface aquifers and springs would be minor. Dr O'Sullivan deposed that the proposed development would cause little difference to the surface fluid flows at Tauhara.

[239] Dr Grant gave the opinion that the shallow aquifers, and the bores and springs producing fluid from them, would be affected by an increased steam upflow and increased downflow from the surface, and by the injected water.

[240] On the evidence we find that the effect of Contact's project on the environment in terms of surface water changes would be minor.

Seismicity

[241] The Taupo fault belt is noted for its naturally high level of seismicity. Dr Allis deposed that there is no correlation between the seismic activity and production or injection activities, although there is a small risk of causing induced seismicity especially around reinjection wells. In summary he gave the opinion that the proposed development is unlikely to cause a change in seismicity.

[242] Dr Watson testified that he knew of no reason to expect that the Tauhara reservoir would be particularly prone to seismic activity as a result of the proposed development. Dr Grant deposed that earthquakes do not appear to happen under what would be normal operating conditions for a project like Tauhara.

[243] In short there was no evidence that would support a finding of seismic effects of allowing the activity.

Hydrothermal eruptions

[244] It was the case for the respondents that although hydrothermal eruptions are the least likely effect, if they occurred they would be devastating. The respondents urged that the possibility of eruptions should not be disregarded altogether, but given some weight in the overall judgment.

[245] Mr Bromley deposed that there is negligible risk of hydrothermal eruptions created by the proposed development because the overall upflow of steam to the surface environment is still expected to decline. In the unlikely event of one occurring, it would grow from a small event at the surface, only last a few days, and be self-quenching.

[246] Dr Grant gave the opinion that some increase in steam flow might be expected, and that means an increased chance of eruptions.

[247] There was no evidence to support a finding that hydrothermal eruptions, if they occurred, would be devastating, or indeed significant rather than insignificant and temporary. In our judgment the evidence does not justify a finding in this respect that should influence the decision of the appeal.

Biota

[248] Mr B R Burns, a plant ecologist, deposed that he would expect few changes in thermotolerant vegetation and biota directly attributable to the proposed development. He described a current 3-year project by Contact establishing new, self-sustaining populations of two geothermal fern species at sites where they have been lost or substantially reduced, including within the Tauhara field. He recorded that the regional policy statement recognises such offset works as a way of mitigating environmental effects in developed geothermal systems.

[249] We find that there would be no significant effect on the environment of allowing the activity in this respect.

Community perceptions

[250] Although counsel for the District Council did not expressly make it part of his submissions, he called as a witness a Mr P A Henry, who gave his opinion in evidence that the geothermal power station and other development of the Tauhara Geothermal Field would have adverse effects on the tourism appeal of the Taupo area. In addition, Mr Keogh suggested that public perceptions are relevant even if not well founded, but he cited no authority for that proposition.

[251] Mr Vane cited a passage in the Environment Court decision in *Shirley Primary School v Telecom Mobile Communications*⁵⁸ that fear can only be given weight if it is reasonably based on real risk. Counsel contended that

in this case the risk is real, in that the feared effects have occurred and in the case of subsidence and hot ground migration, continue to occur; and there is a probability of the feared effects occurring with high potential impact.

[252] Counsel for the respondents also referred to community concern and economic impacts on property as effects to be considered.

[253] Counsel for Contact cited decisions in which the Planning Tribunal and the Environment Court have held that community perceptions of risk are not themselves effects on the environment, and can only be given weight if based on risk established on scientific evidence.⁵⁹ Mr Robinson submitted that community perceptions and concerns are therefore not a separate ground for deferring consideration of the appeal on the merits. He also contended that the perceptions arose from circulation of misleading statements about the proposal and its effects. Mr Robinson observed that the appeal should not be conducted as a political process where the extent to which parties have mobilised public opinion might influence the outcome.

[254] We certainly agree with that remark. Parliament has provided for resource consent appeals to be decided by the Environment Court, which is a judicial body, a court of record. It would not be consistent with those provisions for the outcome of appeals to be influenced by the number of people who express opposition to a proposal, or who perceive themselves to be at risk or concerned about the possible adverse effects. Because the Court has the same duty in respect of a decision appealed against as the primary decision-maker,⁶⁰ it acts on its findings based on evidence of probative value in having regard to the matters directed by section 104 and making the discretionary judgment to grant or refuse consent conferred by section 105 for best achieving the purpose of the Act defined in section 5. There is ample scope in that process for the Court's decision to be influenced by adverse effects on the environment which are shown on evidence to be well founded. However there is no place in that process for the Court to be influenced by mere perceptions of risk which are not shown to be well founded.

[255] Claims of effects on tourism appeal, such as referred to by Mr Henry, like claims of depreciation of property values, are derivative. If they are well founded, that is because of adverse effects on the environment, and it is the adverse effects themselves, rather than the supposed secondary results of them, that should be considered in

⁵⁸ [1999] NZRMA 66, 125-6.

⁵⁹ *Ngataranga Bay 2000 v Attorney-General* Planning Tribunal Decision A16/94; *Telecom New Zealand v Christchurch City Council* W165/96; *Shirley Primary School v Telecom Mobile Communications* [1999] NZRMA 66.

⁶⁰ Resource Management Act 1991, section 290(1).

the ultimate judgment. If they are not proved to be well founded, we hold that they should not influence the Court's decision.⁶¹

Continuity of supply for tourist/visitor facilities

[256] Taupo Hot Springs Limited and Akinra Holdings Limited submitted that the geothermal systems on which their businesses rely are too fragile, the effects of extraction too unpredictable, and the consequences of "something going wrong" too devastating, for the proposed development to be warranted, in that draw-off from Tauhara might result in a material decline in the Waipahihi Springs and the supply of geothermal water essential to their activities. Their counsel, Mr Kember, submitted that the southern part of the Tauhara Field is relatively poorly explored and poorly understood. He listed that there are no deep wells, that Dr Allis had suggested that there is a separate upflow zone, but Dr Grant had discounted that thesis; that Professor O'Sullivan had agreed that the predictive value of his model is affected by the fact that the blocks in the southern part of the field are much larger than those in the northern part; and that Dr Grant had expressed the opinion that the Waipahihi area is only just starting to experience the effects of drawdown at Wairakei, and that there could be significant changes yet to occur. Mr Kember submitted that mitigation and monitoring are not an acceptable antidote to the risks, and the potential impact is such that the risk is not worth taking. Counsel also raised the effects on the particular chemistry of the hot water, observing that in the past around Taupo, it is the chloride content of spring water that is the first to be lost.

[257] Mr Bromley testified that the decline in chloride concentration at the Waipahihi Source Spring is a dilution effect directly linked to increased rainfall recharge of the groundwater aquifer.

[258] Mr Henry, owner of the Lanecove Hotel which uses geothermal fluid from a bore for heating spa pools, hot water supply, and for space heating, expressed similar concerns.

[259] There is no evidence of minimal change in the southern Tauhara area attributable to taking geothermal fluid for the Wairakei Power Station. Dr Allis and Mr Bromley were confident that the proposed development would have negligible further effect, and Professor O'Sullivan modelled a similar pattern. Dr Grant was less sure, but accepted that the O'Sullivan model predicting a slow decline over a prolonged period was consistent with his view of the subsurface structure of the southern part of the field.

[260] Although we understand the concern of those whose businesses use geothermal fluid, the expert evidence does not support any finding that Contact's project would be likely to affect the continuity of supply of fluid or its quality. That is much more likely to be affected by natural processes.

Other effects on tourist/visitor business

[261] Mr A Montgomerie, Economic Development Manager for Destination Lake Taupo, gave the opinion in evidence that disruptions to natural resources have a disproportionate effect on tourism confidence, whether or not the effect is physically significant or not; that because tourism confidence relies on positive image, it is disproportionately affected by negative events, real or imagined. He deposed that physical disturbance to the recreational and sporting facilities in the Tauhara geothermal area would be –

*detrimental to their image perception and consumer confidence in the product, which in terms of attracting visitors will be much more devastating than a purely physical occurrence.*⁶²

[262] As well as the Lanecove Hotel, Mr P A Henry has other business interests in Taupo, mainly related to the tourism industry. He expressed concern about potential adverse effects on tourism of geothermal power generation so close to Taupo township, as being inconsistent with protection and enhancement of the environmental qualities of the area, especially the appearance of wells, pipelines, and a power station, possible fog, subsidence and noise. He also deposed that a hot-water beach on the lake edge near his hotel is popular with visitors, and that loss of that attraction would impact on the business of the hotel and Taupo in general.

[263] Section 104(1)(a) calls on consent authorities to have regard to actual and potential effects on the environment of allowing the activity. We have quoted the meaning to be given to the term 'environment.' If the effects of allowing the activity included physical disturbance to the recreational and sporting facilities referred to by Mr Montgomerie, or the loss of the hot-water beach referred to by Mr Henry, we should have regard to them. However the evidence does not justify finding that effects on those facilities would be likely to be caused by allowing the activity. So the derivative effects on tourism confidence and so on (which would not be effects on the environment as defined) would not be triggered.

[264] The visual effects referred to by Mr Henry (the appearance of the geothermal facilities, fog, subsidence

⁶¹ *Northern Wairoa Dairy Co v Dargaville Borough Council*, Planning Tribunal Decision A181/82; *Affco v Hamilton City Council* Planning Tribunal Decision A3/84; *Purification Technologies v Taupo District Council* [1995] NZRMA 197.

and noise) would be effects on the environment. However there was no plausible evidence to support findings that the geothermal facilities would be visible to the public, that their appearance would be unattractive, or that the project would cause fog, subsidence or noise. The expert evidence of Mr M J Hunt, an environmental noise consultant, refuted any suggestion of noise disturbance or nuisance.

[265] In short, we conclude that these concerns are overstated and, on the evidence before us, unwarranted.

Proposed bypass road

[266] The District Council is working with Transit New Zealand towards joint development of a bypass road around the Taupo urban area. Mr Mitchington stated that the route will be east of the town across land affected by the application, and that the District Council and Contact are working together over the route which crosses the power station site. He stated that a significant amount of land has been acquired, that a designation is shortly to be published, and that Transit and the District Council have expended money on design and investigation.

[267] Mr Mitchington deposed that the route for the bypass road has already been moved eastward to avoid steaming ground and hydrothermal eruptions, so that a road on the current route would be longer than that originally planned. He gave the opinion that any further movement to the east would further lengthen the route and alter its economic balance, possibly making it unacceptable as an alternative route for State highway traffic. He also claimed that any recurrence of surface activities could place the road in jeopardy, denying the opportunity to remove highway traffic from the Taupo lakefront and town centre.

[268] In cross-examination Mr Mitchington confirmed that the proposed bypass road had been first mooted in 1962, and that no formal process to designate the route had been pursued since then, although the route had been shown on the district planning maps from the late 1970s. The witness also confirmed that Contact had shifted its proposed generation station site to accommodate the route, and that an alternative route had then been proposed which would bring the road nearer the generation site, a route which would also go through an area of existing hot ground.

[269] Contact contended that the District Council had made a deliberate decision not to designate the route of a proposed bypass road, and after consulting with the Council Contact had shifted the site of its proposed power station to accommodate the bypass. The District Council had then devised an alternative route through the amended power station site but had not advised Contact of that, even though the power station is a permitted activity in terms of the district plan.

[270] The District Council's position shows the value of the designation process provided by Parliament in successive Acts, and the consequence where a requiring authority planning a public work fails to use that process. In our opinion any difficulty that the District Council might face as a result of Contact erecting a generating station on land where it is a permitted activity is due to the way in which the District Council has managed its affairs, and does not provide a valid ground for refusing resource consents associated with the power station project.

Contact's easements

[271] Contact has property rights (by an easement and profit-à-prendre) over certain land overlaying the Tauhara geothermal field assuring access for extraction and reinjection of geothermal fluids for electricity generation, and for construction of fixtures, pipes, equipment and lines associated with it. The District Council submitted that the easement has the effect of preventing anything other than farming on the land by any person other than Contact without Contact's consent. It contended that this causes adverse effects constraining development of the urban area, especially south of the Napier-Taupo Road (State highway 5). Mr Keogh testified that he considered the effects of the easement as a prohibitively restrictive covenant on most of the land, east, north-east and south-east of the existing Taupo township.

[272] The District Council argued that granting the consents sought may have the effect of encouraging Contact to perpetuate that constraint on development; but that declining consent would inevitably result in release of surface rights over the land south of the Napier-Taupo Road, making it available for urban expansion. It was contended that this would have a very substantial effect on the future development of Taupo and on its urban economy. In addition, the District Council argued that the areas of land subject to the easement lying north-east of Taupo might also become available for development if used for reinjection of Wairakei waste fluids, but granting the consents would be contrary to that, or at the least cause that outcome not to be available.

[273] In reply, Contact submitted that its property rights, and its contract with the owners of the land subject to the easements, are not resource management issues and are not relevant to the matters at issue in these proceedings.

[274] We accept that submission. In addition we observe that the appropriate way for the District Council to pursue its wishes about the future development of Taupo would be to propose provisions in a district plan and allow the proposal to be tested by the process Parliament has provided. That would be an appropriate way for the suitability of the land for urban uses to be decided. In the meantime, the District Council can have no complaint

about those with interests in the land making a use of it that is consistent with what is permitted by law.

[275] In the result, we hold that our decision of this appeal should not be influenced by the District Council's submission about Contact's property rights in respect of the land overlying the Tauhara geothermal field hindering urban expansion over that land.

Discharge of contaminants

[276] Section 104(3) of the Resource Management Act 1991 applies where an application is for a permit to discharge contaminants. It requires a consent authority to have regard to the nature of the discharge, the sensitivity of the receiving environment, the reasons for the choice, and any possible alternative methods of discharge, including into another receiving environment. It is not to belittle the general importance of that provision to record that in the circumstances of this case, the opponents did not seek to make anything of the application of this provision. Accordingly there is nothing to be gained by prolonging an already lengthy decision by punctiliously going through details. It is sufficient that we record our acceptance of the expert opinion expressed by Mr Chrisp, for the reasons that he gave, that discharge to waterways, rather than to the ground, was inappropriate due to environmental effects, and alternatives to discharging hydrogen sulphide by venting the non-condensable gases above the cooling tower exhaust were not considered due to the low levels of emissions predicted.

Mitigation

[277] Witnesses called on behalf of Contact presented evidence on monitoring and mitigation measures that it proposed, and addressing the desire by a number of interested parties for greater assurance about mitigation in the event of unexpected adverse effects.

[278] Mr Bromley gave his recommendations about monitoring hot springs and representative deep and shallow bores, and repeat video thermal infrared surveys. He described an option for mitigating impacts on shallow aquifers or surface features by directly tapping the underlying steam zone with production wells. He also suggested that if a hydrothermal eruption occurred close to buildings, it could be quenched by shallow injection of water, or by localised reduction of steam pressure by venting. He recommended that if adverse effects are detected, mitigation options should be implemented in consultation with the peer-review panel.

[279] Mr A W Clotworthy, a geothermal reservoir engineer with Contact, also described in detail monitoring and testing, the need for a management plan, and support for a peer review panel and its functions. Mr Hunt described design measures to avoid or mitigate noise effects, and suggested a condition of consent in that respect. We have

already referred to the evidence by Mr Burns about establishing new populations of geothermal ferns.

[280] It was the case for the respondents that the mitigation measures proposed leave considerable room for doubt whether they would prove effective in practice. Mr Brocklesby gave the opinion that the conditions suggested gave the consent holder too much flexibility, but he accepted that the drafting could be improved to meet his point. The witness also agreed that the objective ought to be to avoid remedy or mitigate actual effects, rather than loss of property values unconnected with actual or potential effects.

[281] Dr Watson gave the opinion that there can be no certainty that the mitigation measures will work. Quenching steaming ground requires reinjection of water, and there could be practical problems with that. Factors on which success or failure of venting steam to air may depend cannot be predicted or controlled. Dr Watson accepted that measurements of subsidence following reinjection would be a test of reinjection as a mitigation method.

[282] It was the case for the District Council that the grant of the consents sought would effectively preclude mass reinjection of geothermal fluid from Wairakei into the Tauhara geothermal field as a means to mitigate subsidence effects arising from abstraction for the Wairakei Power Station.

[283] Dr Grant deposed that the rationale for producing or injecting fluids is theoretically sound but had not been tried, and suggested a field trial; and remarked that the mitigation programs may have adverse effects on existing bore users, including the AC Baths. He also observed that the mitigation methods would not control subsidence like that occurring at Centennial Drive, caused by a fall in steam zone pressure.

[284] Contact submitted that there was no reliable evidence that mass reinjection of fluid from Wairakei would be a practical measure. The evidence was that it would have negative effects, particularly in cooling the shallow aquifer.

[285] Mr Waters contended that there is a tenuous linkage between taking geothermal fluid as a cause of property damage, and the effect (due to the time-lag), so that even if action is taken to remedy property damage or remove the cause, the effect may continue for a long time, perhaps years. He observed that ground subsidence cannot be reversed by reinjection, that mitigation measures would be experimental and that it may take several years to assess their effectiveness.

[286] We hold that the appropriate way to address these issues is to make a judgment on the proposal on the basis that if the project proceeds there should be a management

plan, a comprehensive regime of monitoring, and a peer-review panel independent of the consent-holder; and that if untoward adverse effects on the environment occur, there are measures for mitigation of the effects which are available to be tried, although success in practice cannot be assured.

[287] On the District Council's point that the project would preclude mass reinjection as a measure to mitigate subsidence effects caused by Wairakei abstraction, we accept Contact's submission that mitigation of that subsidence is hypothetical and speculative. In our judgment it is not a sound basis for judicial decision-making.

Mitigation condition

[288] The draft conditions of consent proffered by Contact included an outline of a provision for avoiding, remedying or mitigating significant actual or reasonably anticipated property damage caused by the exercise of the consents, alone or in combination with the consent-holder's other operations. The peer-review panel would have a part in deciding disputes.

[289] The respondents submitted that the proposed condition requires physical damage and the peer review panel to find that the damage was caused by the consent; and submitted that if Contact had been confident of the predictions of its advisers, they would have expected a more generous approach.

[290] Mr Taylor also submitted that delegating such questions to a peer-review panel raises questions whether such delegation would be valid; but he accepted that this cannot arise where, as here, the regime is proffered by applicant.

[291] The District Council submitted that the Resource Management Act is concerned with avoiding, remedying and mitigating adverse effects on the environment, not with compensating for damage arising from those effects. It questioned the practicality of obtaining agreement on compensation with a town the size of Taupo; and observed that the suggested compensation conditions would only apply in respect of significant property damage involving substantial loss of function from exercise of the consents. The District Council raised a number of claimed deficiencies about the suggested condition.

[292] Contact did not present the suggested condition as a final, polished piece of drafting. Appropriately, it suggested it as an expression of a concept that might be developed if the consents are granted, and if the concept is accepted by the Court. There may be conditions imposed in other cases that could assist in the development of such a condition. We hold that we should make a judgment on the proposal on the basis that if consent is granted there could be a condition of that kind, and indeed other conditions, the

details of which might be addressed by counsel for the parties, and settled by the Court.

Summary of effects

[293] We accept the submission by Contact that of all the witnesses called on behalf of parties opposed to the appeal, only two were qualified by training and expertise to give opinion evidence on technical aspects of geothermal development and the level of likely effects: Drs Watson and Grant.

[294] Dr Watson concluded that a development including an extraction of 20,000 tonnes per day of geothermal fluid "should produce a significant and measurable but acceptably low impact." He had not distinguished effects caused by past Tauhara development, but he accepted that subsidence caused by past development was ongoing and would continue into the future in any event. In cross-examination he explained that it would be very difficult to separate out the effects.

[295] Dr Grant agreed with the consensus of views about the underground structure of the Tauhara geothermal resource. His terms of reference had been to advise what would be required to achieve a very high degree of assurance or certainty about the effects. He offered a program of monitoring which would improve the level of confidence about the effects (on a scale of 1 to 10) from between 6 and 7, to between 8 and 9.

[296] We have found that there have in the past and are now various effects on the environment at Tauhara attributable to past abstraction of geothermal fluid for the Wairakei Power Station, and that changes to geothermal features are likely to continue even if Contact's present proposal does not proceed. We have found that it was appropriate for Contact's expert witnesses to use the mathematical models to arrive at the opinions that they gave in evidence, although the outputs are subject to considerable uncertainty because of limitations in the models and in the field data on which they have been developed.

[297] We have found that Contact's project would not be likely itself to cause any significant adverse effect on ground subsidence, either alone or cumulative on the subsidence attributed to abstraction for the Wairakei Power Station. We have also found that the heat flow and hot ground effects of allowing the activity would not be more than minor; that the effects in terms of surface water changes would be minor; and that the evidence does not point to seismic activity or hydrothermal eruptions as effects of allowing the activity. Nor would there be significant effects on biota.

[298] We have held that there is no sound basis for community perceptions of risk as effects on the

environment that should influence the decision; nor for concern that the activity would affect the supply of geothermal fluid for tourist and visitor facilities; nor for adverse effects on tourism confidence. We have rejected claims of adverse effects in respect of a proposed bypass road and Contact's property rights in respect of land overlying the geothermal field.

[299] In short, there are no significant adverse actual or potential effects on the environment of allowing the activity that should be had regard to in considering the resource consent application. However consideration of the application should take into account that there is uncertainty about the possibility of adverse effects, but that a regime of monitoring can be provided for, mitigation measures are available to be tried, and conditions of consent could provide for an independent peer-review panel to review measures for avoiding, remedying or mitigating any significant property damage caused.

PRECAUTIONARY APPROACH

[300] It was the case of the respondents that assessment of this case involves application of the precautionary principle. Their counsel sought to distinguish the radiation cases,⁶³ where there had been an absence of scientific evidence that there was an effect. By comparison he contended that in this case the geophysics of the resource are well-understood in broad terms, there is past history of a heat pulse in and adjacent to Taupo, and in an area that is now more heavily built up.

[301] Mr Taylor submitted that in this case there is no unproven scientific hypothesis, no lack of evidence about effects or potential effects, there is no scientific uncertainty or ignorance about how the resource responds but an ignorance in the state of knowledge about the resource such that we cannot predict with certainty how it will respond. He contended that the case has more in common with cases like *Liquigas v Manukau City Council*⁶⁴ and *Te Aroha Air Quality Protection Appeal Group v Waikato Regional Council (No 2)*,⁶⁵ cases where the risk was manifest and the issue was whether it was sufficiently remote. He submitted that it would be appropriate to take the precautionary approach at the ultimate judgment (citing *McIntyre*).

[302] Mr Taylor quoted this passage from the decision of the Planning Tribunal in *Liquigas v Manukau City Council*⁶⁶ –

What is called for is an assessment of the risk and consequences of the proposal before us. In making that assessment, we must endeavour to hold a balance between being unduly timorous in the face of danger, however remote, and being callous about other people's safety.

[303] Mr Henry contended that in the absence of certainty, the precautionary principle should apply as the consequences of risking Taupo's natural and built environment could have catastrophic and long-term impacts on the community's social cultural and economic well-being.

[304] Mr Waters described the project as a risky experiment based on a mishmash of 'best guesses', not good enough in such close proximity to a town particularly where the geothermal field extends under the town. He urged that extreme caution should be exercised, assuming a worst-case scenario, and contended that any risk at all is unacceptable.

[305] We do not accept that there is any basis for finding that there would be "catastrophic and long-term impacts," for "assuming a worst-case scenario," or for "extreme caution." Nor do we accept that "any risk at all is unacceptable." However we do accept that the bases for the expert witnesses' opinions involve some degree of uncertainty, the possible extent of which was helpfully quantified by Dr Grant, and incorporated in Dr Watson's conclusion about "acceptably low impact." That uncertainty should not make us "unduly timorous," but ought properly to be taken into consideration, as Mr Taylor submitted, in making the ultimate judgment, to which we can now turn.

JUDGMENT

[306] We have found that the land-use consent has the status of a noncomplying activity, because the operation and maintenance of the existing well TH3 is not provided for in the relevant section of the transitional district plan. Section 105(2)(b) of the Resource Management Act⁶⁷

⁶² A Montgomerie, statement of evidence, page 6, paragraph 18.

⁶³ *McIntyre v Christchurch City Council* [1996] NZRMA 289 and *Shirley Primary School v Telecom Mobile Communication* [1999] NZRMA 66. (1983) 9 NZTPA 193.

⁶⁴ [1993] 2 NZRMA 574.

⁶⁵ (1983) 9 NZTPA 193 at paragraph 23.8, page 220.

⁶⁷ Prior to incorporation of the 1997 amendment – see footnote 5.

prohibited granting of consent for a noncomplying activity unless having considered the matters set out in section 104, the consent authority is satisfied that any effect on the environment will be minor, or granting consent will not be contrary to the objectives and policies of the plan.

[307] Our findings about effects on the environment considered as required by section 104 are that any effect on the environment will be minor. Further, there is nothing in what may be identified as objectives and policies of the district plan relating to the absence of provision in the Rural zone for the operation and maintenance of the existing well TH3 that would lead to a finding that this activity would be contrary to the objectives and policies of the plan. Considering the total proposal, and the totality of the objectives and policies of the plan, and bearing in mind that it is a composite of provisions of two former district schemes under the Town and Country Planning Act 1977 we accept the unchallenged opinion of Mr Chrisp and are satisfied granting consent for the land-use activities will not be contrary to the objectives and policies of the district plan. Accordingly we hold that the contingent prohibition of section 105(2)(b) is not effective, and the Court is not precluded by that from exercising the judgment to grant or refuse consent conferred by section 105(1)(c).

[308] We accept Mr Robinson's submission that this requires an overall broad judgment of whether the proposal would promote the sustainable management of natural and physical resources, and that this allows for comparison of conflicting considerations and the scale or degree of them, and their relative significance or proportion in the final outcome.⁶⁸

[309] Counsel for the respondents urged that because a consent, once granted, cannot be recalled even if later investigations show that it should not have been granted, the appellant must produce compelling evidence to satisfy the Court that the potential impact of the adverse effects on the environment will not occur; and that if the Court does not find the evidence compelling, then either as a result of the application of the statutory criteria, or as a result of the precautionary principle in the Court's overall discretion, the Court should refuse the application. The respondents submitted that even a very small possibility of a risk occurring will be sufficient to decline consent if the risk of sufficiently high impact, citing decisions in *Liquigas*⁶⁹ and *Te Aroha (No 2)*.⁷⁰ Mr Taylor urged that the scale or degree of the effects requires the applicant to demonstrate to a very high level that their proposal is worthy of resource consent. He contended that the applicant had not produced the compelling evidence required to

satisfy the Court that the potential impact of the effects will not occur; that although the chances of serious adverse effects are small, if the effects do occur they would impact on hundreds, if not thousands, of people.

[310] The District Council submitted that to grant the consents, the Court must have a high degree of assurance and certainty about the extent, location and probability of adverse effects and that the effects can and will be avoided or remedied, or very substantially mitigated. The particular circumstances said to require that very high degree of assurance were that the Tauhara geothermal field underlies the Taupo township; that adverse effects have actually been experienced at Taupo arising from extraction of geothermal fluid at Wairakei; the gravity of the potential effects; and the existence of very substantial urban, industrial, tourism and recreational assets and development in areas of Taupo which have suffered adverse effects from draw-off from the Wairakei-Tauhara geothermal system.

[311] The District Council contended that the Court cannot have that very high degree of assurance because the appellant's modelling is inadequate; that existing monitoring of adverse effects is inadequate to establish baselines against which changes could be measured; that future monitoring may not be effective to prevent future adverse effects because of the delay between cause and changes that are able to be monitored; and that assessment of risk to people and property are fundamental matters for the Court to consider when deciding the appeal, and not to be left to a peer review panel in reaction to effects that occur.

[312] Counsel for the Tauhara Middle Trusts submitted that because there is not enough detailed scientific knowledge about the southern part of the Tauhara Geothermal Field to be able to predict its performance as a result of the drawdown of fluid from the northern part of the field, a very conservative approach is called for.

[313] Mr Henry contended that because the use of the geothermal resource is perceived to be free there is no encouragement to explore ways of using the resource more efficiently, and an encouragement to plunder the resource.

[314] Contact did not accept that if effects arise which had not been predicted, those effects would necessarily have high impact; and that the possibility of high potential impact events occurring is so low or remote that it should not preclude the grant of consent. Mr Robinson submitted that a 'no-risk' regime is not compatible with the definition of sustainable management, citing *Aquamarine v Southland*

⁶⁸ *North Shore City Council v Auckland Regional Council* [1997] NZRMA 59.

⁶⁹ (1983) 9 NZTPA 193.

⁷⁰ [1993] 2 NZRMA 574.

Regional Council.⁷¹ In response to Mr Henry's contention about use of the geothermal resource being perceived as free, Contact relied on the Planning Tribunal decision in *Swindley v Waipa District Council*⁷² to support the proposition that classification of the proposed activity as a discretionary activity implies that in general it is an efficient use and development for the purpose of Part II.⁷³

[315] We repeat that we accept that there is uncertainty about the degree of the environmental effects of the proposal that ought to be taken into account in making the judgment. The extent of the uncertainty is represented by Dr Watson's description of acceptably low impact, and by Dr Grant's placing the confidence level at between 6 and 7 on a scale of 0 to 10. We place reliance on their evidence because of their professional understanding of the subject-matter. We also accept Mr Robinson's submission that the Act does not impose a 'no-risk' regime.

[316] Those form the context in which we consider that the cases of the opponents are not in perspective. Even allowing for the uncertainty in the predictions, the evidence does not support even low probability of catastrophic and long-term impacts of the project on hundreds or thousands of people, or of grave potential effects endangering very substantial property assets, as claimed.

[317] We also repeat that in approaching the judgment we do so on the basis that if consent is granted, conditions would be imposed including those discussed earlier in this decision about avoiding, remedying and mitigating adverse effects on the environment.

[318] In terms of the meaning ascribed to the term 'sustainable management' in section 5(2), we find that the modified project would represent a management of the geothermal resource in a way and at a rate which enables Contact, and the community, to provide for their economic wellbeing and for their safety. It does not conflict with the relevant planning instruments in any significant respect. Allowing the activity is not likely to have significant actual or potential effects on the environment and, if carried on in compliance with appropriate conditions, would avoid, remedy or mitigate any adverse effects that occur. It would

sustain the potential of the resources involved to meet future needs, and would safeguard the life-supporting capacity of air, water, soil and ecosystems.

[319] In our judgment the appropriate scale or degree to ascribe to the relevant significance of the concerns advocated by the opponents, including the uncertainty of the predictions about adverse environmental effects, is not enough to warrant refusing the consents. We find that the modified proposal would overall serve the purpose of sustainable management of natural and physical resources, and that the resource consents needed should be granted, subject to compliance with conditions which the Court will impose.

TERMS AND CONDITIONS

Terms and conditions of consents

[320] The hearing proceeded on the basis that if the Court decides that consent should be granted, the parties would then confer about the terms and conditions of consent. Accordingly we invite counsel to confer, and in due course to submit a draft formal order granting the consent needed for the modified proposal, and attaching proposed conditions, to give effect to the contents of this interim decision. If agreement cannot be reached, we will receive written submissions or hold a public sitting to hear submissions, whichever is appropriate in the circumstances.

Costs

[321] The question of costs is reserved. Written submissions may be made.

DATED at Auckland this 24th day of January 2000.

For the Court:

DFG Sheppard,
Environment Judge

⁷¹ Environment Court Decision C126/97.

⁷² Planning Tribunal decision A75/94.

⁷³ Mr Robinson subsequently cited regulation 14(1) of the Resource Management (Transitional Fees, Rents and Royalties) Regulations 1991 which provides for continuation of section 10(1) of the Geothermal Energy Act 1953 (as substituted by section 3(1) of the Geothermal Energy Amendment Act 1977) authorising the Minister for the Environment to impose royalties for use of geothermal energy. We assume that the royalty would be at a substantial rate, on reasoning similar to that in paragraph 10.4 of *Minister of Lands v Bay of Plenty Regional Water Board* Planning Tribunal Decision A55/84.

DECISION A53/99

IN THE MATTER of the Resource Management Act 1991
AND
IN THE MATTER of ten appeals/requests for inquiry under section 120 of the Act
BETWEEN **H T E M PARATA**
(RMA 42/98)
NORTHLAND PORT CORPORATION (NZ) LIMITED
(RMA 54, 55 and 56/98)
J HAMMON and others
(RMA 60/98)
THE MINISTER OF CONSERVATION
(RMA 61 and 64/98)
THE DIRECTOR-GENERAL OF CONSERVATION
(RMA 62 and 63/98)
WHANGAREI HEADS CITIZENS ASSOCIATION INCORPORATED
(RMA 92/98)
Appellants
AND **THE NORTHLAND REGIONAL COUNCIL and THE**
WHANGAREI DISTRICT COUNCIL

Respondents

BEFORE THE ENVIRONMENT COURT
Environment Judge DFG Sheppard (presiding)
Environment Commissioner P A Catchpole
Environment Commissioner F Easdale

HEARING at **WHANGAREI** on 10, 11, 15, 16 and 17 March 1999.

APPEARANCES

S M Henderson and G L Davis for H T M Parata, appellant in Appeal RMA 42/98.
J K MacRae and D Clay for Northland Port Corporation, appellant in Appeals RMA 54, 55 and 56/98.
J Hammon for the appellants in Appeal RMA 60/98.
P Gorrige for the Minister of Conservation, appellant in Appeals RMA 61 and 64/98 and for the
Director-General of Conservation, appellant in Appeals RMA 62 and 63/98.
F Iseke for the Whangarei Heads Citizens Association, appellant in Appeal RMA 92/98.
B I J Cowper for the Northland Regional Council and the Whangarei District Council, respondents.
W E Redwood, submitter, in person.

DECISION AND REPORT TO THE MINISTER OF CONSERVATION

INTRODUCTION

1. The Northland Port Corporation (NZ) Limited proposes to establish a new deep-water port in the Whangarei Harbour at Marsden Point. It needs some 24 resource consents under the Resource Management Act 1991 to do so. Its applications for those consents were notified, and drew numerous submissions in opposition.

2. Some of the proposed activities required the consent of the Northland Regional Council, and some required the consent of the Whangarei District Council. Some of the activities are classified as restricted coastal activities. The primary hearings of the resource consent applications were therefore conducted by a joint hearing committee appointed under sections 102 and 117 of the Resource Management Act. After a full hearing, the committee determined to grant, or to recommend that the Minister of Conservation grant, 23 of the consents sought. Consent for maintenance dredging was refused.

3. These ten appeals under section 120 of the Resource Management Act 1991 arise from the committee's decisions. Four other appeals were withdrawn¹.

4. To the extent that the proposed activities are classified as restricted coastal activities, the appeals are inquiries, and the Court's function in these proceedings is not to decide the resource consent applications, but to conduct an inquiry on the joint hearings committee's recommendations and to report on that inquiry to the Minister of Conservation². In all other respects the Court's function is to conduct a rehearing of the resource consent applications, and make decisions on them in place of the hearings committee's decisions³. Because the issues are intertwined, rather than make a report to the Minister and a separate decision, by this one document we do both.

The appeals

5. By Appeal RMA 42/98, Hori Te Moanaroa Parata appealed against the decisions and recommendations of the joint hearings committee, and sought that grants of consents be cancelled. The particulars of the grounds of appeal referred to the relationship of Maori and their culture and traditions with their ancestral land, water, sites, waahi tapu and taonga; and to the extent to which the resource consents would impact on the ability of tangata whenua to

fulfil their role as kaitiaki. The grounds of appeal also claimed that the joint hearings committee had not taken into account the principles of the Treaty of Waitangi in that it had failed to consult adequately, had failed to actively protect taonga, and had failed to have regard to the principle of partnership.

6. By Appeal RMA 54/98, Northland Port Corporation sought an inquiry into recommendations to the Minister of Conservation in respect of restricted coastal activities, seeking amendments to conditions recommended.

7. By Appeal RMA 55/98, Northland Port Corporation appealed against decisions of the joint hearings committee which were the responsibility of the Regional Council, namely the refusal of consent for maintenance dredging, and conditions on other coastal permits. It sought grant of consent for the maintenance dredging, and amendments to certain conditions imposed by the hearings committee decision.

8. By Appeal RMA 56/98, Northland Port Corporation appealed against decisions of the joint hearings committee which were the responsibility of the District Council. It appealed against the omission of some of the description of the purpose of the land-use consent, and the identification of the land on which it is to be exercised; and it also sought amendments to the conditions imposed on the land-use consents by the hearings committee's decisions.

9. By Appeal RMA 60/98, J Hammon, Patuharakeke te Iwi, Patuharakeke Kaumatua and Jan Dobson appealed against the decisions and recommendations of the joint hearings committee, and sought that consent to the resource consent applications be refused. The grounds of appeal were that the decisions and recommendations of the joint hearings committee were contrary to the purpose of the Act stated in section 5; that they did not provide for the relationship of Maori with their ancestral lands, water, sites, waahi tapu and taonga as required by section 6(e); did not appropriately deal with the role of Patuharakeke as kaitiaki; and did not properly and appropriately take into account the principles of the Treaty of Waitangi.

10. By Appeal RMA 61/98 the Minister of Conservation appealed against the joint committee's decision and sought amendments to certain of the conditions imposed by the joint hearings committee, review of discharge locations and incorporation of mitigation and compensation measures.

¹ The appeals that were withdrawn were Appeals RMA 22, 65, 81 and 82/98.

² See section 118(6) of the Resource Management Act 1991.

³ See *Fleetwing Farms v Marlborough District Council* [1997] NZRMA 385, 391-2; 3 ELRNZ 249, 257-8 (CA); K A Palmer *Local Government Law in New Zealand* (2d ed) 646; DAR Williams *Environmental and Resource Management Law* (2d ed) 167.

11. By Appeal RMA 62/98 the Director-General of Conservation appealed against the hearings committee's recommendations about community liaison, harbour monitoring and kaitiaki groups, and public accesses, and sought amendments to certain conditions of consent recommended by the hearings committee.

12. By Appeal RMA 63/98 the Director-General of Conservation appealed against the hearings committee's recommendations about the scope of the community liaison group, triggers for review of the consents, alternative discharge locations, stormwater monitoring, mitigation and compensation measures, and sought further amendments to the conditions of consent recommended by the hearings committee.

13. By Appeal RMA 64/98 the Minister of Conservation appealed against the hearings committee's decisions in respect of the community liaison group, access to wildlife areas, esplanade strip on reclamation, archaeological sites, and mitigation and compensation measures, and sought further amendments to the conditions of consent.

14. By Appeal RMA 92/98 the Whangarei Heads Citizens Association appealed against the joint hearings committee's decision in respect of details about the community liaison group.

The parties

15. Mr Parata is of Te Waiariki descent, associated with the Ngatikorora and Ngatitaka hapu of Ngatiwai iwi. He is also the vice-chairman of the Ngatiwai Trust Board and resource management convenor of the Trust Board's Resource Management Unit. Ngatikorora have traditionally lived on the northern shores of the Whangarei Harbour. Mr Parata lives at Onerahi, a suburb of Whangarei which lies on the Whangarei Harbour, albeit some distance from the site of the proposed new port.

16. Mr Parata acknowledged that his appeal had been lodged in his own name, although he stated that he was also in court for his brothers, sisters and grandchildren. However he did not claim to have brought his appeal on behalf of Ngatiwai iwi, or on behalf of the Ngatikorora or Ngatitaka hapu.

17. Northland Port Corporation (NZ) Limited was incorporated in 1988 as a port company in terms of the Port Companies Act 1988. Under that Act, land at Marsden Point that had previously been acquired by the former Northland Harbour Board for port development was transferred to the company; and it has since acquired other

land in the locality for that purpose so that its total holding there is about 302 hectares. In addition, it has a leasehold estate in various areas of foreshore and seabed, including some 50 hectares at Marsden Point and at Blacksmiths Creek and Marsden Bay. The company is the proponent of the deepwater port development, the applicant for the resource consents the subject of these proceedings, and the appellant in Appeals RMA 54, 55 and 56/98.

18. The appellants in Appeal RMA 60/98, J Hammon, Patuharakeke te Iwi, Patuharakeke Kaumatua and Jan Dobson are representative of the interests of the Patuharakeke iwi who have traditional and cultural interests in the Whangarei Harbour and in part of the southern shore in the vicinity of Marsden Point.

19. The Minister of Conservation has responsibilities under the Conservation Act 1987, including foreshores. By section 119 of the Resource Management Act, the Minister of Conservation is also the consent authority in respect of restricted coastal activities. To avoid apparent conflict between those responsibilities, submissions under the Resource Management Act in pursuit of interests under the Conservation Act in respect of restricted coastal activities are not made in the name of the Minister, but in the name of the Director-General of Conservation⁴. In accordance with section 117(1)(b) of the Resource Management Act, a person was appointed by the Minister to the joint hearings committee which conducted the primary hearing prima facie the resource consent applications. To the extent that the resource consent applications are for restricted coastal activities, this document is the Court's report to the Minister of Conservation, who then has the decision-making responsibilities set out in section 119 of that Act.

20. The nature and interest of the Whangarei Heads Citizens Association Incorporated is evident from its name.

21. The Northland Regional Council is the regional council for the Northland Region in which the site for the proposed port is located. It is the consent authority for the resource consent applications applying to the coastal marine area, except to the extent that they are restricted coastal activities (in respect of which the Minister of Conservation is the consent authority). The Regional Council is also the major shareholder in Northland Port Corporation. In addition it has land interests in parts of the areas affected by the applications. In accordance with section 102 of the Resource Management Act, the Regional Council and the Whangarei District Council held a joint hearing of the resource consent applications. The Regional Council appointed two independent persons to the joint

⁴ In these proceedings it is not necessary for us to consider whether that way of separating submissions from the responsibility to make decisions on resource consent applications is satisfactory, because the appeals by the Minister and by the Director General of Conservation have been settled.

hearings committee. By section 102(5) of the Act, the Regional Council is the respondent to these appeals to the extent that they relate to proposals in the coastal marine area.

22. The Whangarei District Council is the territorial authority for the district in which the parts of the site above the coastal marine area would be situated. It is the consent authority in respect of the resource consent applications relating to land-use. It also has land interests in the area affected. In accordance with section 102 of the Act, the District Council appointed two independent persons to the joint hearings committee. By section 102(5), the District Council is the respondent to these appeals to the extent that they relate to proposals outside the coastal marine area.

23. Mr W E Redwood lives at Whangarei and has had a lifetime interest in the health of Whangarei Harbour, including recreational sailing in the harbour. He had lodged a submission on the resource consent applications, and as a submitter he was heard in these proceedings under section 271A of the Act.

The appeal hearing

24. The appeals were lodged with the Registrar of the Environment Court in early 1998. On 15 September 1998 we held a conference with the parties⁵ with a view to making arrangements for a fair, orderly and efficient hearing of the appeals. At that conference, we were informed that the parties to the appeals by Northland Port Corporation, the Minister and Director-General of Conservation, and the Whangarei Heads Citizens Association had reached agreement on how most of the issues raised in them should be disposed of. We were also informed that the appeals and requests for inquiries by Mr Parata, J Hammon and others, and the Northland Urban Rural Mission challenged grant of resource consents and it was expected that they would require hearing by the Court.

25. At the conference the Court gave directions requiring those appellants to deliver statements listing all issues to be advanced, and the names and topics of all witnesses to be called by them; and requiring the exchange of statements of evidence by 15 December 1998 and statements of evidence in rebuttal by 31 January 1999. The Court also advised the parties to prepare for hearing on the prospect that it would commence in the latter part of March or April 1999.

26. Subsequently the appeal by the Northland Urban Rural Mission was withdrawn.

27. On 12 February 1999 the Registrar of the Environment Court gave notice to all parties that the remaining appeals would be heard at a sitting of the Court at Whangarei to commence on 10 March 1999.

28. When the Court commenced its sitting on that day, we were informed that all the appeals had been settled except that by Mr Parata. That appellant sought an adjournment for three months, but the Court was unable to hear submissions on that motion on that day, because of disruption of the Court's proceedings by persons outside the court using a loudhailer to protest at the Court sitting and to compel the Court to adjourn. The Court sitting on that day had to be abandoned.

29. On the next day (11 March), the Court resumed its sitting in another courtroom less vulnerable to that kind of disruption. We heard submissions from Mr Parata in support of his motion for an adjournment, and from counsel for Northland Port Corporation and for the respondents, who opposed the adjournment. Having taken time to deliberate, the Court gave an oral decision declining to adjourn the hearing of the appeals⁶. However we indicated that we would give Mr Parata a little more time in which to complete preparation of his address in support of his appeal (a matter which had featured in his submissions in support of the adjournment). For that purpose we appointed 15 March 1999 at 1 pm as the time for the presentation of his case in support of his appeal.

30. The Court then received proposals from the parties to the other appeals, which had been settled, about the disposal of those appeals by making orders by consent (subject to the outcome of Mr Parata's appeal). The orders sought by consent would grant resource consent for maintenance dredging subject to conditions (allowing Northland Port Corporation's appeal in that respect); and making amendments to conditions imposed or recommended by the joint hearings committee on the other resource consents. Only one party sought to be heard in opposition to those proposals, Mr W E Redwood, who sought to be heard under section 271A of the Act, as a person who had made a submission.

31. On 12 March, accompanied by Mr Parata and representatives of Northland Port Corporation and the respondents, we visited the site at Marsden Point and viewed various aspects of the site.

32. When the Court resumed its sitting on 15 March 1999 at 1 pm to hear his case in support of his appeal, Mr Parata was represented by counsel, who began by presenting a further motion for adjournment, this time for two months. We heard submissions by counsel for Mr Parata in support of that motion, and by counsel for

⁵ The conference was held in accordance with section 267 of the Resource Management Act.

⁶ The record of that oral decision is identified as Decision A32/99.

Northland Port Corporation and the respondents in opposition. Having taken time to deliberate, the Court gave an oral decision again declining to adjourn the hearing of Mr Parata's appeal⁷.

33. The Court then called on counsel for Mr Parata to present his case in support of his appeal. Mr Davis then made an opening address, in the course of which it became apparent that the appellant was seeking imposition of a condition of resource consent for a 'kaitiaki structure' by which tangata whenua would be able to continue their role as kaitiaki of the Whangarei Harbour. It also became apparent that the wording of the condition sought had not been settled. To ensure that the Court, the applicant, and the respondents could understand what was sought, we adjourned the hearing to enable counsel to take further instructions, and to present the Court and counsel for the applicant and respondents with the wording of the condition sought.

34. When the Court sitting resumed, Mr Davis presented the Court with the wording of a proposed new condition to be inserted in the conditions of the coastal permit for reclamation and the land-use consent for use of land (including the land proposed to be reclaimed) for port and related activities. The conditions would require payment by the consent-holder of \$15,000 to fund a "Kaitiaki Structure" to provide a forum to address relevant tangata whenua concerns arising from exercise of the resource consents for development and operation of the proposed port. The proposed conditions set out details of the composition and scope of the "Kaitiaki Structure", and provided for the consent holder to pay up to \$25,000 per annum for scientific studies for the purpose of monitoring the cultural impacts of the development. The proposed conditions also provided for the consent holder to pay to the appellant, Mr Parata, \$10,000 as a consultancy fee.

35. In response to the Court's enquiry, and after taking further instructions from Mr Parata (who was present in court), counsel confirmed that the imposition of that condition was a complete statement of all the relief that was sought by the appellant, instead of the seeking that the resource consents be cancelled. Counsel acknowledged that this represented a significant change in Mr Parata's position.

36. The hearing proceeded on that basis, and two witnesses gave evidence in support of the appeal: Mr Parata himself, and Ms M Armstrong. In the light of the refinement of the relief sought by Mr Parata, the evidence-in-chief of Ms Armstrong was modified from her previously prepared statement of evidence, in that paragraphs 8 to 14 of that statement were omitted, and the witness was not asked to

read a previously prepared statement of rebuttal evidence. The cross-examination of Mr Parata and Ms Armstrong by counsel on behalf of the applicant and the respondents was focused on the amended relief sought, namely the introduction of the proposed condition for a 'kaitiaki structure'. There was nothing in Mr Parata's answers to questions in cross-examination to indicate any doubt that his appeal would be satisfied by the proposed condition, or that he was no longer seeking that the resource consents be cancelled.

37. However when the Court resumed on the following day, counsel for the appellant Mr Parata announced that their instructions to act on his behalf had been withdrawn, and they were given leave to withdraw. The appellant, Mr Parata, then resumed personal conduct of his own case, and made what he described as a final statement to the Court:

I, my whanau, hapu and iwi remain resolutely and absolutely opposed to the project in its entirety.

38. In response to an enquiry from the Court, Mr Parata stated that he would not be satisfied by the condition which had been presented on his behalf by his counsel on the preceding day. The appellant did not stay to take any further part in the proceedings, but left the courtroom and did not return during the remainder of the sitting.

39. The Court then proceeded to hear the cases for the applicant and for the respondents. In the absence of Mr Parata or any representative on his behalf, the witnesses for those parties were not cross-examined. To avoid unnecessary inconvenience and cost, and there being no opposition, the evidence of some witnesses was admitted by affidavit. Some other witnesses who (having been sworn) confirmed the truth of the contents of prepared statements of their evidence were not required to read them out in full in court on the basis that we would read them ourselves.

40. Counsel for Northland Port Corporation proposed an amendment to one of the conditions imposed by the joint hearing committee with a view to addressing the issue advanced on behalf of Mr Parata about effects on waahi tapu, taonga and other features of special interest to tangata whenua. Mr Parata's absence from the hearing deprived us of the opportunity of having his response to that proposed amendment.

41. Finally, the Court heard the submissions presented by Mr Redwood on three aspects of the amendments to conditions proposed by other parties. First he sought a time limit for monitoring the turning basin floor; secondly he

⁷ The record of that oral decision is identified as Decision A33/99.

opposed deletion of a requirement that the consent-holder immediately notify the Regional Council of escape of a contaminant, and replacement by a requirement for notice within one week. Thirdly he opposed amendment of a condition about making available an area for a wetland for treating water in Blacksmith's Creek. The amendment would require approximately 0.5 hectares to be made available instead of not less than 0.5 hectares. The Court also heard submissions from counsel for Northland Port Corporation and the respondents in reply to Mr Redwood's submissions.

42. On 24 March 1999, following the end of the hearing and inquiry, the Registrar of the Environment Court received from Mr Parata what purported to be a statement of evidence of a Dr Cleese in reply, documents which he stated should have been "tabled" with Moea Armstrong's evidence, a document which he stated was to have been "tabled" with Warren Farrelly's evidence, and a notice of change of representation and address for service. On 29 March 1999 the Registrar received a response by the solicitors for the Northland Port Corporation objecting to the Court considering those documents (save the last) on several grounds.

43. The first was that on 16 March 1999 counsel for Mr Parata had closed Mr Parata's case without having called Dr Cleese as a witness, and without having sought leave to place any further evidence before the Court. The second ground was that Mr Poynter, a witness called for the port company, had not been asked to give evidence he had prepared in reply to that of Dr Cleese, because the latter had not been called as a witness. The third ground was that Ms Armstrong's evidence had been limited to about two pages of her initial statement of evidence, and an objection by counsel for the Northland Port Corporation to her giving further evidence by reference to a bundle of documents had been upheld. Fourthly, counsel for Mr Parata had elected not to ask Ms Armstrong to present evidence that she had prepared in reply, on the basis that it dealt with matters of consultation, which were no longer relevant to the issues before the Court on Mr Parata's appeal. The two documents relating to Ms Armstrong referred to in Mr Parata's letter had both been referred to in the statement of Ms Armstrong's statement in reply, which she had not given in evidence. Next, Mr Farrelly had not been called as a witness and had not produced any statement or document to the Court. Finally, after Mr Parata had withdrawn instructions from his counsel, he had departed from the proceedings, and had not sought leave to present any further evidence or to produce any further documents to the Court.

44. Those grounds are consistent with the events that occurred. As the Court's hearing and inquiry had been concluded, and leave had not been reserved for the presentation of additional evidence, it would be unfair to

the other parties, and out of order for the Court to receive in evidence the documents enclosed with Mr Parata's letter. Accordingly we have not read them.

THE PROPOSAL

The original proposal

45. The proposal involves dredging a turning basin adjacent to the main channel through the Whangarei Heads to a depth of 13 metres for manoeuvring ships into a berth. The turning basin would be up to 430 metres wide. An area of 32 hectares would be reclaimed from the harbour bed. It would extend about 850 metres to the west of an existing jetty at Marsden Point, and would extend about 500 metres out from the existing shore. The reclamation would be formed by constructing a perimeter bund wall with quarry rock, and filling behind that wall with material dredged from the turning basin. Water content in the dredgings would be decanted back into the harbour. On the northern edge of the reclamation a wharf about 30 metres wide would be constructed on piles. There would be berths for ships for general cargo and for forestry produce. A dry bulk-cargo pier would be constructed as an extension to the existing jetty. A quarantine station, barge berths and a water taxi ramp would also be provided.

46. Behind the berth faces there would be areas of open and covered storage for cargoes, and buildings for administration, workshops, equipment maintenance, and other services. A transport corridor is proposed to provide access to the port for cars and trucks, heavy 'off-road' vehicles, with provision for possible future railway, conveyor and pipeline. Carparking would be provided for 104 cars. Provision for public access to the foreshore would be by an accessway 10 metres wide, and there would be a 6-metre wide walkway to the water taxi berth.

47. A stormwater disposal system would be established on land behind the wharf development and storage areas. It would include a settlement pond behind Blacksmiths Creek leading to a storage pond further to the west. About 39% of the stormwater collected would pass from the storage pond and spill into the harbour through a spillway leading back to the northern face of the wharf, where it would be dispersed into the tidal current in deep water. A similar quantity would be irrigated on farmland. The remainder would be lost by evaporation and seepage.

Modifications to the proposal

48. Following notification of the resource consent applications, some modifications of detail were made to the proposal. The length of the dredged turning basin was reduced; the access strip to the eastern foreshore was widened; a combined entrance for the port and refinery is now proposed; the locations of port administrative and

service buildings, water taxi ramp and pontoon and the quarantine station were altered; and changes made to the wharf cross-section.

49. Northland Port Corporation has agreed to enter into a \$5 million bond to secure performance of all works and mitigation measures. It will investigate the feasibility of constructing a short pier jetty on the northern end of the access on the western wall to provide a fishing platform. It will construct and maintain a public access from One Tree Point Road to the western end of the reclamation including vehicle access to a car park and walking access along the western wall of the reclamation at a point 70 metres from the northern wharf face. Planted amenity strips are to be provided along the eastern side of the transport corridor, along the northern side of One Tree Point Road, and along the western boundary of the development site. Specimen trees are to be planted along parts of the foreshore edge, and on the eastern and western edges of the reclamation. Northland Port Corporation is to contribute \$1.5 million towards upgrading of the access route from State Highway 1 to the proposed port.

THE CONSENTS SOUGHT

50. Resource consents are required from the District Council for activities on land above the coastal marine area; they are required from the Regional Council for activities in the coastal marine area and for discharges to land, water and air; and from the Minister of Conservation for those classified as restricted coastal activities. A description of the consents sought from each consent authority follows.

The Whangarei District Council

51. Many of the proposed activities on land are permitted activities in terms of the district plan. Northland Port Corporation has sought eight certificates of compliance⁸ in respect of activities which it claims are permitted activities. The District Council has granted six of those certificates, and has declined certificates sought for deposition of dredgings, and for hours of operation of the port. The applicant has lodged objections in those respects, and by agreement the issues raised have been held over pending the outcome of these appeals.

52. Northland Port Corporation has also applied for and been granted an extension of the period for giving effect to the certificates to seven years from October 1993 to be consistent with the period for giving effect to a deemed coastal permit (formerly a designation).

53. Although the certificates of compliance that have been granted confirm that Northland Port Corporation is entitled to undertake most of the important land-based elements of the proposal as of right, uncertainties about the precise areas to which they apply and the need for certainty of authorisation for the project have led the company to include all aspects of the proposal in its resource consent applications. Even so the status of many of the land-based activities as permitted activities is relevant to consideration of the appeals because the certificates of compliance that have been granted by the District Council are authority for the activities to which they relate. We now summarise them.

54. First, on land zoned Industrial D and subject to Designation 381 in the south-eastern sector of the development area, port and port-related activities and buildings including loading and unloading structures, cargo sheds, port storage and transport operating areas, as shown on the development plan and elevations in the application documents are permitted activities.

55. Secondly, on land the subject of Designations 380 and 381, construction, use and maintenance of covered and uncovered storage areas as shown on the development plan and elevations are permitted activities.

56. Thirdly, on land the subject of those designations, and land in the Marsden Point Special Industrial Zone, construction, operation and maintenance of stormwater collection and bark separation systems together with stormwater settlement and storage ponds as shown on the development plan are permitted activities. This does not apply to the stormwater storage pond which is on land zoned Rural B.

57. Fourthly, on land identified on the development plan as irrigation areas for spray irrigation, equipment ancillary to irrigation of treated stormwater south of Blacksmiths Creek and the use of that land for spray irrigation by treated stormwater are permitted.

58. Fifthly, on land the subject of Designation 381, ancillary buildings including administrative building, equipment maintenance building, utility maintenance stores, stevedoring facilities, berth operations shed, and gatehouse as shown on the development plan and elevations in the application documents are permitted. The applicant acknowledged that this does not extend to the proposed Mission to Seamen facility.

59. Sixthly, the activities proposed for the transport corridor as shown on the development plan are permitted⁹.

⁸ A certificate of compliance may be granted under section 139 of the Resource Management Act.

⁹ The certificate of compliance does not apply to the land in Certificate of Title 88C/775 fronting McEwens Road, but this is presumably an erroneous omission.

60. Northland Port Corporation applied for nine separate resource consents for land use. As none of these were the subject of contention in the proceedings before the Court, we can properly summarise them.

61. The first applies to port and port-related activities as shown on the development plan on four different classes of land: land east of Marsden Point Road zoned Industrial D and subject to Designation 381 for harbour works; road to be stopped, being Papich Road and the end of Marsden Point Road; land in the Marsden Point Special Industrial zone; and the land to be formed by the proposed reclamation¹⁰.

62. The second applies to covered and uncovered storage areas on the land to be reclaimed, on the portions of road to be stopped, and on land in the Industrial D and Marsden Point Special Industrial zones subject to Designations 380 and 381.

63. The third applies to a Missions to Seamen facility (including accommodation for the manager) on land zoned Industrial D and subject to Designation 381. (Evidently the District Council refused a certificate of compliance for this because the definition of ‘harbour works’ in the Harbours Act included dwellings but only those for port employees.)

64. Fourthly land-use consent is sought for the stormwater collection and bark separation system including the settlement and storage ponds, including in the Marsden Point Special Industrial and Rural B zones.

65. The fifth consent is sought for irrigation and associated equipment in those zones.

66. The sixth is for deposition of dredgings during construction and during maintenance operation on land between the foreshore, Marsden Point and One Tree Point Roads and Blacksmiths Creek. This is a discretionary activity in the Marsden Point Special Industrial zone.

67. Seventhly, access over the land to be reclaimed to the quarantine station, water taxi and barge terminals, which themselves will be in the coastal marine area beyond the District Council’s jurisdiction.

68. Eighthly, ancillary activities including dust suppression, sprinkler and fire protection systems, lighting, landscape planting, fencing, parking and transport corridor, for which consent is sought out of caution.

69. The ninth consent sought is for operation of the port for up to 7 days per week, and 24 hours per day. The district

plan imposes no limitation on hours, but the District Council did not issue a certificate of compliance in this respect.

The Northland Regional Council

70. Northland Port Corporation had also sought numerous resource consents from the Northland Regional Council. Four of them related to restricted coastal activities, in respect of which the decision-maker is the Minister of Conservation. By the Regional Council’s proposed regional plan: coastal, part of the harbour affected by the proposal would be in a Marine 2 (Conservation) Management Area, and part would be in a Marine 5 (Port Facilities) Management Area.

71. First, the Northland Port Corporation applied for consent for occupation of land in the coastal marine area for port construction and operation. In the proposed regional coastal plan, port development is classified as a noncomplying activity in the Marine 2 area, and erection of new port-related structures is a discretionary activity in the Marine 5 area. Out of caution, these activities were treated as restricted coastal activities.

72. Secondly, the Northland Port Corporation applied for consent for excavation and maintenance dredging of a dredge basin with a design depth of 13 metres below chart datum extending approximately 300 metres westward of the proposed reclamation and approximately 420 metres out from the berth face¹¹. This extent of seabed excavation is a restricted coastal activity; and the dredge basin is a noncomplying activity in the Marine 2 area and the Marine 5 area.

73. Thirdly, the Northland Port Corporation applied for consent for a reclamation from the bed of the harbour of approximately 32 hectares in area; and in the course of construction to build a bund wall, to deposit the sediment, and to discharge settled decant water. The reclamation is a restricted coastal activity, and it is a noncomplying activity in the Marine 2 area and in the Marine 5 area.

74. Fourthly, the Northland Port Corporation applied for consent to build, use and maintain piles and wharf structures abutting the reclamation. Out of caution this was treated as a restricted coastal activity. It is a noncomplying activity in the Marine 2 area, and a discretionary activity in the Marine 5 area.

75. Fifthly, the port company applied for consent for construction, use and maintenance of covered and uncovered storage areas supported by a dust suppression sprinkler and firefighting system, bulk store, conveyor,

¹⁰ See the Resource Management Act, section 89(2) and *NZ Rail v Marlborough District Council* (1993) 2 NZRMA 449.

¹¹ These dimensions were subsequently modified.

loading and unloading facilities and associated systems. These activities are noncomplying activities as part of a port development in the Marine 2 area, and are discretionary activities in the Marine 5 area.

76. The sixth application to the Regional Council was for consent for the establishment, use and maintenance of a stormwater and bark separation system linked to a 3-pond settling and treatment system on land adjacent to and to the south of Blacksmiths Creek. These activities, being incidental to port development, are noncomplying activities in the Marine 2 area, and discretionary activities in the Marine 5 area. The diversion and discharge of stormwater is a controlled activity under the proposed regional water and soil plan.

77. The seventh application was for consent to build, use and maintain an extension to the existing jetty. The existing jetty lies within the Marine 5 area and is authorised by a deemed coastal permit (having previously been designated). Where the extension is in the Marine 5 area it is a controlled activity; and where it is in the Marine 2 area it is a discretionary activity.

78. Eighthly, the port company sought consent to build, use and maintain a barge berth, water taxi landing and a quarantine transfer station. The site for the quarantine station is in the Marine 5 area, and the activity is classified as a discretionary activity. Where the barge berths are in the Marine 5 area, they are a discretionary activity; and where they are in the Marine 2 area, being part of a port development, they are a noncomplying activity. Likewise the water taxi landing, being part of a port development in the Marine 2 area, is a noncomplying activity.

79. The ninth application to the Regional Council was for consent to all earthworks, disturbance of foreshore and seabed, removal of sand, shingle, shell and other natural material, depositing of material, compaction and other works and excavations necessary for the construction, operation and maintenance of the port and associated support facilities and systems including the establishment of the stormwater settlement pond and stormwater storage facilities. Out of caution these were treated as restricted coastal activities, and noncomplying activities in the Marine 2 area. In the Marine 5 area they are noncomplying activities as they are not included in any specific activity provided for. By the proposed regional water and soil plan, earthworks outside the coastal marine area and outside a streamside management area are controlled activities, but a discretionary activity if inside a streamside management area.

80. Tenthly, Northland Port Corporation applied for consent to deposit dredge tailings on land. By the proposed regional water and soil plan, earthworks of that kind are a controlled activity outside a streamside management area, and a discretionary activity within such an area.

81. The port company's eleventh application to the Regional Council was for consent to operation of the port for up to 7 days per week, 24 hours per day including vessel and machinery movements, operation and discharges. By the proposed regional coastal plan, the occupation of berth space by commercial vessels is a permitted activity in the Marine 5 area, and occupation and use of new port-related structures is a discretionary activity. In the Marine 2 area, port development is a noncomplying activity. The proposed plan places no limit on hours of operation.

82. The twelfth application was for consent to discharge settled and treated stormwater runoff to Marsden Bay. The discharge is to be through a pipe to the northern face of the wharf structure in the Marine 2 area. The discharge is classified as a controlled activity under the proposed regional coastal plan.

83. The thirteenth application was for consent to diversion and damming of stormwater, a controlled activity under the same proposed plan.

84. The fourteenth application was for consent to diversion of seawater for the purposes of the reclamation and port construction. That activity is not controlled by the proposed plan, and consent is required by section 14 of the Act.

85. The fifteenth application to the Regional Council was for consent to taking and discharge of settled and treated water, including stormwater, by spray irrigation to land. That is a controlled activity under the proposed water and soil plan. It is not specifically dealt with by the proposed regional air quality plan, and is therefore classified as a discretionary activity in respect of that instrument.

86. The sixteenth application to the Regional Council was for consent to discharge particulate matter and contaminants into the air. Discharges of contaminants to air (other than from building construction and dust from moving vehicles, which are permitted activities) are discretionary activities.

87. Finally, the port company applied to the Regional Council for consent for the relocation, maintenance and repair of navigational aids. The placement of navigational aids is a controlled activity in the Marine 2 area, and their maintenance and repair is either a permitted activity or controlled activity.

The Minister of Conservation

88. From the preceding description of the applications to the Regional Council, those which are restricted coastal activities, requiring decision by the Minister of Conservation, are occupation of the coastal marine area for port construction and operation, excavation and

maintenance dredging of the dredge basin, reclamation, building, use and maintenance of piles and wharf structures, and disturbance of foreshore and seabed. To the extent that it relates to those activities, the Court makes no decision on the applications, and this document is a report to the Minister.

THE BASIS FOR DECISION

Part II

89. The proceedings arise under the Resource Management Act 1991. The purpose of that Act is stated in section 5 in this way:

5. Purpose— (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.

90. Other important provisions of the Act are found in sections 6 to 8 of Part II. However, the Act has a single purpose, and the provisions of those sections are to be regarded as subordinate and accessory to the stated purpose of the Act¹².

91. We identify the contents of Part II which may be relevant to this case. The first is the inclusion, in the meaning of the term ‘sustainable management’, of using, developing and protecting resources in ways that enable people and communities to provide for their wellbeing, health and safety. The second is the aim of doing so while

achieving the goals set out in paragraphs (a) to (c) of section 5(2). Particular aspects of achieving those goals are found in sections 6 and 7: preservation of the natural character of the coastal environment, and protection from inappropriate use and development¹³; protection of significant habitats of indigenous fauna¹⁴; maintenance and enhancement of public access to along the coastal marine area¹⁵; the efficient use and development of natural and physical resources¹⁶; maintenance and enhancement of amenity values¹⁷; intrinsic values of ecosystems¹⁸; maintenance and enhancement of the quality of the environment¹⁹; and any finite characteristics of natural and physical resources²⁰. Thirdly there are provisions which respond to Maori values and interests: the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga²¹; kaitiakitanga²²; and the principles of the Treaty of Waitangi²³.

92. It is implicit that those statements of the purpose and principles of the Act are to guide the making of decisions under it.

Part VI

93. Consideration of resource consent applications is governed by Part VI of the Act. In particular, section 104(1) directs that, subject to Part II, in considering a resource consent application a consent authority is to have regard to the various classes of matter listed in that subsection. Making that subsection subject to Part II implies that the duty to have regard to those matters is to yield to the provisions of Part II where there is a conflict between them. In this case no party submitted that there is anything in Part II which would conflict with our having regard to the relevant matters listed. Therefore we have to have regard to such of the matters listed in section 104(1) as are relevant to the facts of this case.

94. Material provisions of section 104 are –

104. Matters to be considered— (1) Subject to Part II, when considering an application for a resource consent and any submissions received, the consent authority shall have regard to –

- (a) Any actual and potential effects on the environment of allowing the activity; and

¹² *NZ Rail v Marlborough District Council* [1994] NZRMA 70.

¹³ Section 6(a).

¹⁴ Section 6(c).

¹⁵ Section 6 (d).

¹⁶ Section 7(b).

¹⁷ Section 7(c).

¹⁸ Section 7(d).

¹⁹ Section 7(f).

²⁰ Section 7(g).

²¹ Section 6(e).

²² Section 7(a).

²³ Section 8.

- ...
- (c) Any relevant ... New Zealand coastal policy statement, regional policy statement, and proposed regional policy statement; and
 - (d) Any relevant objectives, policies, rules, or other provisions of a plan or proposed plan; and
 - (e) Any relevant district plan or proposed district plan, where the application is made in accordance with a regional plan; and
 - (f) Any relevant regional plan or proposed regional plan, where the application is made in accordance with a district plan; and
- ...
- (h) Any relevant designations ... or relevant requirements for designations...; and
 - (i) Any other matters the consent authority considers relevant and reasonably necessary to determine the application.
- ...
- (3) Where an application is for a discharge permit or coastal permit to do something that would otherwise contravene section 15 or 15B (relating to discharge of contaminants), the consent authority shall, in having regard to the actual and potential effects on the environment of allowing the activity, have regard to –
- (a) The nature of the discharge and the sensitivity of the proposed receiving environment to adverse effects and the applicant’s reasons for making the proposed choice; and
 - (b) Any possible alternative methods of discharge, including discharge into any other receiving environment.
- (4) Without limiting subsections (1) and (3), when considering an application for a coastal permit, a consent authority shall have regard to –
- (a) Any relevant policy stated in a New Zealand coastal policy statement in respect of the Crown’s interests in land of the Crown in the coastal marine area; and
 - (b) Any relevant provisions included in the appropriate regional coastal plan to implement that policy.
- (5) Where an application is made to a regional council in respect of a reclamation, the consent authority shall have regard to whether it is appropriate in the circumstances for an esplanade reserve or esplanade strip to be required for the purposes of section 229 and to be set aside or created under section 108(2)(g).

95. Decision of various classes of resource consent is also governed by section 105, relevant passages of which are now quoted.

- 105. Decisions on applications**– (1) Subject to subsections (2) and (3), after considering an application for –
- (a) A resource consent for a controlled activity, a consent authority shall grant the consent, but may impose conditions under section 108

- in respect of those matters over which it has reserved control:
- (b) A resource consent for a discretionary activity, a consent authority may grant or refuse the consent, and (if granted) may impose conditions under section 108:
Provided that, where the consent authority has restricted the exercise of its discretion, [consent may only be refused or] conditions may only be imposed in respect of those matters specified in the plan or proposed plan to which the consent authority has restricted the exercise of its discretion:
 - (c) A resource consent (other than for a controlled activity or a discretionary activity or a restricted coastal activity), a consent authority may grant or refuse the consent, and (if granted) may impose conditions under section 108.
- (2) A consent authority shall not grant a resource consent –
- (a) Contrary to the provisions of section 106 or section 107 or section 217, or contrary to any Order in Council in force under section 152 or to any regulations; or
 - (b) [Repealed]
 - (c) For a prohibited activity; or
 - (d) For any activity described as a prohibited activity by a rule in a proposed plan once the time for making or lodging submissions or appeals against the proposed rule has expired and –
 - (i) No such submissions or appeals have been made or lodged; or
 - (ii) All such submissions and appeals have been withdrawn or dismissed.
- (2A) Notwithstanding any decision made under section 94(2)(a), a consent authority must not grant a resource consent for a non-complying activity unless it is satisfied that –
- (a) The adverse effects on the environment (other than any effect to which section 104 (6) applies) will be minor; or
 - (b) The application is for an activity which will not be contrary to the objectives and policies of, –
 - (i) Where there is only a relevant plan, the relevant plan; or
 - (ii) Where there is only a relevant proposed plan, the relevant proposed plan; or
 - (iii) Where there is a relevant plan and a relevant proposed plan, either the relevant plan or the relevant proposed plan.
- (3) For the avoidance of doubt, when granting a resource consent for a controlled activity under subsection (1)(a), the matters described in section 104 shall be relevant only in determining the conditions, if any, to be included in the consent.

96. The joint hearings committee imposed conditions on the various consents which it granted, and recommended that the Minister of Conservation impose conditions on the consents for restricted coastal activities. We have recorded that the parties proposed that the appeals (other than Mr Parata’s) might be disposed of by granting consent

for maintenance dredging subject to conditions, and by amending the conditions imposed and recommended by the joint hearings committee in respect of other consents. We consider those proposals later. However for the purpose of deciding whether the various resource consents should be granted or refused, it is appropriate that we do so on the basis that if they are granted, they would be subject to the respective conditions imposed and recommended by the joint hearings committee, as they would be modified as proposed by the parties.

GROUNDS FOR H PARATA'S APPEAL

97. All the appeals and requests for inquiry have been settled other than that lodged by Mr Parata²⁴. Accordingly we now address the grounds advanced by him or on his behalf.

Consultation

98. In his notice of appeal, Mr Parata claimed that the joint hearings committee had not taken into account the principles of the Treaty of Waitangi in that it had failed to consult adequately. This claim invokes section 8 of the Resource Management Act:

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 take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).

99. In his address on behalf of Mr Parata his counsel, Mr Davis, submitted that it was incumbent on the Court to ensure that consultation with the appellant and with Ngatikorora and Te Waiariki, and with Ngatiwai, was not in a manner in which the project was presented to them as a *fait accompli*. He acknowledged that it was not the Court's duty to consult, but contended that the Minister, the applicant, and the consent authorities had failed to consult with the applicant, because there had been no consultation about a change in the location of the dredged hole (ie the turning basin). Counsel accepted that the appellant and other representatives of tangata whenua had had opportunity to comment on the revised location at the primary hearing.

100. Mr Parata gave evidence that Ngatikorora and Te Waiariki have traditionally lived on the northern shores of the Whangarei Harbour; that the whakapapa of Ngatiwai and that of the Whangarei Harbour are intertwined, so that anything that affects the water affects Ngatiwai, and Ngatiwai are kaitiaki of the harbour. In cross-examination he agreed that Te Waiariki and Ngatikorora were party to

the kaitiaki structure that was proposed by a number of hapu to the joint hearing committee, that they have mana whenua in the harbour. Mr Parata was asked by counsel for the port company about the payment of \$10,000 to himself which would be included in the condition proposed on his behalf by his counsel. The witness stated that the payment related to attempts to consult with the Ngatiwai resource management unit, starting with a Mrs Z Midwood who had been engaged by the port company to make a cultural assessment of the proposal. Mr Parata stated that Mrs Midwood had approached him in the course of making that assessment and he had arrived at the 'fee' of \$10,000 by reference to the time he had spent with Mrs Midwood and other representatives of the company, at \$100 per hour. He estimated that the costs of the Ngatiwai Trust Board would have been in excess of \$30,000.

101. The other witness called on behalf of Mr Parata was Ms M Armstrong, who has a diploma of environmental studies from Northland Polytechnic, and is by trade a journalist. There was nothing in the evidence given by Mr Parata or by Ms Armstrong about the alleged inadequacy of consultation by the port company or those advising the consent authorities over the proposal.

102. Mr J Smellie, secretary of Northland Port Corporation, gave evidence of his own involvement in consultation about the port project with various individuals and groups within the community. He testified that he had attended a meeting with members of Takahiwai Marae Committee and Patuharakeke Ti Iwi in 1993, followed by correspondence between the company and Patuharakeke; and that during 1994 and 1995 consultation with iwi groups continued through the company's chairman and deputy chairman. The witness continued that following a Planning Tribunal decision in May 1996 a meeting had been held with Patuharakeke to discuss an appropriate person for appointment of a liaison person to facilitate consultation as had been recommended by the Parliamentary Commissioner for the Environment. A Mr B Paki had been appointed, but it turned out that other commitments prevented him from continuing, and after further discussion with Patuharakeke, a Ms M Fletcher had been appointed. Correspondence produced by Mr Smellie showed that the appointments of Mr Paki and of Ms Fletcher involved liaison with tangata whenua generally, not only Patuharakeke, but also with other Maori individuals and groups having interests.

103. Mr Smellie's evidence continued that Ms Fletcher had been active in meeting with hapu and iwi and arranging meetings for company representatives with iwi representatives. Following public notification of the resource consent applications, iwi asked for a longer period

²⁴ The concerns raised by Mr Redwood related to proposed amendments to conditions of consent. He did not challenge the grants of consent.

for lodging submissions, and the company had agreed to a more than doubling of the period prescribed by law. In the meanwhile, consultation with iwi groups had continued. The witness produced a report by Ms Fletcher of the consultation which she had undertaken with tangata whenua. The report extends over 30 pages of text and has 7 appendixes. It recorded numerous occasions on which Ngatiwai had been approached, that they had received all documents and invitations to meet with the company, and that they had submitted comments on the draft environmental impact assessment. The report also recorded that meetings had been held with Ngatiwai Trust Board, represented by Mr Parata and Ms Anderson²⁵, in November 1996.

104. Mr J M Palmer, an engineer employed by Northland Port Corporation, deposed to having had meetings with Mr Parata and Ngatiwai Trust Board since August 1998 to try and resolve their concerns, and to having engaged Mr B Mikaere, who had had several meetings with Ngatiwai.

105. Mr Mikaere is a consultant who had been engaged by the Northland Port Corporation in 1998 and had reviewed the consultation with Patuharakeke and with Ngatiwai over the port project. It is not necessary for us to refer in detail to his evidence about consultation with Patuharakeke, as that was not in issue. On consultation with Ngatiwai, he recounted the sequence of events from January 1992, and acknowledged the potential for conflict between Ngatiwai and Patuharakeke in respect to their respective roles and perceived responsibilities towards the harbour and its environs. He rejected any suggestion that the issues raised by the appellants had not been considered, and stated that they had been dealt with in a variety of ways including incorporation in project planning, acceptance of mitigation activities, and appropriate consent conditions. Mr Mikaere gave the opinion that Mr Parata has a right to assert a kaitiaki role for Ngatiwai, and that there had been various offers to Ngatiwai of involvement in monitoring, in restoration work, in membership of the proposed community liaison group and Te Roopu Kaumatua. The Northland Port Corporation was keen to discuss with Ngatiwai other means of giving practical expression to their kaitiaki role, and Ngatiwai concerns about degradation of waters are being properly and respectfully addressed by mitigation and other measures. The witness gave the opinion the responses and suggested resolution of the issues raised show the efficacy of the consultation in identifying tangata whenua concerns.

106. Mr D M Hill is resource management consultant who had been engaged by the consent authorities to advise on the resource consent applications, having previously led the team of technical experts (including Dr M Mutu on

Maori culture and tikanga) who had reviewed the environmental assessment of the project for the Parliamentary Commissioner for the Environment. Mr Hill recounted the appointments of Mr Paki and Ms Fletcher, that Northland Port Corporation had taken responsibility for Maori consultation, and the company had assisted the Councils with a series of hui aimed at ensuring that all potential Maori submitter groups reached a common understanding of the proposal. Three hui had been held (Mr Hill attending two of them), and subsequently a professional Maori planner, Mr H Matunga, had been engaged to assist the Maori submitters. Mr Matunga had conducted a three-day workshop at the Ngatiwai Trust Board in April 1997, and Mr Hill had attended to provide information and answer questions. In addition the iwi liaison officers of the Regional Council and the District Council had been in regular contact with the submitters and attended a number of other hui.

107. Mr Hill also deposed that after the lodging of appeals, he had advised the appellants of his wish to meet with them to discuss and explore outstanding matters; and through the Regional Council's iwi liaison officer he had attempted to ensure that tangata whenua appellants were aware the was prepared to meet and discuss issues. On 14 August 1998 he had met Mr Parata, representatives of Ngatiwai, and Mr Davis, and the meeting had isolated the issue of kaitiakitanga as the principal underlying issue to be resolved.

108. Mr Hill concluded with the opinion that the consultation undertaken by the Councils and the applicant was adequate for the purpose of ensuring that all parties understood what is intended and its likely consequences, and the views and feelings of parties about it. The process had enabled the concerns of hapu and iwi to be clearly and eloquently expressed, and the fact that not all had been satisfied was not a reason for dismissing the adequacy of the consultation.

109. The evidence of Messrs Smellie, Palmer, Mikaere and Hill was not challenged or contradicted by cross-examination or by conflicting evidence. We accept it.

110. The scale of the project, and its site in the Whangarei Harbour, made it appropriate that the applicant consult with tangata whenua about it, and that the consent authorities had their advisers consider the concerns of tangata whenua about it. On the totality of the evidence which we have summarised, we find that the applicant identified, and consulted fully with all tangata whenua of the locality, including the hapu and iwi with which Mr Parata is associated. The number of hours of consultation represented by the amounts of \$10, 000 and \$30,000

25 Presumably the reference to Ms Anderson is an error, and the report should have referred to Ms Armstrong.

referred to by Mr Parata would indicate very extensive consultation. We also find that the consent authorities performed their duties of having their advisers consider and report on the interests and concerns of tangata whenua and how they might be addressed.

111. There was no evidence to support the claim by Mr Parata that consultation with him and his iwi presented the project as a *fait accompli*. There was no evidence that there had been no consultation about the change in the location of the turning basin; nor any evidence that the revised location raised any different issues or concerns. In addition it was accepted that Mr Parata and other tangata whenua had opportunity to comment on the revised location at the primary hearing. In short, there was no evidence to support Mr Parata's claim that consultation with tangata whenua had been inadequate, and we do not accept it. There is no basis in this ground of appeal for refusing any of the resource consents sought.

Maori relationship with Whangarei Harbour

112. Another ground of Mr Parata's appeal was to the effect that the joint committee's decision and recommendations do not recognise and provide for the relationship of Maori and their culture and traditions with the Whangarei Harbour. That claim invokes section 6(e) of the Act:

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 following matters of national importance:

...

(e) The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, *waahi tapu*, and other *taonga*.

113. No party challenged the existence or the importance of that relationship. The issue was whether the proposal recognises and provides for the relationship.

114. The respect in which it was claimed that the proposal fails to do so was that it would be inconsistent with Te Waiariki/Ngatiakorora and/or Ngatiwai's

115. unextinguished customary or aboriginal titles to the foreshore and bed of Whangarei Harbour. However argument in support of the claim of failure to provide for the relationship in that respect was not presented by Mr Parata's counsel. We apprehend that counsel acknowledged that this Court does not have jurisdiction to decide issues about the existence, nature and extent of those titles, and the necessary parties are not before the Court anyway. Grant of resource consent implies no judgment about ownership of land or other rights in respect of it. Indeed, as Mr Parata himself said in evidence, the cultural significance of land is not dependent upon title.

116. In his evidence Mr Parata expressed concern that places of traditional occupation, *taonga* of Ngatiwai, might be destroyed by construction of the port, and by increased shipping and traffic flow to and from the port. In particular, Mr Parata expressed concern that increased shipping might destroy middens along the east coast; that there might be a spill or discharge of chemicals that would destroy *kaimoana* and fisheries. He suggested that there should be a baseline study of the health of the Whangarei Harbour completed prior to any work being commenced on the port.

117. In cross-examination by counsel for the consent authorities, Mr Parata agreed that physical impacts on the harbour would be covered by scientific studies provided for by condition 10 of coastal permit 2. He explained that if a midden was to be removed, the *kaitiaki* structure may require that it be properly excavated and recorded; and agreed that the work would require the consent of the Historic Places Trust, and that the Trust would seek the views of tangata whenua.

118. Ms Armstrong affirmed that the Whangarei Harbour has always been an important site for local Maori. She expressed concerns about ballast water discharged from ships using the port, and decant water from dredging and reclamation activities, having negative effects on flora and fauna. Ms Armstrong also advocated a baseline environmental study of the health of the harbour.

119. No expert witness was called on behalf of Mr Parata to show how the effects referred to by him and Ms Armstrong might be caused by the construction or operation of the proposed port.

120. Mr M Poynter, an applied environmental scientist having a Master of Science with Honours in Marine Zoology from the University of Auckland, had been commissioned by Northland Port Corporation to report on the actual and potential ecological and water quality effects of construction and operation of the proposed port. He gave a detailed assessment in evidence and concluded there would be no significant adverse effects on terrestrial or freshwater habitats; the reclamation would not cause loss of a significant percentage of the marine intertidal or subtidal habitats of the harbour; it would not impact on breeding grounds which are vital to populations of threatened birdlife and would have no effect of any consequence on the availability of feeding habitat for birds in the harbour; there are good prospects of recovery in subtidal habitats to be removed by the development; a benthic invertebrate community would quickly recolonise the harbour bed; and the wider sustainability of fisheries within and beyond the harbour would not be threatened.

121. Mr Poynter also deposed that dredging and decanting of dredged water would not cause any adverse effects or cause the classification of the water (CA) to be exceeded beyond the defined mixing zone; stormwater discharge would be treated so that the CA standard would be met a

very short distance from the outfall; increased seepage to Blacksmiths Creek from land irrigation would be small and would not significantly affect water quality or shellfish; it is unlikely that tributyl tin will continue to be used by international shipping; ballast water discharges and associated environmental risks are controlled and managed by the Import Health Standard issued pursuant to the Biosecurity Act 1993; and the proposed maintenance dredging would comply with the environmental standards that currently apply to that activity in the Whangarei Harbour.

122. In reply to the evidence of Mr Parata and Ms Armstrong about a baseline study, Mr Poynter deposed that there had already been a multi-disciplinary study of the Whangarei Harbour, the report of which was published in 1989; and that the Ministry for the Environment had produced a number of documents dealing with the environmental performance indicators that need to be monitored to define the state of the marine environment and measure environmental change. The witness observed that it is the Regional Council that is primarily responsible for defining and implementing state of the environment research and monitoring in Northland.

123. Mr Poynter gave the opinions that a harbour-wide study of the health of the Whangarei Harbour is not of particular relevance or use in relation to the port proposal; that the Northland Port Corporation could reasonably be expected to assess the effects of its activities, and any studies would need to be highly focused on measuring those effects, as required by condition 10 of coastal permit 2. He also observed that the mitigation fund under condition 11 of that permit could be used for studies of the kind which Mr Parata may be contemplating, and that the Regional Council would have to consult with the kaitiaki group before deciding how that fund is to be applied.

124. In relation to the concern expressed in evidence by Ms Armstrong about ballast water, Mr Poynter produced the Import Health Standard under the Biosecurity Act, and deposed that the Northland Port Corporation actively supports its implementation and is receptive to measures to identify and reduce risks defined within the legislation and government strategies.

125. The evidence of Mr Poynter was not challenged or contradicted by cross-examination or by conflicting evidence. We accept it.

126. Condition 10 of coastal permit 2, referred to by Mr Parata in cross-examination and by Mr Poynter, would require the consent holder to pay the Regional Council up to \$25,000 per year towards scientific studies for monitoring the effects of the development on the water quality and environment of the Whangarei Harbour. The studies are to be approved after consultation with the consent holder, and after taking advice from a

representative group of agencies, organisations and individuals including the community liaison group and any kaitiaki group.

127. In addition, Condition 11 would require the consent holder to pay \$50,000 per year for 10 years to be allocated after consultation with the consent holder and a kaitiaki group, to enable improvements to the health of the Whangarei Harbour, and may include re-seeding shellfish beds, study of New Zealand dotterel nesting, roosting and feeding areas, maintenance and enhancement of habitat for New Zealand dotterel and other shorebirds, and should include concerns of tangata whenua. The Northland Port Corporation announced that it would agree to the list of purposes of that fund to be expanded to include the study and/or mitigation of the effects of the port development on waahi tapu, taonga and other features of special interest to tangata whenua.

128. We have considered the concerns expressed in evidence by Mr Parata and Ms Armstrong, and the evidence of Mr Poynter. On the totality of the evidence we do not accept that construction or operation of the proposed port would have the effects claimed by Mr Parata and Ms Armstrong. We accept that any interference with archaeological sites would need to be authorised under the Historic Places Act. We find that the decision of the joint committee, including proposed amendments to conditions 10 and 11 of coastal permit 2, fully recognise and provide for the relationship of Maori, their culture and traditions, with the Whangarei Harbour and its shores in the respects raised by them. There is no basis in this ground of appeal for refusing any of the resource consents sought.

Kaitiakitanga

129. The next ground of Mr Parata's appeal was that the resource consents would impact on the ability of tangata whenua to fulfil their role as kaitiaki. That is relevant to the direction in section 7(a) of the Act to functionaries to have particular regard to kaitiakitanga. Again there was no issue about Mr Parata's claim that he and his hapu and iwi are kaitiaki of the Whangarei Harbour, accepting that other hapu and iwi may also be kaitiaki of it. Nor was there any issue about the importance of kaitiakitanga to the identity and mana of the kaitiaki.

130. In his address on behalf of Mr Parata, his counsel referred to conditions imposed and recommended by the joint committee which provide for establishment of a community liaison group, and also allow for a kaitiaki group. It was contended that as the conditions require the former but not the latter, the joint committee failed to discharge its obligations to Mr Parata and his hapu to recognise and provide for their kaitiakitanga; and that the joint committee took into account irrelevant considerations in particular the role of the persons and groups other than tangata whenua in setting up the community liaison group.

131. It was claimed that the role of the community liaison group is to act in a manner akin to that of kaitiaki in respect of the port development, in that its stated purpose of having discussions with the consent holder, reporting to local authorities about the development, and recommending studies designed to improve the health of the harbour are roles that have traditionally been fulfilled by kaitiaki, including Mr Parata, his hapu and iwi. It was argued that priority has been given to resident and ratepayer groups and citizens associations representing communities of which Mr Parata and his hapu are members, but there had not been any attempt to recognise and provide for Mr Parata and his hapu's kaitiakitanga. It was submitted that the community liaison group would in effect be usurping the role that has traditionally been carried out since time immemorial by Mr Parata, Te Waiariki, Ngatikorora and Ngatiwai.

132. By section 7(a) Parliament has directed functionaries to have particular regard to kaitiakitanga. It has not directed that that kaitiaki are to be recognised to the exclusion of other members of the community.

133. The conditions imposed and recommended by the joint committee, provide for a community liaison group (in which any member of the community, kaitiaki or not, Maori or not) would be able to take part. In addition, they also provide for the possibility of a kaitiaki group (or 'kaitiaki structure'). We infer that membership of a kaitiaki group or 'kaitiaki structure' would be confined to people who are themselves kaitiaki. The joint committee did not demean kaitiaki, by providing only for them to participate along with other members of the community. They allowed for them to take part in that way. They also gave them special status (if they want it) as kaitiaki as well, by providing in addition for a kaitiaki group (or 'kaitiaki structure').

134. The subject-matters which, under condition 10 of coastal permit 2, would be referred to the community liaison group and any kaitiaki group are scientific studies for monitoring the effects of the development on the water quality and environment of the Whangarei Harbour. Effects on the water quality and environment of the Whangarei Harbour are of interest to kaitiaki, and within the scope of kaitiakitanga. They are also of interest to other members of the community, Maori and non-Maori. It does not demean the status of kaitiaki, or the importance of kaitiakitanga, that other members of the community have opportunity to contribute to these same matters.

135. Recommended Condition 11 of Coastal Permit 2 provides for allocation of funds after consultation with the consent holder and a kaitiaki group to enable improvements to the health of the Whangarei Harbour, and may include re-seeding shellfish beds, study of New Zealand dotterel nesting, roosting and feeding areas, maintenance and

enhancement of habitat for New Zealand dotterel and other shorebirds, and including concerns of tangata whenua. Again, these are subjects which may be within the scope of kaitiakitanga, but may also be properly within the interests of other members of the community who are not kaitiaki. The express references to consultation with a kaitiaki group, and to concerns of tangata whenua, deny the claim that the joint committee failed to have particular regard to kaitiakitanga.

136. The offer by Northland Port Corporation that the list of purposes of that fund to be extended to effects of the port development on waahi tapu, taonga and other features of special interest to tangata whenua, was a substantive and appropriate response to Mr Parata's case in this respect.

137. We do not accept Mr Parata's allegation that the joint committee's decision and recommendations would impact adversely on the ability of tangata whenua to fulfil their role as kaitiaki. To the contrary, we find that it would enhance their role by providing funds for relevant purposes of kaitiakitanga. In our judgment there is no basis in this ground of appeal for refusing any of the resource consents sought. If this ground calls for any response, the offer by Northland Port Corporation of a further amendment to condition 11 is sufficient.

Hydrodynamics

138. Mr Parata's notice of appeal did not identify directly any concern about the effects of the proposed port works on the hydrodynamics of the harbour. Mr Davis's address on behalf of Mr Parata did not do so either. However, one of the grounds advanced by counsel in support of Mr Parata's second motion for adjournment of the hearing of his appeal was an assertion that a hydrodynamic study that had been made by the port company's advisers had been faulty. The fault claimed was that the study having been made in the northern hemisphere, it had been based on the water regime of that hemisphere (described as the plughole effect), rather than the opposite regime of the southern hemisphere.

139. Mr Parata gave and called no evidence in support of that allegation, nor any evidence to give rise to even a remote suspicion that such an error might have occurred. Even so, we have considered the point so that Mr Parata and the public can be assured that it has not been neglected. This should not be taken as a precedent for expecting the Court to depart from the normal expectation that a party who makes an assertion in Court has a responsibility to present evidence to make it out. Parties to proceedings in the Environment Court should not expect the Court to give consideration to bare assertions of which they provide no evidence. That is particularly valid in respect of assertions of primary fact, such as the present subject.

140. Fortunately the Northland Port Corporation assisted the Court by providing evidence on this topic from a hydraulic consultant, Dr A G Barnett, who has over 30 years experience in computational hydraulics including wide experience of harbour modelling studies. He has a Ph D in civil engineering, followed by three years post-doctoral research in Europe. His evidence about the hydraulic effects of the proposed port drew on hydrodynamic study reports by the Danish Hydraulic Institute (one of the leading specialist hydraulic engineering consulting groups worldwide) and interpreting work undertaken under his own direct supervision.

141. The issue raised on Mr Parata's behalf is a narrow one, whether the hydraulic study was based on a northern hemisphere water regime rather than a southern one. No other party raised any question about the hydraulic effects of the proposal. Accordingly we do not need to detail much of the evidence given by Mr Barnett to support his conclusions. He deposed to the opinions that concentration of ebb flow currents and eddy formation in the shipping basin would largely be compensated by the blocking effect of the proposed extended reclamation; that local accretion and erosion impacts are predicted to balance without net supply from surrounding areas; that a gradual trend to a new stable harbour morphology is expected; that the main impact outside the immediate area of construction is a small increase in ebb tide velocities near the oil wharf; and conditions recommended for the coastal permits incorporate his recommended monitoring regime.

142. Dr Barnett was asked whether the difference in vortex rotation of water (the plughole effect) between the northern and southern hemispheres had been allowed for in the hydraulic model. As Mr Parata was not present in Court when Dr Barnett gave his evidence, we quote his answer:

Yes, technically known as coriolis effect so that rotation occurs in different direction in the southern and northern hemispheres. This effect is well understood and I should add although the model was developed in the northern hemisphere, the man in charge of the development was an Australian colleague of mine who was well aware of catering to the southern hemisphere, and I have personally input the required specifications to cater for the fact that this model is in the southern hemisphere. That applies to the numerical model, the physical modelling was done in the northern hemisphere. It is not possible to take the coriolis effect in a physical model, so the location of a physical model is irrelevant, it's a rather small effect in any case in harbour work.

143. Asked whether the model he used has been used successfully in the southern hemisphere in port development, Dr Barnett affirmed that many of the initial applications of the model had been in Australia so it had certainly been developed with southern hemisphere conditions very much in mind.

144. Dr Barnett's evidence was not challenged or contradicted by cross-examination or by conflicting evidence, and we accept it. It is the only evidence before the Court on this topic.

145. We do not accept suggestion on behalf of Mr Parata that the hydrodynamic study on which the port works had been designed was faulty for having been based on the Coriolis effect of the northern hemisphere rather than the opposite regime of the southern hemisphere. On the contrary, on the evidence before the Court we find that the study correctly identified the coreolis effect of the southern hemisphere and was not faulty in the respect suggested. In our judgment there is no basis in this respect for refusing any of the resource consents sought.

146. In summary, none of the grounds advanced by Mr Parata, or on his behalf, has been made out, and his appeal should be disallowed.

W E REDWOOD

147. Mr Redwood made submissions to the Court on three aspects of amendments to the imposed and recommended conditions of consent which were proposed by the parties to the appeals.

148. The first submission concerned a condition requiring monitoring of the bed of the turning basin for re-establishment of marine life. Mr Redwood urged that the condition be amended to require that monitoring commence 12 months after dredging is commenced, or on completion of 50% of the turning basin dredging. He contended that it is important that the floor of the basin be re-established as soon as possible, and that this could be achieved by early monitoring, so that action could be taken if necessary to counter any adverse effects. Mr Redwood observed that the harbour floor is an integral and important chain in the marine life of the harbour, and if it is not re-established there could be serious environmental effects.

149. In reply, Mr MacRae observed that the monitoring condition is to apply in the event of delayed re-establishment of the benthic community; and submitted that the time suggested by Mr Redwood would be inappropriate for that purpose, because re-establishment would not occur within 12 months. Mr MacRae also submitted that what Mr Redwood had referred to as a condition was not strictly a condition under section 108 of the Act, but the recording of an undertaking given by Northland Port Corporation, so it is not open to amendment by the Court in the same way as a condition.

150. Having examined the joint committee's decision and recommendations, we accept Mr MacRae's submissions, and we are not persuaded to make the amendment sought by Mr Redwood.

151. Mr Redwood's second submission concerned a proposed amendment to conditions that would apply where a contaminant escapes otherwise than in conformity with the consent. The proposed amendment would delete a subclause requiring the consent-holder to notify the Regional Council immediately. Instead a new subclause would require the consent-holder to report the escape to the Regional Council within one week of occurrence, and the steps taken to clean up, remedy adverse effects and prevent recurrence of the escape.

152. Mr Redwood opposed that amendment, claiming that it would negate any environmental responsibility the Regional Council would have to the Whangarei Harbour; and would give Northland Port Corporation the absolute right to pollute as much as they like for seven days before informing the authority responsible for the environment. He spoke of his experience that the Northland Regional Council has been very fair in responding to environmental mishaps, and has a special 'hot line' for any such occurrences. He argued that to omit the requirement for immediate notification would leave a serious and dangerous situation.

153. In reply, Mr MacRae submitted that it is not always practicable or necessary to report immediately an escape of contaminant occurs, for instance when it is initially perceived differently. Mr Cowper reported concern by the Regional Council on how far it could require a consent holder, under penalty, to notify a contravention of the Act, and had felt that it would be preferable to rely on the provisions of section 341(2) of the Act which apply when an escape occurs.

154. We consider that the responsibility to mitigate and remedy effects indicated by section 341(2) is an appropriate basis for the condition, and we have not been persuaded that the amendment sought by Mr Redwood ought to be made.

155. The subject of Mr Redwood's third submission was a condition requiring a study of the Blacksmiths Creek catchment to identify measures for improving the quality of water in the creek. The condition continues that if the study concludes that a wetland is a suitable and feasible option, the consent-holder is to make available an area to be agreed between it and the Regional Council but not less than 0.5 hectares of its land for wetland treatment of water flows. The parties to the appeal proposed that the condition be amended so that it would require approximately 0.5 hectares instead of not less than 0.5 hectares.

156. Mr Redwood opposed that amendment to the condition, and urged that either the condition not be changed (leaving the requirement to be not less than 0.5 hectares), or that the reference to the area be removed from the condition. He stated that Blacksmiths Creek is very important, and observed that the area of land that may be required cannot be determined until the study is complete.

157. Mr MacRae reported that the Northland Port Corporation had received advice that if a wetland proves to be desirable, it would not occupy more than 0.5 hectares, and that the Regional Council had accepted that advice. Mr Cowper announced that the advice the Regional Council had received was that it was most unlikely that the wetland would need more than 0.5 hectares.

158. We accept Mr Redwood's submission about the importance of the quality of the water in Blacksmiths Creek, but the present cause for concern in that regard does not arise from the Northland Port Corporation proposal the subject of these proceedings. Further, it would not be appropriate for the condition to remain unchanged (requiring an area that may be larger than required). Nor would it be appropriate for the condition to impose on the consent holder an unquantified obligation, as it would if the reference to the area was deleted. Therefore we do not accept Mr Redwood's submission in that regard.

PLANNING INSTRUMENTS

159. We have quoted material provisions of section 104(1) of the Act. They require a consent authority to have regard to various classes of planning instrument. The instruments that are applicable in this case are the New Zealand Coastal Policy Statement, the Northland regional policy statement, the proposed Northland regional plan: coastal, and the Whangarei district plan.

160. Each of these is a substantial and important document. However we have disposed of the issues in contention. We can therefore address the planning instruments more briefly than if any issues turned on their contents.

New Zealand Coastal Policy Statement

161. The New Zealand Coastal Policy Statement²⁶ states important principles derived particularly from the direction in section 6(a) of the Act for preservation of the natural character of the coastal environment and its protection from inappropriate use and development. The Statement recognises that some activities which can only be located

²⁶ *New Zealand Gazette* No 42, 5 May 1994, page 1563.

on the coast are important to the social and economic wellbeing of people and communities²⁷; and that the protection of the values of the coastal community need not preclude appropriate use and development in appropriate places²⁸. The appropriateness of particular development in a particular place on the coast is guided by provisions of subordinate instruments.

162. Mr Davies observed that by its function a port is an appropriate use and development in the coastal environment, as it cannot be located anywhere else. Mr Hill gave the opinion that granting the consents sought would not be contrary to the objectives and policies of the New Zealand Coastal Policy Statement provided the effects that cannot be avoided are appropriately remedied and mitigated. He considered that the relevant policies had been provided for or given appropriate attention in the process, decisions and subsequent condition amendments. We accept those opinions.

Northland regional policy statement

163. The proposed Northland regional policy statement contains general directions, objectives and policies. They include involvement of tangata whenua in management of natural and physical resources of the region; minimisation of contaminants entering coastal waters; maintenance of the biodiversity of the region; protection of the life-supporting capacity of ecosystems through avoiding, remedying and mitigating adverse effects; and protection of significant indigenous vegetation and significant habitats of indigenous fauna. Mr Hill gave the opinion that granting the consents would not be contrary to those objectives, provided that those effects that cannot be avoided are appropriately remedied or mitigated.

164. The witness also referred to provisions of the regional policy statement about coastal management, preservation of natural character, protection of traditional fisheries and other resources, allocation of space in the coastal marine area, and public access. He gave the opinion that granting the consents would not be contrary to those objectives provided the effects that cannot be avoided are appropriately remedied and mitigated. He considered that the relevant policies had been provided for or given appropriate attention in the process, decisions and subsequent condition amendments. He also observed that the proposed development is consistent with particular policies about allocation of space. That evidence was not challenged, and we accept those opinions.

Transitional regional plan

165. The transitional regional plan comprises what were formerly a general authorisation under the Water and Soil Conservation Act 1967, a bylaw for protection of water courses under the Soil Conservation and Rivers Control Act 1941, and a notice relating to clearance of vegetation and disturbance of land surfaces under the Soil Conservation and Rivers Control Amendment Act 1959. (The latter expired on 1 December 1995.) Under the plan (by application of 39 of the Resource Management Act 1991) resource consent is required for stormwater collection and irrigation; for the use of coastal water; for discharges to water; for discharges to land and discharges to air; the drainage system is a discretionary activity.

Proposed Northland regional plan: coastal

166. Decisions have been given on submissions in respect of the Proposed Regional Plan: Coastal, references have been lodged with the Environment Court, but have not yet been decided.

167. By it, part²⁹ of the Whangarei Harbour affected by the Northland Port Corporation's proposals would be included in the Marine 5 (Port Facilities) Management Area, and part would be included in the Marine 2 (Conservation) Management Area. The proposed new water classification for the Whangarei Harbour is CA, with a mixing zone for an area of discharges just off Marsden Point itself.

168. The evidence of Mr Davies and Mr Hill identified the relevant provisions of the proposed plan. Mr Hill gave the opinion that few of the objectives provide a definite yardstick, apart from an objective of protection of significant habitats of indigenous fauna. Otherwise the objectives point to matters to be considered in making judgments of activities to be allowed. He concluded the proposal is not contrary to the objectives provided its adverse effects are mitigated, and those effects that are unavoidable are not significant in the sustainable management of the resource.

169. Mr Hill and Mr Davies reviewed the policies of the proposed plan. The former identified provisions that indicate that port development and operation are contemplated, and concluded that on the proposed conditions the proposal is consistent with the objectives and policies of the proposed plan. Mr Davies came to a

27 *NZ Coastal Policy Statement*, Principle 1.

28 *Ibid*, Principle 2.

29 The Marine 5 area is a band about 30 metres each side of the existing general cargo wharf, with 60 metres on the harbour side of the berthing jetty, in effect recognising the existing situation.

similar opinion. There was no evidence to the contrary and we accept their opinions.

Transitional coastal plan

170. The transitional regional coastal plan comprises provisions of the Whangarei district scheme under the Town and Country Planning Act 1977 applicable to the coastal marine area; the final classification of the Whangarei Harbour under the Water and Soil Conservation Act 1967; a change pursuant to a direction by the Minister of Conservation classifying restricted coastal activities; and the three instruments which comprise the transitional regional plan already mentioned. The relevant district scheme provision is the former designation for Harbour Works. The water classification for the relevant part of the Whangarei Harbour is SC. Mr Hill gave the opinion that this has no significance for the proposal as none of the development area falls within any identified classified marine zone. The classification of restricted coastal activities has been superseded by the notification of the proposed regional plan: coastal.

Transitional Whangarei district plan

171. The operative district plan was prepared under the Town and Country Planning Act 1977 and publicly notified in 1984. It continues in the transition pending completion of the processing of the proposed district plan under the current regime.

172. A deemed coastal permit (previously a designation) for harbour works applies to the area of foreshore and harbour bed the subject of the application, except for about 80 square metres to be occupied as part of the proposed barge terminal.

173. The land above mean high water springs is designated for harbour works, some having an underlying zoning of Marsden Point Special Industrial, and some Industrial D.

174. The district plan and its predecessor has anticipated and provided for the proposed port since 1967, and the provisions were brought up to date by change in 1992. The objectives and policies have been designed to allow for it, as has the Marsden Point Special Industrial Zone.

175. Mr Davies deposed that the land side component of the development has been designed to satisfy the relevant provisions of the district plan, which were most recently reviewed in 1992.

Proposed Whangarei district plan

176. The proposed district plan was publicly notified in September 1998, and its contents are still subject to amendment under the statutory processes of submissions

and references. It is the latest statement of policy by the Council, prepared under the current legislation.

177. By the proposed plan, the land would be zoned Business 4. The port would qualify as a permitted activity, and the zone appears intended to facilitate it.

Effects on the environment

178. In accordance with section 104(1)(a) of the Act we also have regard to any actual and potential effects on the environment of allowing the proposed activity. We do so bearing in mind the extended definition of the term ‘environment’ in section 2(1):

(1) In this Act, unless the context otherwise requires, -

“Environment” includes -

...

- (a) Ecosystems and their constituent parts, including people and communities; and
- (b) All natural and physical resources; and
- (c) Amenity values; and
- (d) The social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) of this definition or which are affected by those matters:

179. The most significant effect on the environment of allowing the development would be the change to the shape and tidal flow in a relevant small part of the Whangarei Harbour as a result of the dredging and reclamation. Other major effects would be the visual effects of the structures and buildings associated with the port; and changes in the intensity, pattern and flow of traffic in the Marsden Point area. There would be social, economic and cultural effects on people who will live and work in the locality, and those who have interests there (including tangata whenua). For some the economic effects would be positive, for others the social and cultural effects would be perceived as negative.

180. Mr Hill gave the opinion that certain localised adverse environmental effects of the proposal, particularly the reclamation and dredging, cannot be avoided and will be significant in extent. In particular we find from Dr Barnett’s evidence that the configuration of the reclamation and turning basin have been designed to minimise adverse effects on tidal flow.

181. Mr Davies reminded us that the proposal for a port at this locality has been public for many years, and has been included in successive planning instruments.

182. Conditions of consent have been devised to avoid, remedy and mitigate adverse effects of the proposal. Those conditions (as proposed to be amended) evidently satisfied all who would have taken part in the Court’s appeal hearing and inquiry save Mr Parata and Mr Redwood. We have

already given our findings on the matters raised by Mr Parata and Mr Redwood.

CONSIDERATION

183. By the proposed regional plan: coastal, port development, the proposed piles and wharf structures, the storage areas, the stormwater and bark separating system, the barge berths and water-taxi landing, and the earthworks disturbance of foreshore and harbour bed and other works are noncomplying activities in the Marine 2 area. Dredging the turning basin and the reclamation are also noncomplying activities.

184. Granting consent to noncomplying activities is controlled by section 105(2A)³⁰:

(2A) Notwithstanding any decision made under section 94(2)(a), a consent authority must not grant a resource consent for a non-complying activity unless it is satisfied that -

(a) The adverse effects on the environment (other than any effect to which section 104 (6) applies) will be minor; or

(b) The application is for an activity which will not be contrary to the objectives and policies of,

-

(i) Where there is only a relevant plan, the relevant plan; or

(ii) Where there is only a relevant proposed plan, the relevant proposed plan; or

(iii) Where there is a relevant plan and a relevant proposed plan, either the relevant plan or the relevant proposed plan.

185. We accept the opinion expressed tentatively by Mr Davies that those elements of the proposal are not contrary to the objectives and policies of the various planning instruments. Mr Hill expressed a similar opinion. We are so satisfied and find that the resource consent applications can be considered even though those elements of the proposal are noncomplying activities.

186. That condition being met, the Court has to make a discretionary judgment whether to grant or refuse the resource consents, and whether to impose conditions, as provided by section 105(1) of the Act (except that in respect of the restricted coastal activities the decisions have to be made by the Minister of Conservation). Section 105(1)³¹ provides:

(1) Subject to subsections (2) and (3), after considering an application for -

(a) A resource consent for a controlled activity, a consent authority shall grant the consent, but may impose conditions under section 108 in respect

of those matters over which it has reserved control: (b) A resource consent for a discretionary activity, a consent authority may grant or refuse the consent, and (if granted) may impose conditions under section 108:

Provided that, where the consent authority has restricted the exercise of its discretion, consent may only be refused or conditions may only be imposed in respect of those matters specified in the plan or proposed plan to which the consent authority has restricted the exercise of its discretion:

(c) A resource consent (other than for a controlled activity or a discretionary activity or a restricted coastal activity), a consent authority may grant or refuse the consent, and (if granted) may impose conditions under section 108.

187. We have considered the conditions imposed and recommended by the joint hearings committee and the various amendments proposed by the parties to the appeals and inquiries before the Court. Earlier in this decision we addressed the issues raised about those conditions by Mr Parata and Mr Redwood. The other amendments to the conditions made and recommended by the joint hearings committee were not the subject of any contention. Accordingly it is not necessary for us to address them in detail. It suffices that we find that, with those amendments, the conditions are appropriate to avoid, remedy and mitigate the adverse effects on the 'environment' (in the sense given to that term by section 2(1) of the Act) of the proposal. Therefore it is appropriate that we consider whether the resource consent applications should be granted or refused on the basis that if granted, those conditions (as proposed to be amended) would be imposed.

188. We have had regard to the effects on the environment of allowing the activities, and to the relevant provisions of the applicable planning instruments. We find that the adverse effects on the environment would be no different in nature, or greater in extent, than would be inevitable in the development of a new port at Marsden Point designed to serve the purpose of the Resource Management Act, and avoid remedy or mitigate adverse effects to the extent practicable. Details of the location of individual elements in the proposal do not conform with the proposed regional plan: coastal. However the proposal is consistent with the objectives and policies of that proposed plan, as it is with the other planning instruments.

189. It is well established that the judgment whether resource consent is to be granted or refused is to be made for the purpose of the Act, namely, to promote sustainable management of natural and physical resources. The provisions of sections 6 to 8 of the Act are accessory to that purpose.

³⁰ Subsection (2A) was inserted by section 22(3) of the Resource Management Amendment Act 1997.

³¹ Section 105(1) as substituted by section 55(1) of the Resource Management Amendment Act 1993 and further amended by section 22(1) of the Resource Management Amendment Act 1997.

190. Section 6(a) directs functionaries to recognise and provide for the preservation of the natural character of the coastal environment (including the coastal marine area), and the protection of them from inappropriate development. The proposed port would change the natural character of part of the harbour where the natural character of the shore has been significantly modified by existing port works. Mr Davies observed that a seaport by its function is an appropriate development in the coastal environment, as it cannot be located elsewhere. We accept his opinion that the duty cast by section 6(a) does not preclude granting consent to this proposal.

191. Section 6(b) requires recognition and provision for protection of outstanding natural features and landscape from inappropriate use and development. The Whangarei Harbour is generally an attractive natural feature. However the development of the region makes the harbour an appropriate place for a port. The present proposal would not jeopardise any outstanding natural feature or landscape.

192. Section 6(c) relates to protection of significant habitats of indigenous fauna. The proposal would not jeopardise any such habitats.

193. Section 6(d) requires recognition and provision for maintenance and enhancement of public access to and along the coastal marine area. For safety and security reasons, public access cannot be allowed to the port operations area. However it is proposed that public access be provided along the western embankment of the reclamation, and improved access between there and Blacksmiths Creek. In addition public access to the east of the reclamation is to be continued. We find that in general the proposal recognises and provides adequately for public access to the coastal marine area.

194. Section 6(e) directs recognition and provision for the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga. That relationship is to be recognised and provided for in particular by the provision for a kaitiaki group to which we referred to in detail earlier in this decision in considering Mr Parata's appeal. It is also addressed by the proposed amendments to Conditions 10 and 11. Although Mr Parata sought to represent the interests of his whanau, hapu and iwi, none of those groups took part in the proceedings. The tangata whenua of the southern shore of the harbour, who were appellants, joined with the other parties in asking the Court to amend the conditions made and recommended by the joint hearings committee, and announced that those amendments would satisfy their concerns. Accordingly we are satisfied that the amended proposal appropriately recognises and provides for the relationship referred to in section 6(e).

195. Section 7(a) directs that particular regard is to be had to kaitiakitanga. We have also addressed that issue in the context of Mr Parata's appeal. The provision for a

kaitiaki group is a particular response to kaitiakitanga in respect of the proposed port and more generally in respect of the Whangarei Harbour.

196. Section 7(b) requires particular regard to the efficient use and development of natural and physical resources. Mr Davies deposed that 'efficient' is a very appropriate description of the intended construction and operation of the proposed port. That evidence was not challenged or contradicted, and we accept it.

197. Section 7(c) requires particular regard to the maintenance and enhancement of amenity values. In that regard the evidence of Mr S K Brown, landscape architect, was that the visual effects from some local viewpoints would be detrimental, but would be substantially mitigated and consistent with the general scheme of the Act and the instruments under it. Mr Brown's evidence was not challenged or contradicted, and we accept it.

198. Section 7(d) refers to intrinsic values of ecosystems. We have already referred to the evidence given by Mr Poynter in that respect, from which we find that the proposal would not significantly interfere with intrinsic values of ecosystems.

199. Section 8 requires functionaries to take into account the principles of the Treaty of Waitangi. We have addressed that in considering Mr Parata's case. We are not aware of any other issue in that regard.

200. Having considered the relevant directions in sections 6 to 8 of the Act, we have now to consider whether the purpose of the Act explained in section 5 would be better served by grant of the resource consents, subject to compliance with the amended conditions, or by refusing them.

201. The proposed port would represent managing the natural and physical resources in a way which would enable people and the community to provide for their economic wellbeing. The proposal has been designed, and the amended conditions are calculated, to avoid, remedy or minimise any adverse effects on social or cultural wellbeing and on the environment. It would not interfere with sustaining the potential of natural and physical resources to meet the needs of future generations. Any port of the scale needed would unavoidably involve loss of open public harbour. The configuration of the reclamation and turning basin in this proposal has been designed to minimise the adverse effects. Similarly they have been designed to minimise the inevitable visual effects. It is our judgment that the purpose of the Act would be better served by granting the consents sought, and by imposition of the amended conditions, than by refusing them.

Determination and recommendations

202. For the foregoing reasons the Court makes the following determinations:

- a) To the extent that the resource consents sought are for coastal permits which are restricted coastal activities (that is, for reclamation and dredging of harbour bed), it reports that it has no recommendation to make to the Minister of Conservation adverse to his granting coastal permits on the terms, and subject to the conditions, attached to this decision.
- b) To the extent that the resource consents sought are for restricted coastal activities which are not restricted coastal activities, and to the extent that other resource consents are sought, it grants them on the terms and subject to compliance with the conditions attached to this decision.
- c) That the appeals are allowed to that extent only, and in all other respects are disallowed.
- d) That the question of costs on Appeal RMA 42/98 is reserved.

DATED at **AUCKLAND** this day of May, 1999.

DFG Sheppard
Environment Judge

YANNER V EATON [1999] HCA 53 (7 OCTOBER 1999)

Last Updated: 7 October 1999

HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ
MURRANDOO BULANYI MUNGABAYI YANNER APPELLANT

AND

GRAEME JOHN EATON RESPONDENT

Yanner v Eaton [1999] HCA 53
7 October 1999
B52/1998

ORDER

1. *Appeal allowed.*
2. *Set aside the orders of the Court of Appeal of the Supreme Court of Queensland made on 27 February 1998; and in lieu thereof, order that the order nisi of Williams J dated 28 November 1996 be discharged.*
3. *Order that each of the Attorney-General of the Commonwealth, the Attorney-General of the State of Western Australia, the Attorney-General of the State of South Australia and the Attorney-General of the Northern Territory pay to the appellant the additional costs incurred by him by reason of the intervention of that Attorney-General, such additional costs to be taxed.*
4. *The question of costs in respect of the proceedings in this Court and in the Court of Appeal of the Supreme Court of Queensland be reserved.*
5. *The appellant is to have leave to file and serve, within 14 days of the date of this order, written submissions on the reserved question of costs.*
6. *The respondent is to have leave to file and serve, within a further 14 days, written submissions on the reserved question of costs.*

On appeal from the Supreme Court of Queensland

2.

Representation:

D F Jackson QC with A Vasta QC for the appellant (instructed by Hogan & Besley)

G J Gibson QC with G J Koppol and A M Preston for the respondent (instructed by Crown Solicitor for Queensland)

Interveners:

D M J Bennett QC, Solicitor-General for the Commonwealth with H C Burmester QC and K L Eastman intervening on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor)

T I Pauling QC, Solicitor-General for the Northern Territory with A D Rorrison intervening on behalf of the Attorney-General of the Northern Territory (instructed by the Solicitor for the Northern Territory)

B M Selway QC, Solicitor-General for the State of South Australia with R P Smith intervening on behalf of the

Attorney-General of the State of South Australia (instructed by Crown Solicitor for the State of South Australia)

R J Meadows QC, Solicitor-General for the State of Western Australia with P D Quinlan intervening on behalf of the Attorney-General of the State of Western Australia (instructed by Crown Solicitor for the State of Western Australia)

W Sofronoff QC with G C Newton intervening on behalf of the Cape York Land Council (Aboriginal Corporation) (instructed by Ebsworth & Ebsworth)

J Basten QC intervening on behalf of Walden & Ors on behalf of the Lardil, Kaiadilt, Yangkaal and Gangalidda Peoples and intervening on behalf of the Northern Land Council (instructed by Andrew Chalk Associates and B Midena, Northern Land Council)

M L Barker QC with W J Hammond intervening on behalf of Ben Ward & Ors on behalf of the Miriuwung and Gajerrong People (instructed by the Aboriginal Legal Service of Western Australia (Inc))

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS**Yanner v Eaton**

Aboriginals - Native title - Right to hunt wild animals - Regulation by State fauna protection legislation - Whether inconsistent with continued existence of right - Whether right extinguished prior to preservation by *Native Title Act 1993* (Cth).

Constitutional law - Inconsistency between Commonwealth and State laws - Regulation of exercise of native title right by State fauna protection legislation - Whether inconsistent with *Native Title Act 1993* (Cth) - Operation of *Racial Discrimination Act 1975* (Cth).

Animals - Wild animals - Property vested in the Crown - Whether constitutes absolute or full beneficial ownership.

Property - Nature of proprietary interests - Relationship between owner and subject matter.

Statutes - Construction - Meaning of "Crown" - Operation of State fauna protection legislation vesting "property" in the Crown.

Crown - Immunity - Queensland - Extent of immunity conferred by State fauna protection legislation.

Words and phrases - "property" - "Crown" - "vesting" - "wild by nature".

The Constitution, s 109.

Fauna Conservation Act 1974 (Q), ss 7, 24, 24A, 25, 27, 30, 54, 60, 67, 71(2), 83(3), 84.

Native Title Act 1993 (Cth), ss 211, 223.

1. GLEESON CJ, GAUDRON, KIRBY AND HAYNE JJ. The appellant is a member of the Gunnamulla clan of the Gangalidda tribe^{fn0} [1] of Aboriginal Australians. Between 31 October and 1 December 1994 he used a traditional form of harpoon to catch two juvenile estuarine crocodiles in Cliffdale Creek in the Gulf of Carpentaria area of Queensland. He and other members of his clan ate some of the crocodile meat; he froze the rest of the meat and the skins of the crocodiles and kept them at his home.

2. In 1994, the *Fauna Conservation Act 1974* (Q) (“the Fauna Act”) provided, by s 54(1)(a), that:

“A person shall not take, keep or attempt to take or keep fauna of any kind unless he is the holder of a licence, permit, certificate or other authority granted and issued under this Act.”

(The Fauna Act was repealed and replaced by the *Nature Conservation Act 1992* (Q) which came into operation on 19 December 1994. It was, however, common ground, and clearly correct, that these proceedings fell to be decided in accordance with the Fauna Act.)

3. The appellant was not the holder of any licence, permit, certificate or other authority granted and issued under the Fauna Act. He was charged in the Magistrates Court of Queensland with one count of taking fauna contrary to the Fauna Act. The appellant contended, and the Magistrate accepted, that s 211 of the *Native Title Act 1993* (Cth) (“the *Native Title Act*”) applied. That section provided at the relevant time:

“(1) Subsection (2) applies if:

- (a) the exercise or enjoyment of native title rights and interests in relation to land or waters consists of or includes carrying on a particular class of activity (defined in subsection (3)); and
- (b) a law of the Commonwealth, a State or a Territory prohibits or restricts persons from carrying on the class of activity other than in accordance with a licence, permit or other instrument granted or issued to them under the law; and
- (c) the law is not one that confers rights or interests only on, or for the benefit of, Aboriginal peoples or Torres Strait Islanders.

(2) If this subsection applies, the law does not prohibit or restrict the native title holders from carrying on the class of activity, or from gaining access to the land or waters for the purpose of carrying on the class of activity, where they do so:

- (a) for the purpose of satisfying their personal,

domestic or non-commercial communal needs; and

- (b) in exercise or enjoyment of their native title rights and interests.
- (3) Each of the following is a separate *class of activity*:
 - (a) hunting;
 - (b) fishing;
 - (c) gathering;
 - (d) a cultural or spiritual activity;
 - (e) any other kind of activity prescribed for the purpose of this paragraph.”

4. The Magistrate found that the appellant’s clan “have a connection with the area of land from which the crocodiles were taken” and that this connection had existed “before the common law came into being in the colony of Queensland in 1823 and ... thereafter continued”. He further found that it was a traditional custom of the clan to hunt juvenile crocodiles for food and that the evidence suggested that the taking of juvenile rather than adult crocodiles had “tribal totemic significance and [was based on] spiritual belief”. The Magistrate found the appellant not guilty and dismissed the charge.

5. In effect, then, the Magistrate found that:

- (a) the exercise or enjoyment of native title rights and interests in relation to the land or waters where the crocodiles were taken consisted of or included hunting or fishing”[2];
- (b) a law of the State (the Fauna Act) prohibited or restricted persons from carrying on those classes of activity other than in accordance with a licence, permit or other instrument granted or issued to them under the Fauna Act 1886”[3];
- (c) the Fauna Act was not one that conferred rights or interests only on, or for the benefit of, Aboriginal peoples or Torres Strait Islanders”[4]; and accordingly
- (d) the Fauna Act did not prohibit or restrict the native title holders from carrying on those classes of activity (hunting and fishing) or from gaining access to the land or waters for the purpose of satisfying their personal, domestic or non-commercial communal needs and in exercise or enjoyment of their native title rights and interests”[5].

6. The informant (a police officer) applied for an order to review the Magistrate’s decision”[6] and the order nisi for review was made returnable before the Court of Appeal of Queensland. The Court of Appeal, by majority, made the order nisi absolute, set aside the order of the Magistrates Court dismissing the complaint, and remitted the proceedings to the Magistrates Court for the matter to proceed according to law”[7]. By special leave the appellant appeals to this Court.

7. The appellant contended that the Magistrate was right to dismiss the charge because in taking the crocodiles the appellant was exercising or enjoying his native title

rights and interests; these rights and interests were preserved by the Native Title Act. It followed (so the argument went) that the Fauna Act, to the extent to which it prohibited or restricted the taking of crocodiles in the exercise of those rights and interests for the purpose of satisfying personal, domestic or non-commercial communal needs, was invalidated by s 109 of the Constitution.

8. The respondent contended that any native title right or interest to hunt crocodiles in Queensland which the appellant may have enjoyed had been extinguished, prior to the commencement of the Native Title Act, by the enactment of s 7(1) of the Fauna Act which provided that:

“All fauna, save fauna taken or kept otherwise than in contravention of this Act during an open season with respect to that fauna, is the property of the Crown and under the control of the Fauna Authority.”

It followed, so the respondent submitted, that the Native Title Act provisions preserving native title rights and interests to hunt and fish had no relevant operation in this case, because the native title rights and interests upon which the appellant relied had been extinguished before the Native Title Act was enacted.

9. Earlier forms of Queensland fauna legislation had provided expressly that those Acts (with some presently irrelevant exceptions) did not apply to “[a]ny aboriginal killing any native animal for his own food”^{fn7}[8]. Unlike these earlier Acts, however, the Fauna Act did not deal expressly with Aboriginals taking native animals or birds for food. That being so, much of the argument in this Court concerned what effect the Fauna Act’s vesting of “property” in some fauna in the Crown had on the native title rights and interests asserted by the appellant.

The Fauna Act

10. The meaning of s 7(1) can be identified only by construing it in the light of the whole Fauna Act. It is necessary, therefore, to refer to a number of other provisions, but before doing so it is as well to emphasise that s 7(1) did not make *all* fauna “the property of the Crown and under the control of the Fauna Authority”[9]. What the sub-section described as “fauna taken or kept otherwise than in contravention of this Act during an open season with respect to that fauna” was excepted.

11. “Fauna” was defined by the Fauna Act (in effect) as any bird or mammal indigenous to Australia or declared by Order in Council to be fauna, and any animal or member of a species of animal declared by Order in Council to be fauna”[10]. “Fauna” included the young, the egg, the carcass, skin or nest of the animal or member of species but did not include any processed products except those declared by Order in Council”[11]. “Bird” and “mammal”

were defined respectively to mean a bird or mammal, “wild by nature whether native to a State or Territory of the Commonwealth, migratory or introduced, in captivity, bred in captivity or tamed”[12]. Estuarine crocodiles were declared by Order in Council made on 29 August 1974 to be fauna for the purposes of the Act.

12. The Fauna Act divided fauna into four classes: “permanently protected fauna”, “protected fauna”, “non-protected fauna” and “prohibited fauna”[13]. Fauna other than permanently protected fauna, non-protected fauna and prohibited fauna was defined as protected fauna for the purposes of the Act”[14]. Subject to declaration of an open season, protected fauna could lawfully be taken or kept only in certain limited circumstances: if it was orphaned, injured, sick or emaciated” [15]; or if it was causing or likely to cause damage or injury”[16]. In addition, a snake or estuarine crocodile might be killed if it had caused, was causing or was likely to cause injury to a person”[17]. Non-protected fauna might be taken at any time”[18]. An open season might be declared in respect of protected fauna and in that case permits could be issued permitting the taking of that fauna”[19]. Additionally, the Director of National Parks and Wildlife was empowered to issue permits to fauna dealers to buy, keep, sell or otherwise dispose of protected fauna during a close season”[20].

13. The terms of s 54(1)(a) prohibiting the taking or keeping of fauna without a licence are set out above. The apparent generality of that prohibition must be understood in the light of not only its reference to the holder of a licence, permit, certificate or other authority granted and issued under the Fauna Act, but also the further exemptions created by s 54(1)(b). That paragraph exempted (among other things) the keeping of protected fauna that was taken otherwise than in contravention of the Act during an open season”[21] and the taking of fauna at a time and place when and where it is non-protected fauna” [22]. The penalty for contravening s 54(1)(a) was a fine or imprisonment (or both) and the offender was liable “in any case to an additional penalty not exceeding twice the royalty on each fauna in respect of which the offence is committed” [23].

14. The reference to royalty is significant. Section 67 of the Fauna Act provided:

- “(1) Subject to subsection (4), royalty at the rates prescribed shall be payable to the Crown on prescribed fauna.
- (2) Notwithstanding this Act or any other Act or law, payment of royalty on fauna pursuant to this Act does not transfer property in that fauna from the Crown.
- (3) Rates of royalty may vary in respect of different species of fauna.
- (4) The regulations may exempt from the payment of royalty species of fauna specified therein in cases where that fauna is taken otherwise than in contravention of this Act.”

Fauna protection legislation in Queensland had contained generally similar royalty provisions for many years” [24]. They were introduced in 1924 to take the benefit of what was seen at the time to be a valuable and developing fur trade” [25].

15. The obligation to pay royalty under the Fauna Act was supported by several other provisions of that Act including s 69 which made it an offence to fail to pay royalty, s 70 which provided for recovery by summary proceeding under the *Justices Act* (Q) or by action “as for a debt due to the Crown”, and s 71 which permitted a fauna officer to detain fauna in respect of which royalty payable was not paid. Section 71(2) provided that:

“Fauna so seized and detained shall, without further or other authority, be forfeited to Her Majesty, unless all royalty payable thereon is paid within one month of its seizure and detention.”

Similar provision was made by s 83 in respect of fauna, appliances or other things seized under the Act. Section 83(3) provided that:

“Notwithstanding this Act, the Minister may order that any fauna, appliance or other thing seized under this Act be forfeited to Her Majesty though proceedings have not been taken for, nor any person convicted of, an offence against this Act in respect thereof.”

No doubt ss 71(2) and 83(3) must be read in the light of s 84 which provided that:

“The provisions of this Act with respect to the seizure, detention or forfeiture of fauna shall not prejudice or affect in any way the rights of the Crown with respect to fauna that by virtue of section 7 is the property of the Crown, and those rights may be exercised at any time.”

16. What, then, is the meaning to be given to s 7(1) and its provision that some fauna is the property of the Crown and under the control of the Fauna Authority? Did it, as the respondent submitted, give rights to the Crown in respect of fauna that were inconsistent with the rights and interests upon which the appellant relied?

“Property”

17. The word “property” is often used to refer to something that belongs to another. But in the Fauna Act, as elsewhere in the law, “property” does not refer to a thing; it is a description of a legal relationship with a thing” [26]. It refers to a degree of power that is recognised in law as power permissibly exercised over the thing. The concept of “property” may be elusive. Usually it is treated as a “bundle of rights” [27]. But even this may have its limits as an analytical tool or accurate description, and it may be, as Professor Gray has said” [28], that “the ultimate fact

about property is that it does not really exist: it is mere illusion”. Considering whether, or to what extent, there can be property in knowledge or information or property in human tissue may illustrate some of the difficulties in deciding what is meant by “property” in a subject matter” [29]. So too, identifying the apparent circularity of reasoning from the availability of specific performance in protection of property rights in a chattel to the conclusion that the rights protected are proprietary may illustrate some of the limits to the use of “property” as an analytical tool” [30]. No doubt the examples could be multiplied.

18. Nevertheless, as Professor Gray also says” [31], “An extensive frame of reference is created by the notion that ‘property’ consists primarily in control over access. Much of our false thinking about property stems from the residual perception that ‘property’ is itself a thing or resource rather than a legally endorsed concentration of power over things and resources” [32].”

19. “Property” is a term that can be, and is, applied to many different kinds of relationship with a subject matter. It is not “a monolithic notion of standard content and invariable intensity” [33]. That is why, in the context of a testator’s will, “property” has been said to be “the most comprehensive of all the terms which can be used, inasmuch as it is indicative and descriptive of every possible interest which the party can have” [34].

20. Because “property” is a comprehensive term it can be used to describe all or any of very many different kinds of relationship between a person and a subject matter. To say that person A has property in item B invites the question what is the interest that A has in B? The statement that A has property in B will usually provoke further questions of classification. Is the interest real or personal? Is the item tangible or intangible? Is the interest legal or equitable? For present purposes, however, the important question is what interest in fauna was vested in the Crown when the Fauna Act provided that some fauna was “the property of the Crown and under the control of the Fauna Authority”?

21. The respondent’s submission (which the Commonwealth supported) was that s 7(1) of the Fauna Act gave full beneficial, or absolute, ownership of the fauna to the Crown. In part this submission was founded on the dictum noted earlier, that “property” is “the most comprehensive of all the terms which can be used” [35]. But the very fact that the word is so comprehensive presents the problem, not the answer to it. “Property” comprehends a wide variety of different forms of interests; its use in the Act does not, without more, signify what form of interest is created.

22. There are several reasons to conclude that the “property” conferred on the Crown is not accurately described as “full beneficial, or absolute, ownership”. First, there is the difficulty in identifying what fauna is owned by the Crown. Is the Fauna Act to be read as purporting to

deal with the ownership of all fauna that is located within the territorial boundaries of the State but only for so long as the fauna is within those boundaries, or does it deal with all fauna that has at any time been located within those boundaries? That is, does the Fauna Act purport to give the Crown ownership of migratory birds only as they pass through Queensland, or does it purport to give ownership to the Crown of every bird that has ever crossed the Queensland border?

23. Secondly, assuming that the subject matter of the asserted ownership could be identified or some suitable criterion of identification could be determined, what exactly is meant by saying that the Crown has full beneficial, or absolute, ownership of a wild bird or animal? The respondent (and the Commonwealth) sought to equate the Crown's property in fauna with an individual's ownership of a domestic animal. That is, it was sought to attribute to the Crown what Pollock called "the entirety of the powers of use and disposal allowed by law"^{fn35}[36].

24. At common law, wild animals were the subject of only the most limited property rights. At common law there could be no "absolute property", but only "qualified property" in fire, light, air, water and wild animals"^{fn36}[37]. An action for trespass or conversion would lie against a person taking wild animals that had been tamed"^{fn37}[38], or a person taking young wild animals born on the land and not yet old enough to fly or run away"^{fn38}[39], and a land owner had the exclusive right to hunt, take and kill wild animals on his own land"^{fn39}[40]. Otherwise no person had property in a wild animal.

25. "Ownership" connotes a legal right to have and to dispose of possession and enjoyment of the subject matter. But the subject matter dealt with by the Fauna Act is, with very limited exceptions, intended by that Act always to remain outside the possession of, and beyond disposition by, humans. As Holmes J said in *Missouri v Holland*"^{fn40}[41]: "Wild birds are not in the possession of anyone; and possession is the beginning of ownership."^{fn41}[42]

26. Thirdly, there are several aspects of the Fauna Act which tend to suggest that the property in fauna conferred on the Crown may not easily be equated with the property an individual may have in a domestic animal. The property rights of the Crown would come and go according to the operation of the exception contained in s 7(1) of fauna taken or kept "otherwise than in contravention of this Act during an open season with respect to that fauna". As open seasons were declared and fauna taken, what otherwise was the property of the Crown, ceased to be. Next there are the references in ss 71(2) and 83(3) to forfeiture of fauna to the Crown. Even accepting that s 84 says that these sections shall not prejudice or affect the rights of the Crown conferred by s 7, why were ss 71(2) and 83(3) necessary

if the Crown owned the fauna? Then there are the provisions of s 7(2) that "[l]iability at law shall not attach to the Crown by reason only of the vesting of fauna in the Crown pursuant to this section". The Crown's property is property with no responsibility. None of these aspects of the Fauna Act concludes the question what is meant by "property of the Crown", but each tends to suggest that it is an unusual kind of property and is less than full beneficial, or absolute, ownership.

27. Fourthly, it is necessary to consider why property in some fauna is vested in the Crown. Provisions vesting property in fauna in the Crown were introduced into Queensland legislation at the same time as provisions imposing a royalty on the skins of animals or birds taken or killed in Queensland"^[43]. A "royalty" is a fee exacted by someone having property in a resource from someone who exploits that resource. As was pointed out in *Stanton v Federal Commissioner of Taxation*"^[44]:

"... the modern applications of the term [royalty] seem to fall under two heads, namely the payments which the grantees of monopolies such as patents and copyrights receive under licences and payments which the owner of the soil obtains in respect of the taking of some special thing forming part of it or attached to it which he suffers to be taken."

That being so, the drafter of the early Queensland fauna legislation may well have seen it as desirable (if not positively essential) to provide for the vesting of some property in fauna in the Crown as a necessary step in creating a royalty system. Further, the statutory vesting of property in fauna in the Crown may also owe much to a perceived need to differentiate the levy imposed by the successive Queensland fauna statutes from an excise. For that reason it may well have been thought important to make the levy as similar as possible not only to traditional royalties recognised in Australia and imposed by a proprietor for taking minerals or timber from land, but also to some other rights (such as warren and piscary) which never made the journey from England to Australia.

28. In light of all these considerations, the statutory vesting of "property" in the Crown by the successive Queensland fauna Acts can be seen to be nothing more than "a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource"^[45]. So much was acknowledged in the second reading speech on the Bill which first vested property in fauna in the Crown. The Minister said"^[46]:

"It [the fur industry] is an industry that really belongs to the people, and although the Bill, amongst other things, makes it quite clear that the native animals of the State belong to the people of the State, I do not think there is any doubt in the minds of any one regarding that question

already. The native animals belong to the people in just the same way as the timber and the minerals belong to the people, and they cannot be sold without permission.”

29. Roscoe Pound explained why wild animals and other things not the subject of private ownership are spoken of as being publicly owned. He said”[47]:

“We are also tending to limit the idea of discovery and occupation by making *res nullius* (eg, wild game) into *res publicae* and to justify a more stringent regulation of individual use of *res communes* (eg, of the use of running water for irrigation or for power) by declaring that they are the property of the state or are ‘owned by the state in trust for the people.’ It should be said, however, that while in form our courts and legislatures seem thus to have reduced everything but the air and the high seas to ownership, in fact the so-called state ownership of *res communes* and *res nullius* is only a sort of guardianship for social purposes. It is *imperium*, not *dominium*. The state as a corporation does not own a river as it owns the furniture in the state house. *It does not own wild game as it owns the cash in the vaults of the treasury*. What is meant is that conservation of important social resources requires regulation of the use of *res communes* to eliminate friction and prevent waste, and requires limitation of the times when, places where, and persons by whom *res nullius* may be acquired in order to prevent their extermination. *Our modern way of putting it is only an incident of the nineteenth-century dogma that everything must be owned.*” (Emphasis added)

30. The “property” which the Fauna Act and its predecessors vested in the Crown was therefore no more than the aggregate of the various rights of control by the Executive that the legislation created. So far as now relevant those were rights to limit what fauna might be taken and how it might be taken”fn47”[48], rights to possession of fauna that had been reduced to possession”fn48”[49], and rights to receive royalty in respect of fauna that was taken”fn49”[50] (all coupled with, or supported by, a prohibition against taking or keeping fauna except in accordance with the Act 1975 “fn50”[51]). Those rights are less than the rights of full beneficial, or absolute, ownership. Taken as a whole the effect of the Fauna Act was to establish a regime forbidding the taking or keeping of fauna except pursuant to licence granted by or under the Act.

31. The respondent expressly disclaimed a contention that the enactment of legislation forbidding the taking or keeping of fauna except pursuant to licence would be sufficient to extinguish the rights and interests relied on by the appellant. This concession was rightly made and it follows, therefore, from what we have said about the meaning and effect of the Fauna Act (and, in particular, the vesting of property in some fauna in the Crown) that the Act did not extinguish those rights and interests. It is as well, however, to examine why the respondent’s

concession was right. That examination must begin from a consideration of what is meant by native title rights and interests.

Native title rights and interests

32. Section 223 of the Native Title Act provides (in part):

“(1) The expression *native title* or *native title rights and interests* means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:

- (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
- (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
- (c) the rights and interests are recognised by the common law of Australia.

(2) Without limiting subsection (1), *rights and interests* in that subsection includes hunting, gathering, or fishing, rights and interests.”

33. The hunting and fishing rights and interests upon which the appellant relied (and which the Magistrate found to exist) were rights and interests “possessed under the traditional laws acknowledged, and the traditional customs observed”, by the clan and tribe of which the appellant was a member”[52]. The Magistrate found that by those laws and customs, the appellant’s clan and tribe had a connection with the land and waters where the crocodiles were taken”[53]. At least until the passing of the Fauna Act those rights and interests were recognised by the common law of Australia”[54].

34. The respondent’s contention was that the Fauna Act “extinguished” these rights and interests. This led to debate about what was referred to as the “partial extinguishment of native title” and what was meant by that term. It is unnecessary, however, to examine that debate in this case.

35. It is clear that native title in land is extinguished by a grant in fee simple of that land”[55]. As was said in the joint judgment in *Fejo v Northern Territory*”[56] “it is extinguished because the rights that are given by a grant in fee simple are rights that are inconsistent with the native title holders continuing to hold any of the rights or interests which together make up native title”. That is, native title is extinguished by the creation of rights that are inconsistent with the native title holders continuing to hold their rights and interests. The extinguishment of such rights must, by conventional theory, be clearly established”[57].

36. The critical contention of the respondent was that the Fauna Act created a legal regime that was inconsistent with native title holders in Queensland (and, in particular, the group of which the appellant is a member) continuing

to hold one of the rights and interests (the right and interest in hunting and fishing) that made up the native title the Magistrate found to exist. That inconsistency was said to lie in the creation of property rights in the Crown that were inconsistent with the continued existence of the native title rights and interests.

37. It is unnecessary to decide whether the creation of property rights of the kind that the respondent contended had been created by the Fauna Act would be inconsistent with the continued existence of native title rights. It is sufficient to say that *regulating* the way in which rights and interests may be exercised is not inconsistent with their continued existence. Indeed, regulating the way in which a right may be exercised presupposes that the right exists. No doubt, of course, regulation may shade into prohibition and the line between the two may be difficult to discern^{fn57} [58]. Similarly, it may not always be easy to say whether the creation of statutory rights or interests before the enactment of the *Racial Discrimination Act* (Cth) and the *Native Title Act* was consistent with the continued existence of native title rights and interests. (The *Racial Discrimination Act 1974* and the *Native Title Act* will, of course, have to be considered where the question concerns the effect of steps taken after the enactment of those Acts.) But in deciding whether an alleged inconsistency is made out, it will usually be necessary to keep well in mind that native title rights and interests not only find their origin in Aboriginal law and custom, they reflect connection with the land. As Brennan J said in *R v Toohey; Ex parte Meneling Station Pty Ltd*^{fn58} [59], “Aboriginal ownership is primarily a spiritual affair rather than a bundle of rights” but “[t]raditional Aboriginal land is not used or enjoyed only by those who have primary spiritual responsibility for it. Other Aboriginals or Aboriginal groups may have a spiritual responsibility for the same land or may be entitled to exercise some usufructuary right with respect to it.”

38. Native title rights and interests must be understood as what has been called “a perception of socially constituted fact” as well as “comprising various assortments of artificially defined jural right”^{fn59} [60]. And an important aspect of the socially constituted fact of native title rights and interests that is recognised by the common law is the spiritual, cultural and social connection with the land. Regulating particular aspects of the usufructuary relationship with traditional land does not sever the connection of the Aboriginal peoples concerned with the land (whether or not prohibiting the exercise of that relationship altogether might, or might to some extent). That is, saying to a group of Aboriginal peoples, “You may not hunt or fish without a permit”, does not sever their connection with the land concerned and does not deny the continued exercise of the rights and interests that Aboriginal law and custom recognises them as possessing.

39. Not only did the respondent not contend that such a law severed that connection, s 211 of the *Native Title Act*

assumes that it does not. Section 211 provides that a law which “prohibits or restricts persons” from hunting or fishing “other than in accordance with a licence, permit or other instrument granted or issued to them under the law”, does not prohibit or restrict the pursuit of that activity in certain circumstances where native title exists. By doing so, the section necessarily assumes that a conditional prohibition of the kind described does not affect the existence of the native title rights and interests in relation to which the activity is pursued.

40. The Fauna Act did not extinguish the rights and interests upon which the appellant relied. Accordingly, by operation of s 211(2) of the *Native Title Act* and s 109 of the Constitution, the Fauna Act did not prohibit or restrict the appellant, as a native title holder, from hunting or fishing for the crocodiles he took for the purpose of satisfying personal, domestic or non-commercial communal needs. The Magistrate was right to dismiss the information.

41. For completeness it is as well to note two further matters. First, although the respondent did not rely on the earlier decision of this Court in *Walden v Hensler*^{fn60} [61] it must be recalled that the issues discussed in that case were radically different from those that arise in the present, not least because they arose before the passing of the *Native Title Act*. Secondly, a number of submissions were made in the course of argument that touched upon questions much broader than those that must be decided in this proceeding. It is neither necessary nor desirable to express any view about them when this case can be decided on the narrow question whether the Fauna Act should be given the construction for which the respondent and the Commonwealth contended. It should not be given that construction.

42. The appeal should be allowed, the orders of the Court of Appeal of Queensland set aside and in lieu it should be ordered that the order nisi be discharged. For the reasons given by Gummow J, costs should be disposed of as his Honour has proposed.

43. McHUGH J. The critical question in this case is a simple one. It is whether, by force of the *Fauna Conservation Act* (Q) (“the Act”), property in all fauna in Queensland, present or future, became or becomes vested in the Crown after the commencement of the Act. If that is the effect of the Act, the two estuarine crocodiles which the appellant killed were the property of the Crown and he had no right to kill them by reason of the *Native Title Act 1993* (Cth) or otherwise.

44. Whether the property was vested in the Crown turns on the construction of s 7 of the *Act* which, at the time of its enactment, relevantly provided:

“(1) All fauna, save fauna taken or kept during an open season with respect to that fauna, is the

property of the Crown and under the control of the Fauna Authority.

(2) Liability at law shall not attach to the Crown by reason only of the vesting of fauna in the Crown pursuant to this section.”

45. The Act effectively defined”fn61”[62] “fauna” to mean any bird or mammal indigenous to Australia or any animal which was declared by Order in Council to be fauna. The Act defined”fn62”[63] “bird” and “mammal” to mean a bird or mammal “wild by nature whether native to a State or Territory of the Commonwealth, migratory or introduced, in captivity, bred in captivity or tamed”. An Order in Council made on 29 August 1974 declared estuarine crocodiles to be fauna for the purposes of the Act.

46. In its natural and ordinary meaning, s 7 vests in the Crown, and takes away from everyone else, the right to deal with fauna as defined by the Act. Other provisions of the Act give a right to apply for a licence to take fauna. But s 7 destroyed all existing rights to take fauna. At common law, the only right of property in wild animals was “the exclusive right to catch, kill and appropriate such animals which is sometimes called by the law a reduction of them into possession.”[64] That right arose from the possession of land on which the animals happened to be or from a Crown grant to enter another’s land for the purpose of catching, killing or appropriating wild game. No doubt in Australia, the existence of common law native title rights meant that Aboriginals had similar rights over fauna.

47. Section 7 of the Act reverses the common law rules and vests all rights of catching, killing and appropriating fauna in Queensland in the Crown. It therefore gives to the Crown the sole right of catching, killing and appropriating fauna in Queensland together with the right to exclude every other person from catching, killing and appropriating that fauna. If the term “property” has any recognisable meaning in the Act, it must at least have conferred those rights on the Crown and taken them away from every other person once the Act was proclaimed.

48. One aspect of the history of fauna legislation in Queensland provides convincing evidence that the intention of the Act was to take away from others all existing rights to take fauna and vest those rights in the Crown. Earlier fauna legislation in Queensland had expressly provided that that legislation did not apply to “[a]ny aboriginal killing any native animal for his own food.””fn64”[65] The Act contains no such immunity for Aboriginal people. In *Walden v Hensler*”fn65”[66], Brennan J had no doubt that the effect of the Act was to destroy the rights of the Aboriginal people to take fauna. His Honour said:

“But the Act changed the law. It vested the property in all fauna in the Crown (s 7) and prohibited the taking or keeping of fauna without a licence, etc.

The Act eliminated any right which Aborigines or others might have acquired lawfully to take and keep ‘fauna’ as defined in the Act, and any entitlement which Aborigines might have enjoyed at common law to take and keep fauna (assuming that such an entitlement had survived the alienation by the Crown of land over which Aborigines had traditionally hunted).”

49. Undoubtedly, s 7 does more than give to the Crown the exclusive right to kill, take or appropriate fauna and to take away from others any pre-existing right to do those things. The section gives to the Crown every right, power, privilege and benefit that does or will exist in respect of fauna together with the right, subject to the Act, to exclude every other person from enjoying those rights, powers, privileges and benefits. That is the ordinary meaning of property”[67], although, of course, the term can have a more limited meaning depending upon the terms of the instrument which creates it. Whatever else property may mean in a particular context, it describes a relationship between owner and object by reference to the power of the owner to deal with the object to the exclusion of all others, except a joint owner.

50. The appellant would have it that s 7 has a more limited meaning than that set out in the previous paragraph. His argument suggests that the property in fauna in Queensland vests in the Crown only upon other persons taking or dealing with the fauna. Another version of the argument is that the Act has effectively created a new, negative form of property - that property in s 7 is no more than a label which describes what the Crown notionally has after the Act has identified the circumstances in which others may take, possess and pay royalties to the Crown in respect of fauna.

51. If “property” in s 7 meant no more than the residue of other people’s rights or the measure of the Crown’s entitlement to royalties, it would seem to serve little purpose, if indeed it serves any purpose at all. I see no indication in the Act that “property” in s 7 has such a limited function or meaning. Words in legislative instruments should not be read as if they were buildings on a movie set - structures with the appearance of reality but having no substance behind them”fn67”[68]. When the Queensland legislature declared that the property in fauna is vested in the Crown, it should be taken to have meant what it said. That being so, the ordinary meaning of property should not be ignored. “Property” in s 7 should not be taken as meaning no more than the residue of control over fauna which the Crown has after others have carved out their entitlements to take and keep fauna pursuant to a licence granted by or under the Act. That is to turn the Act on its head. The content of s 7 is the starting point for, not the result of, determining the Crown’s power over fauna in Queensland.

52. The short answer to the appellant’s arguments is that “/au/legis/cth/consol_act/nta1993147/s7.html”s 7 says that

all fauna is the property of the Crown. Acts of Parliament speak from their enactment. Consequently, the ordinary and natural meaning of s 7 is that, after the commencement of the Act, the property in fauna is and always remains in the Crown until it disposes of it or a person, acting in accordance with the Act, puts an end to the Crown's property in particular fauna. Moreover, the fauna is and remains "under the control of the Fauna Authority." To the absolute rule that property in fauna in Queensland is in the Crown, s 7(1) contains an exception - when fauna is taken in open season in accordance with the Act, the property in the fauna passes to the person who has taken it. However, I cannot see how that exception provides any ground for thinking that the nature of the property that the Crown has in the fauna is less than every right, power, privilege and benefit that does or will exist in respect of the fauna or that from the commencement of the Act the Crown did not have the right to exclude every other person from enjoying those rights, powers, privileges and benefits. To contend that the Crown obtains no property in fauna until it is taken, killed or appropriated is to deny the plain words of s 7(1).

53. It is also to deny the assumption on which s 7(2) of the Act is based. That assumption is that, but for s 7(2), the Crown's ownership of the fauna might make it liable for the damage or harm that particular birds or mammals might cause while at large.

54. Consider also some of the consequences of upholding the appellant's arguments. The Crown would obtain property in fauna only when a bird, mammal or declared animal was killed, taken, or otherwise appropriated by a third party. Presumably, the Crown would lose its property as soon as the third party gave up possession of it - at all events if that party set the bird or mammal free. The arguments of the appellant must also mean that "the control of the Fauna Authority"^{fn68} [69] only commences when a third party has killed, taken or appropriated fauna. Presumably, the hapless officers of the Authority, seeing an unlicensed person about to kill or otherwise take or deal with fauna, would have no statutory authority to act until the unlicensed person takes action. Until death, taking or appropriation had occurred, the officers would have no more legal authority to act to protect the bird or mammal than any other citizen.

55. The appellant contended that it would be absurd for the legislature to have intended that the Crown should have property in wild animals before they were caught. Illustrations were given during argument - the migratory bird flying through Queensland being one example. Once it is perceived that the purpose of the Act is to put an end to arguments about who has the property in or the right to hunt fauna as defined, I see nothing absurd in the legislature of Queensland giving to the Crown the property in all fauna in Queensland - even migratory birds. In any event, it leads to no more absurd results than the opposing contention which would vest property in the Crown when a young

boy trapped a migratory bird but would divest it when he let it go, making property in fauna in Queensland depend upon a kind of statutory version of what old system conveyancers called springing and shifting uses.

56. Nor is there anything unusual in a person having property in an object of which he or she is unaware. The common law has long recognised that a person may have property in an object although he or she was unaware of its existence. Thus in *R v Rowe* [70], an indictment for larceny charged the accused with stealing a piece of iron from the bed of a canal and laid the property in the iron in the canal owner who apparently did not know of its existence. The Court of Crown Cases Reserved held that the indictment was good.

57. By declaring (s 7) that the property in fauna in Queensland is vested in the Crown and then in subsequent sections defining the circumstances in which others may take that property, the Act proclaimed upon its commencement that henceforth no one, land owner, Aboriginal or holder of a grant from the Crown, had any right to kill, take or appropriate fauna as defined. That being so, the appellant had no right which the *Native Title Act 1974* protected when it came into force. The reasons why that is so are fully explained in the judgment of Callinan J.

58. The appeal must be dismissed.

GUMMOW J.

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I INTRODUCTION

59. This appeal concerns the appellant's exercise, or enjoyment, of a right, or incident, of common law native title. The case comes to this Court after findings of fact [71] were made at the appellant's trial in the Magistrates Court of Queensland on a complaint by the respondent. The appellant exercised the incident of native title between 31 October 1994 and 1 December 1994, when he hunted

estuarine crocodiles, killed two and shared the meat from the kill with members of his tribe. The *Fauna Conservation Act* (Q) (“the Fauna Act”) prohibited the engagement in some of this conduct without a licence under that statute. The appellant had no such licence but he and the interveners^[72] supporting him submit that the *Native Title Act 1993* (Cth) (“the *Native Title Act*”) operated, in conjunction with s 109 of the Constitution, to permit what was otherwise prohibited by the State legislation. The respondent and the interveners^[73] who supported him deny that proposition. They assert that, with effect from 1 September 1974 (the operative date of an Order in Council made under the Fauna Act), the State statute had extinguished any previously existing native title rights, otherwise exercisable by the appellant, to take fauna, in particular estuarine crocodiles.

60. I approach the issue raised on this appeal on the footing, which is supplied both by principle and statements in the authorities in this Court^[74], that for such extinguishment to be effective it was unnecessary that the statutory regime and all that constituted the native title be wholly inconsistent. Rather, the issue is one of identifying what Brennan J called “the extent of the inconsistency”^[75].

II THE OFFENCE

61. The appellant was charged under s 54(1) of the Fauna Act 1886^[76]. The Bench charge sheet, as amended, stated:

“That between the 31st day of October 1994 and the 1st day of December 1994 at Cliffdale Creek via Doomadgee in the Magistrates Courts District of Mount Isa in the state of Queensland [the appellant] did take fauna namely 2 [estuarine] crocodile when he was not the holder of a licence permit certificate or other lawful authority granted and issued under the [Fauna Act] and when the [appellant] was not exempted by section 54(1)(b) of the [Fauna Act].”

At the time of the alleged offence, s 54(1) materially provided:

- “(a) A person shall not take^[77], keep^[78] or attempt to take or keep fauna of any kind unless he is the holder of a licence, permit, certificate or other authority granted and issued under this Act. (b) Save as is otherwise expressly provided by this Act, a person who -
- (i) keeps protected fauna which fauna was taken otherwise than in contravention of this Act during an open season with respect to that protected fauna in a place to which that open season refers;
 - (ii) takes fauna at a time and place when and where that fauna is non-protected fauna;
 - (iii) continues to keep fauna taken and kept lawfully prior to the date of commencement of this Act;

- ...
 (vi) keeps dead non-protected fauna, does not commit an offence against this Act.
 (c) The exemption granted by provision (i) of paragraph (b) shall not apply to the keeping of live protected fauna by any person.”

62. The facts constituting the elements of the alleged offence were not contested by the appellant at trial. The killing of the two estuarine crocodiles was a “taking” of fauna and the appellant did not hold a licence, permit, certificate or other authority granted and issued under the Fauna Act, nor did any of the exemptions in sub-s (b) of s 54(1) apply.

63. However, the appellant sought to rely on an immunity conferred by provisions of the *Native Title Act* as a “defence”. Under cross-examination the appellant argued:

“I believe there’s a greater law than a State law, there’s a Commonwealth law called the Native Title Act and that was in at that stage I took the crocodiles, so I was quite confident that I was being lawful.”

The appellant submits before this Court that s 54(1) of the Fauna Act is inconsistent with s 211(2) of the *Native Title Act* and therefore s 109 of the Constitution renders s 54(1) invalid to the extent of the inconsistency. Consequently, the appellant’s alleged liability under s 54(1) of the Fauna Act never arose and the complaint laid against him had to be dismissed.

64. On 11 October 1996, the Magistrate found the appellant not guilty on the basis of this “defence” and he was discharged. The complainant, the respondent to this appeal, applied under s 209 of the *Justices Act* (Q) for review of the decision in the Supreme Court of Queensland. On 28 November 1996, Williams J granted an order nisi requiring the appellant to show cause before the Queensland Court of Appeal (“the Court of Appeal”) why the decision and order of the Magistrate should not be reviewed on the following grounds:

- “(a) that the Magistrates Court erred in law in failing to find that any entitlement which Aborigines might have enjoyed at common law to take or hunt estuarine crocodiles has previously been validly extinguished by the enactment of the [Fauna Act] and the operation of an order in council dated 29 August 1974 made under that Act and published in the Government Gazette on 31 August 1974; and that accordingly
 (b) the Magistrates Court erred in law in finding that the [appellant] is a person who holds native title rights and/or interests within the meaning of the [Native Title Act] which rights and/or interests entitled him to take the said estuarine crocodiles.”

65. The Court of Appeal (McPherson JA and Moynihan J, Fitzgerald P dissenting) held^[79] that

s 211(2) of the Native Title Act had no relevant operation as the appellant's native title right, or incident, to hunt estuarine crocodiles had been extinguished by s 7(1) of the Fauna Act and therefore the threshold requirement in s 223(1)(c) of the Native Title Act that the right was "recognised by the common law of Australia" was not fulfilled. The Court of Appeal ordered that the order nisi be made absolute and that the Magistrate's order, dismissing the complaint against the appellant, be set aside. Further, the Court of Appeal ordered that the proceedings be remitted to the Magistrates Court, directing that the matter proceed according to law. From these orders this Court granted special leave to appeal.

66. It is convenient now to turn to consider the appellant's conduct which allegedly gave rise to the offence under s 54(1) of the Fauna Act.

III THE APPELLANT'S CONDUCT

67. The appellant is a member of the Gunnamulla clan of the Gungaletta, or Gangalidda, tribe of indigenous Australians. The clan's traditional land area is located around Cliffdale Creek. This area is within the land occupied by the Gungaletta tribe between Burketown and the Queensland border with the Northern Territory. Between 31 October 1994 and 1 December 1994, the appellant killed two estuarine crocodiles from Cliffdale Creek.

68. The appellant hunted the estuarine crocodiles using a traditional harpoon-type weapon, known as a "wock", using a dinghy powered by an outboard motor. This was an evolved, or altered, form of traditional behaviour^[80]. That is, the use of this mechanical device to provide transport during the hunt was not a method of hunting known to the appellant's tribe before contact with non-indigenous people. At trial, the Magistrate held that this method of hunting was consistent with the traditional custom of the appellant's indigenous community. This finding is not challenged.

69. The definition of "take" in s 5 includes, in relation to fauna^[81], to "hunt", to "attempt" to hunt and to "permit" hunting. There is no further definition in the Fauna Act of what is meant by "hunt". But its inclusion in the definition of "take" in s 5, with terms such as "shoot", "kill", "spear" and "trap", suggests it is used in the statute to identify no more than physical acts for the obtaining of possession of the fauna. However, the conduct of the appellant complied with a traditional code of conduct respecting the hunting of juvenile rather than mature crocodiles and involved tribal totemic significance and spiritual belief. The conduct of the appellant is inadequately identified in terms of the statutory definition of "take" and its components such as "hunt". What was involved was the manifestation by the appellant of the beliefs, customs and laws of his community.

70. After the crocodiles were killed, the appellant transported and utilised the kill. The appellant ate part of the flesh of the crocodiles, part he shared with members of his clan and the remainder he froze, with the skins, and kept at his home. It was not challenged that the appellant's conduct was at all times within the customs of his community.

71. The legal character at common law of the appellant's conduct was disputed on the appeal to this Court and it is to this that I now turn.

IV COMMON LAW NATIVE TITLE

72. In *Mabo v Queensland [No 2]*, Brennan J stated the essential characteristics of native title^[82]:

"Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs."

Native title is not treated by the common law as a unitary concept. The heterogeneous laws and customs of Australia's indigenous peoples, the Aboriginals and Torres Strait Islanders, provide its content. It is the relationship^[83] between a community of indigenous people and the land, defined by reference to that community's traditional laws and customs, which is the bridgehead to the common law. As a corollary, native title does not exhibit the uniformity of rights and interests of an estate in land at common law and "ingrained habits of thought and understanding"^[84] must be adjusted to reflect the diverse rights and interests which arise under the rubric of "native title". To repeat what was said in *Wik Peoples v Queensland*^[85]:

"The content of native title, its nature and incidents, will vary from one case to another. It may comprise what are classified as personal or communal usufructuary rights involving access to the area of land in question to hunt for or gather food, or to perform traditional ceremonies. This may leave room for others to use the land either concurrently or from time to time"^[86]. At the opposite extreme, the degree of attachment to the land may be such as to approximate that which would flow from a legal or equitable estate therein^[87]. In all these instances, a conclusion as to the content of native title is to be reached by determination of matters of fact, ascertained by evidence^[88]."

73. The term "native title" conveniently describes "the interests and rights of indigenous inhabitants in land, whether communal, group or individual, possessed under the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants"^[89]. The native title of a community^[90] of indigenous Australians

is comprised of the collective rights, powers and other interests of that community, which may be exercised by particular sub-groups or individuals in accordance with that community's traditional laws and customs. Each collective right, power or other interest is an "incident" of that indigenous community's native title. This case concerns the native title right, or incident, to hunt estuarine crocodiles exercised by an individual, the appellant, who is a member of a community, the Gunnamulla clan, who have native title in the land on which the individual exercised the right, within a tribe of indigenous Australians, the Gungaletta.

74. The exercise of rights, or incidents, of an indigenous community's native title, by sub-groups and individuals within that community, is best described as the exercise of privileges of native title. The right, or incident, to hunt may be a component of the native title of a numerous community but the exercise by individuals of the privilege to hunt may be defined by the idiosyncratic laws and customs of that community. For example, a finding on the evidence that, in accordance with its laws and customs, a community hunts estuarine crocodiles on its traditional lands will establish that an incident of that community's native title is hunting estuarine crocodiles on its traditional lands. However, such a finding will not necessarily dispose of the question of whether a particular individual or sub-group within that community has the privilege to hunt estuarine crocodiles. The nature and scope of the privileges in question will vary with the traditional laws and customs of the particular community so as to accord with the distinct social structure and patterns of occupancy and use of the land of that indigenous community"^[91].

75. The common law recognition of native title limits the class of persons who may exercise such rights to those who have the requisite privilege, or entitlement, under the traditional laws and customs of the community under scrutiny. It is unnecessary in this case to consider whether this is the only limiting factor imposed by the common law; it was not challenged, other than in respect to s 54(1) of the Fauna Act, that the appellant was entitled to exercise the native title right, or incident, to hunt estuarine crocodiles in accordance with his community's traditional laws and customs.

76. Whilst recognised by the common law, native title and the rights, or incidents, thereof arise independently of the common law tenurial system"^[92]. It is to be noted that it was not argued that the pastoral holding, leased by the Carpentaria Land Council Corporation, which included the land on which the appellant killed the crocodiles was inconsistent with the native title right, or incident, to hunt estuarine crocodiles at issue in this case. It is unnecessary to determine whether the doctrine of inconsistency, as considered in *Wik*"^[93] and *Fejo v Northern Territory*"^[94], or principles of merger apply if a community of indigenous Australians holds both native title and an estate or a statutory interest with respect to the same land. However,

it is convenient to emphasise that ingrained, but misleading, habits of thought and understanding lurk in this area of law. Whilst there is "an intersection" between them, common law (and statutory) estates and native title are derived from two distinct sources"^[95]. The former is drawn from principles developed in the English common law, as modified by statute, whilst the latter finds its origin in "the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory"^[96].

77. Analogies to the doctrine of merger of estates appear inapposite in dealing with the intersection between the common law tenurial system and traditional laws and customs. Blackstone describes the operation of the doctrine of merger of estates as follows"^[97]:

"[I]t may be proper to observe, that whenever a greater estate and a less coincide and meet in one and the same person, without any intermediate estate, the less is immediately annihilated; or, in the law phrase, is said to be merged, that is, sunk or drowned, in the greater."

The coalescence of rights and interests under the doctrine of merger is apt to be misleading when considering the intersection of native title rights and interests with an estate or statutory interest in land held by one and the same indigenous community. Moreover, it should be noted that whilst at law the doctrine of merger applied irrespective of the will of the parties concerned, equity's inclination to follow the law here gave way to its preference for substance over form. As Sir William Grant MR put it in *Forbes v Moffatt*"^[98], in equity:

"[t]he question is upon the intention, actual or presumed, of the person, in whom the interests are united."

In Queensland, as in other States, the equity rule as to merger of estates prevails"^[99].

V PRELIMINARY MATTERS

78. Before construing the Fauna Act and dealing with its operation upon the native title right, or incident, exercised by the appellant, it is necessary to attend to two matters. The first is the operation of the *Racial Discrimination Act 1975* (Cth) ("the *Racial Discrimination Act*") and the second is to describe the treatment by the common law of animals as the object of property rights.

Racial Discrimination Act 1954

79. The Racial Discrimination Act commenced on 31 October 1975 ("the Commencement Date"). This is a significant date for consideration of any alleged extinguishment of native title rights by State legislation. If acts done before the Commencement Date were effective to extinguish or impair common law native title, the *Native*

Title Act does not undo that result”[100]. The question arises whether the Fauna Act operated to extinguish the native title right, or incident, to hunt exercised by the appellant such that, as the respondent submits, s 211(2) of the Native Title Act can have no relevant operation. It is necessary to construe the Fauna Act, in each of its forms prior to the Commencement Date, to answer this question. Any amendments thereafter, which otherwise would have effected an extinguishment, would be open to challenge under s 109 of the Constitution for inconsistency with the Racial Discrimination Act”[101]. No such challenge was made by the appellant in this case. Further, the respondent and his supporters have not submitted that any other State legislation, such as the precursors to the Fauna Act”[102], operated to extinguish the native title right at issue. The amendments to the Fauna Act following the Commencement Date will be considered in Section VII of these reasons.

Animals at common law

80. I come now to the second matter. The common law divides animals into two categories, harmless or domestic (*mansuetae naturae*) and those which are dangerous or wild by nature (*ferae naturae*). The distinction is significant. *Ferae naturae*, such as estuarine crocodiles which are dangerous and wild by nature”[103], are reduced to property at common law when killed or for so long as they have been taken or tamed by the person claiming title. What Field J identified as this qualified property right *per industriam*”[104] ceases if the creatures regain their natural liberty. Further, the owner of a fee simple, who has not licensed the right to hunt, take or kill *ferae naturae*, has a qualified property *ratione soli* in them for the time being while they are on that owner’s land”[105]. In contrast, *mansuetae naturae* found on a fee simple are owned by the landowner. Equally, a person who keeps a dangerous animal may be liable in negligence for damage done, or injury inflicted, by the animal without proof of scienter”[106]. Wright also noted a corollary that “trespass or theft cannot at common law be committed of living animals *ferae naturae* unless they are tame or confined”[107].

81. It is appropriate now to consider the operation of the Fauna Act on the native title right, or incident, to hunt estuarine crocodiles which was exercised by the appellant.

VI THE FAUNA ACT

82. The Fauna Act was assented to on 2 May 1974 and commenced on 1 September 1974, and was not amended in the period prior to the Commencement Date. The long title described it is an “Act to consolidate and amend the law relating to the conservation of fauna in its habitats and throughout its distribution in the State, the introduction into and removal from the State of fauna, and for other purposes”. Section 3 divided the Fauna Act into twelve Parts. Part I (ss 1-9) and Pt II (ss 10-17) were respectively

entitled “PRELIMINARY” and “ADMINISTRATION”. The principal point of contention between the parties concerns the operation of s 7(1), the construction of which will be considered below. Section 6(1) of the Act divided “fauna” into four categories, (a) permanently protected fauna, (b) protected fauna, (c) non-protected fauna, and (d) prohibited fauna. Part III (ss 18-21) of the Act regulated permanently protected fauna, whilst Pt IV (ss 22-25) regulated protected fauna and Pt V (ss 26-27) regulated both non-protected and prohibited fauna. Part VI (ss 28-33), entitled “OPEN SEASONS”, Pt VII (ss 34-46), entitled “SANCTUARIES, REFUGES AND RESERVES”, and Pt XI (ss 67-71), entitled “ROYALTY”, were broadly self-descriptive of the objects which each regulated. It will be necessary later to refer more fully to the royalty regime created by Pt XI. Parts VIII (ss 47-51), IX (ss 52-54) and X (ss 55-56) created an enforcement regime for the protection of fauna, whilst Pt XII (ss 72-94) contained miscellaneous provisions and the Schedule listed permanently protected fauna.

83. “Fauna” was defined in s 5 to mean “a mammal or bird: the term includes also any other animal or group of animals wild by nature declared by Order in Council to be fauna”. Estuarine crocodiles neither fell within the definition of “mammal” nor “bird” in s 5. By Order in Council dated 29 August 1974 and published in the *Queensland Government Gazette* on 31 August 1974 (“the Order in Council”), the Governor in Council declared estuarine crocodiles to be “fauna for the purposes of [the Fauna Act] throughout the State” in accordance with s 11 of the Fauna Act. This occurred after the passing of the Fauna Act but before its commencement on 1 September 1974. Section 17 of the *Acts Interpretation Act* (Q) provided that the power under s 11 could be exercised at any time after the passing of the Fauna Act provided that the Order in Council made under that power did not have any effect until the Fauna Act came into operation. The initial date for considering the Fauna Act’s operation on the native title right, or incident, to hunt crocodiles at issue was therefore 1 September 1974, more than a year before the Commencement Date. Upon that date, estuarine crocodiles, two of which were later killed by the appellant, were “fauna” within the meaning of the Fauna Act.

84. The respondent’s submission is that, with effect from 1 September 1974, s 7(1) of the Fauna Act operated to extinguish the appellant’s right as an incident of the native title of his community to hunt estuarine crocodiles. Section 7 provided:

“(1) All fauna, save fauna taken or kept”[108] during an open season with respect to that fauna, is the property of the Crown and under the control of the Fauna Authority.

(2) Liability at law shall not attach to the Crown by reason only of the vesting of fauna in the Crown pursuant to this section.”

The operation of s 7(1) turns, first, on the construction of the word “property” therein and, secondly, on the manner in which s 7 vests “property” in the Crown.

The meaning of “property”

85. Property is used in the law in various senses to describe a range of legal and equitable estates and interests, corporeal and incorporeal. Distinct corporeal and incorporeal property rights in relation to the one object may exist concurrently and be held by different parties”[109]. Ownership may be divorced from possession. At common law, wrongful possession of land might give rise to an estate in fee simple with the rightful owner having but a right of re-entry”[110]. Property need not necessarily be susceptible of transfer. A common law debt, albeit not assignable, was nonetheless property”[111]. Equity brings particular sophistications to the subject. The degree of protection afforded by equity to confidential information makes it appropriate to describe it as having a proprietary character, but that is not because property is the basis upon which protection is given; rather this is because of the effect of that protection”[112]. Hohfeld identified the term “property” as a striking example of the inherent ambiguity and looseness in legal terminology”[113]. The risk of confusion is increased when, without further definition, statutory or constitutional rights and liabilities are so expressed as to turn upon the existence of “property”. The content of the term then becomes a question of statutory or constitutional interpretation”[114].

86. Finkelstein J recently pointed out”[115] that, to Hohfeld, property comprised legal relations not things, and those sets of legal relations need not be absolute or fixed. Hohfeld said of “property”[116]:

“Sometimes it is employed to indicate the physical object to which various legal rights, privileges, etc., relate; then again - with far greater discrimination and accuracy - the word is used to denote the legal interest (or aggregate of legal relations) appertaining to such physical object. Frequently there is a rapid and fallacious shift from the one meaning to the other. At times, also, the term is used in such a ‘blended’ sense as to convey no definite meaning whatever.”

“Property” is used in the latter sense in s 7(1), that is, as an aggregate of legal relations between the “Crown” and “fauna”. In order to determine the content of these legal relations, it is necessary to consider: first, the manner in which “property” is vested in the Crown; secondly, the Crown’s immunity under s 7(2) from such liability as would otherwise have arisen from the vesting of property; thirdly, the qualification contained in s 7(1); and, fourthly, the meaning of the term “Crown”.

The vesting of property and Crown immunity

87. There is a threshold matter for the purposes of determining inconsistency concerning the point in time when “property” in the estuarine crocodiles hunted by the appellant vested in the Crown. Did s 7(1) vest “property” in estuarine crocodiles in the Crown when these animals became “fauna” on 1 September 1974 or upon another event? In order to dispose of this question it is necessary to consider the operation of the immunity conferred on the Crown by s 7(2) and the significant exception within s 7(1) that “property” in fauna in the Crown does not arise where it is “taken or kept during an open season with respect to that fauna”.

88. Section 7(2) operates to immunise the Crown against any claims which could have otherwise arisen as a result of the enactment of s 7(1). This leads to consideration of the doctrine of Crown immunity as it has applied to Queensland. In *The Commonwealth v Mewett*, Gummow and Kirby JJ said”[117]:

“[B]efore federation, in all the Australian colonies save Victoria, legislation had established procedures whereby claims in tort as well as in contract might be brought against the colonial governments”[118].”

89. Queensland was the source of this tradition”[119], enacting legislation in 1866 which was to become the dominant model for Australian Crown proceedings legislation, namely the *Claims against Government Act 1866* (Q) (“the Claims Act”). The Claims Act was not repealed”[120] until 1 July 1980. By that time, given the supervening operation of s 108 of the Constitution”[121], “the Crown” or colonial government affected by the Claims Act was the State of Queensland”[122]. Upon the enactment of s 7(2) of the Fauna Act in 1974, the State’s immunity was understood to have been subject to the operation of the Claims Act. Section 7(2) thus partially replaced the shield of the Crown which had been removed by s 5 of the Claims Act 1903”[123].

90. To identify the liability at law arising from the enactment of s 7(1) of the Fauna Act, it is necessary to return to the definition of “fauna” in s 5. The definition was limited to birds and mammals which were “wild by nature” and such “other animal or group of animals wild by nature declared by Order in Council to be fauna”. The condition, “wild by nature”, limited the definition of “fauna” to *ferae naturae*. At common law, in respect to liability for damage caused by *ferae naturae*, liability for damage arose upon a person taking or taming the animal. Therefore s 7(2) applied only if s 7(1) vested “property” in the Crown in “fauna” such that the Crown acquired at least the equivalent legal obligations at common law of a person who had taken or tamed *ferae naturae*. It is convenient now to consider the qualification contained within s 7(1).

The qualification in s 7(1)

91. Not all fauna is the “property of the Crown” within the meaning of s 7(1). Fauna which is taken or kept during an open season”fn123”[124] with respect to that fauna is not the “property of the Crown”. The acts of taking or keeping thus perform a threshold distributive function in determining whether “property” is vested in the Crown.

92. This assists in determining the statutory meaning of “property” in s 7(1). For example, if an open season be declared for estuarine crocodiles and a tourist boat “injures”, “damages” or even “disturbs” an estuarine crocodile, the result is that the “property” in the crocodile does not vest in the Crown. This is because the creature has been “taken” in an “open season”. Thus, where an “open season” has been declared in respect to particular fauna, the vesting and subsistence of “property” in such fauna is conditioned upon the actions of third parties. The interests in fauna created by s 7(1) differ in nature from the ordinary understanding of property in a chattel conferred by the common law.

93. These matters support a construction of s 7(1) that the legal relations, described in s 7 as the “vesting” of “property”, arise only if a person “takes” or “keeps” “fauna”. If the fauna is taken or kept, during an open season with respect to that fauna, “property” does not vest in the Crown. However, if fauna is otherwise “taken” or “kept”, within the meaning of s 5, “property” is vested in the Crown and the immunity provided for in s 7(2) for the Crown has a relevant operation.

94. The scope of the legal relations, known as “property”, between estuarine crocodiles and the Crown remains to be identified. It is necessary now to consider the meaning of “vesting” in s 7(2). In *Attorney-General for Quebec v Attorney-General for Canada*”[125], a Canadian provincial statute provided that “tracts of land shall be and are hereby respectively set apart and appropriated to and for the use of the several Indian tribes in Lower Canada ... and the said tracts of land shall accordingly, by virtue of this Act ... be vested in and managed by the Commissioner of Indian Lands for Lower Canada”. The Privy Council observed that”[126]:

“It is not unimportant, however, to notice that the term ‘vest’ is of elastic import; and a declaration that lands are ‘vested’ in a public body for public purposes may pass only such powers of control and management *and such proprietary interest as may be necessary to enable that body to discharge its public functions effectively*”. (emphasis added)

95. In this case, s 7(1) does not in terms provide that it is for particular public or statutory purposes that fauna “is the property of the Crown and under the control of the

Fauna Authority”. As a matter of construction, should s 7(1) be read as so limited?

The meaning of “Crown”

96. To construe s 7(1) in its statutory context, it is necessary to determine the meaning of the word “Crown” in s 7(1) in a manner which is consistent with the remaining provisions of the Fauna Act. Section 7(1) identifies the Crown in two senses. First, fauna is the property of the “Crown” and secondly, fauna was under the control of the “Fauna Authority” which was defined in s 5 to mean the “Minister and subject to the Minister the Under Secretary and the Conservator”. “Minister” in turn was defined in s 5 to mean “the Minister for Primary Industries or other Minister of the Crown who at the material time is charged with the administration of this Act: the term includes a Minister of the Crown who is temporarily performing the duties of the Minister”. Section 7(1) therefore placed control of fauna in *a persona designata* of the Crown, that is a Minister of the Crown in right of Queensland. In contrast, the reference in s 7(1) to fauna being the “property of the Crown” must be taken to be a reference to that body politic which is the State of Queensland.

97. This construction of s 7(1) accords with the structure of the Fauna Act as a whole. Section 10 provides that the “Act shall be administered” by the designated person, whilst numerous provisions throughout the remainder of the Act provide that the Governor in Council may undertake certain activities in order, broadly, to effectuate the purposes of the Act. In contrast, the “Crown”, as the State of Queensland, is referred to in the Fauna Act for the limited purpose of recouping money sums which may become payable from time to time under the Act.

98. The principal reference to the “Crown”, as the State of Queensland, is found in Pt XI of the Fauna Act. To adopt the language of Deane J in *Walden v Hensler*”[127], s 7(1) provides a “basis of the royalty system which Pt XI of the [Fauna Act] establishes”. The collection of royalty sums, as opposed to the physical possession of fauna, is the relevant legal interest of the Crown manifested in Pt XI (ss 67-71). Section 71(1) confirms this construction. It provides for the seizure and forfeiture of fauna in default of payment of royalty sums.

99. Part XI vastly expands the royalties, or sums payable, which at common law otherwise would have attached as a privilege of the Crown in respect of certain animals”[128]. As first enacted in 1974, Pt XI created a royalty regime for “prescribed fauna”. Sub-section (1) of s 67 provided that “royalty at the rates prescribed shall be payable to the Crown on prescribed fauna”, whilst sub-s (2) stated:

“Notwithstanding this Act or any other Act or law, payment of royalty on fauna pursuant to this Act

does not transfer property in that fauna from the Crown.”

The persons liable for payment of royalty were identified in s 68(1):

“The following persons shall be jointly and severally liable for the payment of royalty:-

- (a) the person who takes the fauna;
- (b) a fauna dealer or other person who at any time after the taking of the fauna receives or keeps the fauna or fauna obtained therefrom.

Liability for the payment of royalty arises -

- (c) in a case to which subparagraph (a) applies, immediately upon the taking of the fauna in question;
- (d) in a case to which subparagraph (b) applies, immediately upon the receipt of the fauna in question.”

The first event which triggers liability for the payment of royalty is a “taking” of prescribed fauna. At a time thereafter actual payment of the royalty may or may not be made. If that payment occurs, s 67(2) confirms that it does “not transfer property in that fauna from the Crown”. Section 67(2) assumes that “property” in fauna in the Crown vests before payment of the royalty. These provisions are therefore consistent with the construction of s 7(1) considered above whereby “property” in fauna vests in the Crown upon a taking or keeping of the fauna, events anterior to any time when a royalty payment is to be made.

100. The second implicit reference in the Fauna Act to the Crown, as the State of Queensland, is found in the enforcement provisions. These impose penalties upon persons who contravene the statutory proscriptions supporting the royalty regime. Section 54(1)(a), the text of which is set out in Section II of these reasons, is one such enforcement provision. As first enacted, s 54(2) provided:

“A person who commits an offence against this section is liable to a penalty of not less than \$50 and not more than \$1,000, and in addition to a penalty of twice the royalty payable on each fauna in respect of which the offence is committed.”

The Crown, as the State of Queensland, is the entity to which the penalty was payable”[129].

101. Accordingly, the State of Queensland had two interests conferred by the Fauna Act, first, the recovery of royalties under Pt XI and, secondly, the recovery of penalty sums under the various enforcement provisions in the Act, such as s 54(2). The legal relations between the Crown, as the State of Queensland, and “fauna”, created by s 7(1) by the vesting of “property” in the Crown, supported these limited statutory interests. The rights of “the Crown” in fauna created by the vesting of “property” by s 7(1), as

enacted in 1974, were limited to those which may have arisen, from time to time, first by way of royalty and, secondly, by penalty exacted from a person who contravened the statutory proscriptions supporting the royalty regime.

VII SUBSEQUENT AMENDMENTS TO THE FAUNA ACT

102. Before considering the question of extinguishment, it is necessary to inquire whether the amendments to the Fauna Act, subsequent to the Commencement Date and before the time of the appellant’s alleged offence”[130], effected a change in the Crown’s rights under the Fauna Act in respect to “fauna”.

103. The amendments did not materially alter the construction of the Fauna Act set out in Section VI of these reasons nor did they expand the rights conferred on the Crown arising from the vesting of “property” in the Crown in s 7(1). However, reference should be made to the insertion of s 7(1A) by s 5 of the 1984 Amendment Act. Section 66 forbade, without a permit, the breeding of prescribed fauna for gain or reward, and the sale of fauna so bred. Section 7(1A), with effect from 15 May 1984, made provision with respect to the transfer, royalty-free, of property to an authorised breeder. It stated:

“Notwithstanding the provisions of this Act, and subject to the provisions of any Act dealing with the farming of deer, the Conservator may, with the consent in writing of the Minister, transfer the property in fauna that is obtained by an authorized person from the breeding of fauna for gain or reward in accordance with the provisions of section 66 from the Crown to that authorized person and no royalty shall be payable on that fauna or any farm-bred progeny therefrom.”

104. Property in the Crown would arise, in respect of fauna bred for gain or reward by a permit holder under s 66, because it was “kept” by that breeder. A royalty would be payable under s 68 because the fauna had been “taken” or had been “obtained” from such fauna. Section 7(1A) provided for a relaxation of that royalty regime.

105. It is convenient now to consider whether the vesting of these rights in the Crown in respect to estuarine crocodiles extinguished the appellant’s native title right, or incident, to hunt estuarine crocodiles.

VIII EXTINGUISHMENT

106. In *Wik*”[131], this Court considered the effect of rights conferred by statute on native title rights. It was held that native title rights will be extinguished where they are inconsistent with the statutory rights. This requires”[132]:

“a comparison between the legal nature and incidents of the existing right and of the statutory

right. The question is whether the respective incidents thereof are such that the existing right cannot be exercised without abrogating the statutory right. If it cannot, then by necessary implication, the statute extinguishes the existing right.”

107. Whether in a given case native title rights have been extinguished is a question of law. The inquiry turns on the legal criterion of inconsistency. Where there has been a grant of a fee simple, the application of this criterion is not determined by the existence, as a matter of fact, of an indigenous community’s attachment or connection to the land, whether spiritual, cultural, social or economic. This inquiry relates to the anterior question of whether, but for the relevant inconsistency, native title would still subsist. For example, a non-indigenous owner of land in fee simple may continue to permit indigenous people to retain connections to the land but this will not derogate from the conclusion that the grant of fee simple extinguished native title on that land. Further, the existence, as a matter of fact, of indigenous peoples’ continued connection to land which has been the subject of a grant in fee simple does not permit a “springing” back of native title at some future time”[133].

108. The continued subsistence of native title will turn upon the extent of the inconsistency in question. In the case of a grant of a fee simple or of a leasehold interest, as known to the common law, this second step will be unnecessary; subject to the observations above concerning the intersection of native title rights and estates, the comprehensiveness of the grant precludes any question of partial extinguishment.

109. Before turning to whether inconsistency arose in the present appeal, it is important to clarify the utility of factual findings. Factual findings are necessary to establish the ambit of the native title right as defined by the traditional laws and customs of the indigenous community. The ambit of the native title right is a finding of law. This must then be placed against the statutory rights which are said to abrogate it. The question to be asked in each case is whether the statutory right necessarily curtails the exercise of the native title right such that the conclusion of abrogation is compelled, or whether to some extent the title survives, or whether there is no inconsistency at all. Indeed, statute may regulate the exercise of the native title right without in any degree abrogating it.

110. In *Wik*, the Court considered the grant of particular statutory interests. The statutory grants did not “clearly, plainly and distinctly [authorise] activities and other enjoyment of the land which necessarily were inconsistent with the continued existence of any of the incidents of native title which could have been subsisting at the time of these grants”[134]. Further, the subsistence of native title rights was not abrogated by the mere existence of unperformed conditions in the grant of a pastoral lease”[135]. These conditions had no immediate legal

effect, in terms of inconsistency, whilst unperformed. If performance had occurred, questions would have arisen respecting operational inconsistency between the performed condition and the continued exercise of native title rights.

111. Some analogy is provided by *The Commonwealth v Western Australia*”[136]. There, it was necessary to determine whether operational inconsistency under s 109 of the Constitution had arisen between Pt XI of the Defence Force Regulations, made under s 124(1) of the *Defence Act* (Cth), and the *Mining Act 1978* (WA) in respect of a residual portion of land declared to be a defence practice area in Western Australia. The State law provided for the granting of mining exploration licences with respect to this land, subject to conditions. However, if licences were granted, inconsistency was not inevitable. The Minister for Mines could have granted the licences under the State law on terms which prevented the licensees from being on the relevant land at any time during the conduct of defence operations”[137].

112. In the present appeal, the narrow issue is whether the creation of certain statutory rights, conditioned upon the exercise of power conferred by the statute, abrogated the exercise of the native title right, or incident, to hunt. The characteristics of the statutory rights created by or pursuant to the exercise of powers conferred by the Fauna Act are described in Section VI of these reasons. The power in question was exercised by the declaration of estuarine crocodiles as fauna by the Order in Council. Only then could any question of inconsistency arise.

113. The matters which require determination in the present appeal are: (i) when does the question of inconsistency properly arise?; and (ii) what is the effect of the statutory rights on the exercise of the native title right to hunt?

114. The Crown’s “property” in fauna under s 7(1) of the Fauna Act arises only upon a “taking” or “keeping”. Further, the provisions in the Fauna Act for the granting of permission to take fauna and for the declaration of animals to be (or not be) fauna reinforce the conclusion that any question of inconsistency arises upon, but not before, a “taking” or “keeping” of fauna.

115. The exercise of the native title right to hunt was a matter within the control of the appellant’s indigenous community. The legislative regulation of that control, by requiring an indigenous person to obtain a permit under the Fauna Act in order to exercise the privilege to hunt, did not abrogate the native title right. Rather, the regulation was consistent with the continued existence of that right.

116. Further, as described in Section III of these reasons, the native title right to hunt exercised by the appellant was not merely the right to “take” estuarine crocodiles within

the meaning of s 5 of the Fauna Act. The native title right has both an anterior and posterior operation. Any anterior exercise of the native title right, prior to a “taking” or “keeping” of an estuarine crocodile, is not inconsistent with the Crown’s so-called “property” rights pursuant to s 7(1).

117. Accordingly, the native title right, or incident, to hunt estuarine crocodiles exercised by the appellant was not extinguished at any time before the “taking” of the estuarine crocodiles which allegedly contravened s 54(1) of the Fauna Act.

118. Finally, I turn to consider the effect of the Native Title Act on the appellant’s common law native title right, or incident, to hunt estuarine crocodiles.

IX OPERATION OF THE NATIVE TITLE ACT

119. Part 13 (ss 208-215) of the Native Title Act is entitled “Miscellaneous”. Section 211 provides:

“Preservation of certain native title rights and interests

Requirements for removal of prohibition etc on native title holders

- (1) Subsection (2) applies if:
- (a) the exercise or enjoyment of native title rights and interests in relation to land or waters consists of or includes carrying on a particular class of activity (defined in subsection (3)); and
 - (b) a law of the Commonwealth, a State or a Territory prohibits or restricts persons from carrying on the class of activity other than in accordance with a licence, permit or other instrument granted or issued to them under the law; and
 - (c) the law is not one that confers rights or interests only on, or for the benefit of, Aboriginal peoples or Torres Strait Islanders.

Removal of prohibition etc on native title holders

(2) If this subsection applies, the law does not prohibit or restrict the native title holders from carrying on the class of activity, or from gaining access to the land or waters for the purpose of carrying on the class of activity, where they do so:

- (a) for the purpose of satisfying their personal, domestic or non-commercial communal needs; and
- (b) in exercise or enjoyment of their native title rights and interests.

Definition of class of activity

(3) Each of the following is a separate *class of activity*:

- (a) hunting;
- (b) fishing;
- (c) gathering;
- (d) a cultural or spiritual activity;
- (e) any other kind of activity prescribed for the purpose of this paragraph.”

Part 15 (ss 222-253) is entitled “Definitions”, Div 2 (ss 223-240) therein is entitled “Key concepts: Native title and acts of various kinds etc”. Sections 223 and 224 inform the meaning of s 211. They materially state:

“223 Native title

Common law rights and interests

(1) The expression *native title* or *native title rights and interests* means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:

- (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
- (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
- (c) the rights and interests are recognised by the common law of Australia.

Hunting, gathering and fishing covered

(2) Without limiting subsection (1), *rights and interests* in that subsection includes hunting, gathering, or fishing, rights and interests.”

“224 Native title holder

The expression *native title holder*, in relation to native title, means:

- (a) if a prescribed body corporate is registered on the National Native Title Register as holding the native title rights and interests on trust - the prescribed body corporate; or
- (b) in any other case - the person or persons who hold the native title.”

120. In *Western Australia v The Commonwealth (Native Title Act Case)*^{fn137}[138], the Court, after setting out the relevant text of s 211, continued:

“The usufructuary rights comprehended by sub-s (3) are, by virtue of sub-s (2)(b), rights and interests which are incidents of native title. They are, by definition (s 223(1)), rights and interests that are recognised by the common law and, by operation of s 11(1), they cannot be extinguished except in conformity with the Act. Section 211(2) removes the requirement of a ‘licence, permit or other instrument granted or issued ... under the law’ referred to in s 211(1)(b) as a legal condition upon the exercise of the native title rights specified in sub-s (3). If the affected law be a law of a State, its validity is unimpaired, but its operation is suspended in order to allow the enjoyment of the native title rights and interests which, by s 211, are to be enjoyed without the necessity of first obtaining ‘a licence, permit or other instrument’. Again, the effect of s 211 is not to control the exercise of State legislative power, but to exclude laws made in exercise of that power (inter alia) from affecting the freedom of native title holders

to enjoy the usufructuary rights referred to in s 211.”

121. The appellant’s conduct in hunting and killing the estuarine crocodiles was a “class of activity” for the purposes of s 211(2) of the Native Title Act. Further, s 54(1)(a) of the Fauna Act was a State law which fell within the terms of s 211(1)(b). It prohibited or restricted persons from carrying on the relevant class of activity at stake in this case, namely hunting, other than in accordance with a licence, permit or other instrument granted or issued to them under the Fauna Act. Equally, s 54(1)(a) of the Fauna Act answered the criteria in s 211(1)(c).

122. The respondent’s principal contention was that the appellant’s conduct did not fall within the definition of “native title” or “native title rights and interests” in s 223, because the condition in par (c) of s 223(1) that “the rights and interests are recognised by the common law of Australia” could not have been satisfied. The existence of a native title right, which was not extinguished prior to the enactment of s 211, is assumed. Section 211, in conjunction with s 109 of the Constitution, operates to remove prohibitions or restrictions in Commonwealth, State or Territory laws which might otherwise extinguish the relevant native title right.

123. However, the common law native title right, or incident, to hunt estuarine crocodiles exercised by the appellant was not extinguished by the Fauna Act prior to the “taking” of the two estuarine crocodiles at Cliffdale Creek. Therefore the “native title right” was “recognised by the common law of Australia” within the meaning of par (c) of s 223(1), at the time when the appellant was alleged to have committed the offence against s 54(1) of the Fauna Act.

124. The Magistrate held that the conditions of s 211(2)(a) were fulfilled in this case. It was not otherwise disputed that the appellant’s conduct was in “exercise or enjoyment” of his “native title rights and interests” within the meaning of s 211(2)(b). As a consequence, s 211(2) applied to the appellant’s conduct. Direct inconsistency arose between the prohibition purportedly imposed on the appellant by s 54(1) of the Fauna Act and the removal of the prohibition by s 211(2) of the Native Title Act. Section 109 of the Constitution operated to deny what otherwise could have been the appellant’s liability to punishment for contravention of s 54(1) of the Fauna Act. Therefore the complaint against the appellant was not well based in law.

X CONCLUSION

125. I would allow the appeal, order that the orders of the Court of Appeal be set aside and in lieu thereof order that the order nisi of Williams J dated 28 November 1996 be discharged.

126. The appellant seeks an order for costs in this Court and in the Court of Appeal. The appeal arises out of a prosecution but presents special features. The outcome is dictated by the operation, through the medium of s 109 of the Constitution upon the Fauna Act, of the Native Title Act. This attracted interventions, as to some said to be as of right under s 78A(1) of the *Judiciary Act 1903* (Cth) and as to others admitted to require leave.

127. It is implicit in what has been said earlier in these reasons that, to the extent necessary to grant leave to any intervener, I would do so.

128. Section 78A(2) of the *Judiciary Act 1974* provides for costs orders against intervening Attorneys-General. The appellant seeks such orders in respect of the increase in costs brought about by their interventions. In the end, as might have been expected, this case has turned upon a close analysis of the Fauna Act. The interveners supporting the respondent, the Attorneys-General, between them filed extensive materials which did not assist in that task. There is merit in the appellant’s submission that this is a case for the special order he seeks against the intervening Attorneys. I would make an order against each of the intervening Attorneys, that they pay the additional costs of the appellant resulting from their intervention.

129. There was no argument with respect to the general order for costs sought against the respondent. I would give the appellant leave to present written submissions as to why, notwithstanding the criminal nature of the process involved, there should be such an order in his favour in respect of the proceedings in this Court and in the Court of Appeal. The submissions should be filed not later than 14 days after delivery of judgment. The respondent should have 14 days to reply to those submissions.

130. CALLINAN J. This case which was commenced in the Magistrates Court in Mount Isa raises a question whether an incident, tradition, right or privilege of or interest in native title has been extinguished by the *Fauna Conservation Act* (Q) (“the Act”).

Facts

131. The appellant was charged with having taken fauna, crocodiles, without being the holder of a licence, permit, certificate or other authority, under s 54(1)(a) of the Act. Section 54 provides as follows:

- “54(1)(a) A person shall not take, keep or attempt to take or keep fauna of any kind unless he is the holder of a licence, permit, certificate or other authority granted and issued under this Act.
- (b) Save as is otherwise expressly provided by this Act, a person who -
- (i) keeps protected fauna which fauna was taken otherwise than in contravention of this Act

- during an open season with respect to that protected fauna in a place to which that open season refers;
- (ii) takes fauna at a time and place when and where that fauna is non-protected fauna;
 - (iii) continues to keep fauna taken and kept lawfully prior to the date of commencement of this Act;
 - (iv) keeps aviary birds;
 - (v) keeps for his own private domestic enjoyment, not more than five in total of birds of prescribed species which birds have not been unlawfully taken, and who at the same time keeps no birds other than aviary birds;
 - (vi) keeps dead non-protected fauna, does not commit an offence under this Act.
- (c) The exemption granted by provision (i) of paragraph (b) shall not apply to the keeping of live protected fauna by any person.
- (2) A person who commits an offence against this section is liable -
- (a) if the offence is one related to the taking of fauna, to a penalty of 100 penalty units or 12 months imprisonment or both;
 - (b) if the offence is one related to the keeping of fauna, to a penalty of 40 penalty units, and in any case to an additional penalty not exceeding twice the royalty on each fauna in respect of which the offence is committed.”

132. Evidence was given in the Magistrates Court without objection, that the appellant took, during a period of five weeks, two young crocodiles from Clifffdale Creek in North Queensland. He and other members of his group or tribe froze and ate part of the catch. The area around Clifffdale Creek was traditionally occupied by the tribe or group of people, the Gungaletta people, of whom the appellant was a member. The precise length of time of this occupation was uncertain. The appellant claimed that the area had been occupied for at least 1,300 years. Dr Trigger, an anthropologist, gave unchallenged evidence that radiocarbon dating conducted in 1983 indicated that shellfish-eating people occupied the area 140 years ago (plus or minus 60 years) and 1,300 years ago (plus or minus 80 years). The appellant and Dr Trigger gave evidence that the appellant’s genealogy could be traced back to 1870. The Magistrate concluded that the appellant’s tribe or people were identical with those whose presence was revealed by carbon dating. The hunting and taking of crocodiles in the area was a practice which, Mr Yanner stated, his people had been following “forever”. He also said that although traditional hunting methods had changed over the years, the way in which he hunted crocodiles was “[p]retty much the same” as the way in which his ancestors had. This claim was made despite the fact that the appellant used a modern boat with an outboard motor and a steel tomahawk to administer the coup de grâce to the crocodiles”^{fn138}[139]. Dr Trigger also gave evidence that “Gungaletta customs and traditions have simply been maintained from the earliest processes of colonisation through to the present, though they have changed in certain ways”.

133. On the basis of this evidence and although some of it, particularly as to a possible totemic significance of crocodiles in this area, was vague”^{fn139}[140], because it was neither challenged nor the subject of any objection, the Magistrate formed the view that the appellant had been doing no more than taking advantage of his native title right in taking and eating the crocodiles, and that that right had not been extinguished by the Act. In acquitting the appellant the Magistrate expressed himself in this way:

“[T]he evidence is that the traditional custom was to hunt crocodile for food from time to time, not just crocodile, however, but juvenile creatures. Evidence is that adults are not hunted. Quite apart from the fact that that seems rather prudent, the evidence suggests tribal totemic significance and spiritual belief. The defendant says he complies with that code of behaviour.

...
Whilst there is the authority for the proposition that ‘hunting’ rights as such are not available on common law principles, the clear inclusion of such in subsection (2) of section 223 of the Native Title Act now demands of the common law in Australia the statutory interpretation now provided.

Being satisfied that the provisions of clause (c) are complied with and being satisfied that the defendant is a member of a class described in all paragraphs of section 223(1), I accept that the defendant was in the exercise or enjoyment of his Native Title rights and interests, section 211(2)(b). He is therefore a person who holds Native Title rights and interests as defined in section 224.

Having accepted the criteria set out, and as referred to in the Native Title Act, I am satisfied that the defendant has established his defence to the offence alleged under the State legislation. That being the case, the defendant is found not guilty and is discharged.”

134. In the Queensland Supreme Court the respondent obtained an order nisi for review of the Magistrate’s decision. The Queensland Court of Appeal (McPherson JA and Moynihan J; Fitzgerald P dissenting) accepted the respondent’s argument that the native title rights of the appellant had been extinguished by the operation of the Act, and accordingly held that the Magistrate erred in applying the Native Title Act 1993 (Cth). The Court of Appeal made the order nisi absolute and remitted the proceedings to the Magistrates Court in Mount Isa for determination according to law.

Appeal to this Court

135. The appeal to this Court may, in my opinion, be resolved by the application of s 7 (in the context of the Act as a whole) to the facts as found by the Magistrate.

136. Section 7 of the Act provides as follows:

“(1) All fauna, save fauna taken or kept otherwise than in contravention of this Act during an open season with respect to that fauna, is the property of the Crown and under the control of the Fauna Authority.

(1A) Notwithstanding the provisions of this Act, and subject to the provisions of any Act dealing with the farming of deer, the [Conservator] may, with the consent in writing of the Minister, transfer the property in fauna that is obtained by an authorized person from the breeding of fauna for gain or reward in accordance with the provisions of section 66 from the Crown to that authorized person and no royalty shall be payable on that fauna or any farm-bred progeny therefrom.

(2) Liability at law shall not attach to the Crown by reason only of the vesting of fauna in the Crown pursuant to this section.”

137. The word “property” is a word of the widest import. Indeed when counsel were invited to do so they were unable to suggest any more ample expression to convey the notion of absolute ownership. The Act uses the word “property” without qualification. If something less than absolute ownership were intended then an appropriate qualification in that regard could be expected to have been expressed.

138. During argument the appellant sought to say that “property” should not be given its ordinary meaning where it appears in s 7 of the Act for two reasons: first, that it was unlikely that the Queensland legislature would have intended the word to have its ordinary and natural meaning in relation to wild creatures when regard is had to their natural and generally inaccessible state until reduced to captivity, circumstances which the common law recognised and gave effect to by elaborate rules with respect to them; and, secondly, a reading of the Act as a whole dictated a conclusion that the real intention of the legislature was to do no more than protect and control fauna and regulate any access to, or exploitation of fauna to which the Act and regulations made under it referred”^{fn140}[141].

139. *Walden v Hensler*”^{fn141}[142] is a case in which fairly recent consideration was given by this Court to the effect and operation of s 7 and s 54 of the Act. The appellant there was an Aboriginal who was found in possession of a partly-plucked turkey and a live turkey chick. He had shot the turkey in the bush for food, and the chick was being kept until it had grown sufficiently to be released in the bush. The birds were fauna for the purposes of the Act, and the appellant had no licence to take them. At the relevant time the appellant believed, in accordance with Aboriginal custom and his own practice of a lifetime, that he was entitled to take the turkeys as “bush tucker” and that he was committing no offence in so doing.

140. Brennan J in *Walden*”[143] quoted what Lord Westbury LC had stated in *Blades v Higgs*”[144]:

“... when it is said by writers on the Common Law of England that there is a qualified or special right of property in game, that is in animals *ferae naturae* which are fit for the food of man, whilst they continue in their wild state, I apprehend that the word ‘property’ can mean no more than the exclusive right to catch, kill and appropriate such animals which is sometimes called by the law a reduction of them into possession.

This right is said in law to exist *ratione soli*, or *ratione privilegii* ... Property *ratione soli* is the common law right which every owner of land has to kill and take all such animals *ferae naturae* as may from time to time be found on his land, and as soon as this right is exercised the animal so killed or caught becomes the absolute property of the owner of the soil.

Property *ratione privilegii* is the right which, by a peculiar franchise anciently granted by the Crown in virtue of its prerogative, one man had of killing and taking animals *ferae naturae* on the land of another; and in like manner the game, when killed or taken by virtue of the privilege, became the absolute property of the owner of the franchise, just as in the other case it becomes the absolute property of the owner of the soil.”

141. Brennan J then said this”[145]:

“It follows that, apart from the provisions of the Act of which the appellant was ignorant, he was entitled by law to keep the birds which he had taken. But the Act changed the law. It vested the property in all fauna in the Crown (s 7) and prohibited the taking or keeping of fauna without a licence, etc. The Act eliminated any right which Aborigines or others might have acquired lawfully to take and keep ‘fauna’ as defined in the Act, and any entitlement which Aborigines might have enjoyed at common law to take and keep fauna (assuming that such an entitlement had survived the alienation by the Crown of land over which Aborigines had traditionally hunted).”

142. The law which Lord Westbury LC summarised owes its origins no doubt to many 19th century and earlier, now outdated, historical, indeed feudal conditions of questionable relevance to Australia at any time: for example, the ownership by a few of vast hunting estates, aristocratic preoccupations with the Chase, hound, horse, lure, snare, falconry, gun and dogs”^{fn145}[146], uncertain agricultural yields, the poverty suffered by many which might tempt them to poach, the partial domestication of game birds to enable them to be more vulnerable to the landowner’s fowling piece, Royal privilege in respect of certain animals, and competition between wealthy people to collect and keep for ornamental purposes and as curiosities exotic animals.

143. But times and views about ecology and the environment of which wild creatures are now indubitably

taken to be part”[147], change. Darwin’s *On the Origin of Species* which raised the consciousness and sensitivity of Western Society to the importance and significance of the natural world, was published in 1859”[148]. By 1907 this consciousness was manifesting itself by statements and endeavours by concerned and informed people such as Dudley Le Souef of the Australasian Ornithologists Union who said in that year “[t]he wild birds do not belong to us to treat as we like”[149]. The most effective way to ensure the survival and protection of wild creatures, particularly as the means of taking and destroying them became more efficient, was for the State to legislate in the most comprehensive way possible to obtain absolute dominion over them and this I am satisfied the legislature of Queensland did in enacting the Act. The Queensland Parliament meant exactly what it said when it used the word “property” in s 8A of the *Animals and Birds Act 1921 (Q)*”fn149”[150] and when it repeated that word in each subsequent enactment”[151].

144. The second argument of the appellant is that the text of the Act as a whole requires “property” in s 7 to be read as meaning no more than an extensive power to regulate the protection and some limited exploitation of fauna. In support of this submission reference was made to s 71(2) which provides that fauna seized for non-payment of a royalty shall be “forfeited to Her Majesty”, a phrase said to be incompatible with pre-existing ownership by the Crown. Reference was also made to the division of “fauna” in s 6 into four classes (“permanently protected fauna”, “protected fauna”, “non-protected fauna” and “prohibited fauna”) and to the provisions relating to the circumstances under which permits for taking fauna in different classes are needed and may be obtained (ss 26, 27 and 53). These provisions were said to indicate that the “property” vested in the Crown under s 7 was less than absolute.

145. None of these indications in the Act is of sufficient significance and force to detract from the ordinary and natural meaning of “property” in s 7. But in any event there are other parts of the Act which reinforce this natural meaning. Section 67, particularly sub-s (2) is one:

“67(1) Subject to subsection (4), royalty at the rates prescribed shall be payable to the Crown on prescribed fauna.

(2) Notwithstanding this Act or any other Act or law, payment of royalty on fauna pursuant to this Act does not transfer property in that fauna from the Crown.

(3) Rates of royalty may vary in respect of different species of fauna.

(4) The regulations may exempt from the payment of royalty species of fauna specified therein in cases where that fauna is taken otherwise than in contravention of this Act.”

146. The whole scheme of the Act is consistent with no intention other than an intention by the legislature to have absolute property in all fauna occurring or present in the State. And in my opinion there were and are no impediments which prevented it from effecting that intention by the legislation it enacted.

147. In support of his second argument the appellant referred to the difficulty in reducing wild animals to possession and of preventing them from migrating out of the State as a reason for the reading down of the word “property” in the Act. In this connexion an analogy may be drawn with the way in which, in the United States, natural gas and oil, which are fugitive minerals, are treated. There, these are regarded as having some features in common with wild animals. In that country ownership of the land generally carries with it ownership of minerals beneath it. The fact that natural gas or oil may migrate from under one property to another, does not mean that a property owner does not own absolutely and may not exploit fully these minerals whilst they are underneath his or her land”[152].

148. No question of native title was argued in *Walden v Hensler*”[153]. However the references by Brennan J to the appellant’s former rights to take the birds and to traditional entitlements before land was alienated by the Crown suggest that his Honour was well alive to the possible existence of native title rights which in fact were declared to exist only five years later in *Mabo v Queensland [No 2]*”[154] when the issue did arise. *Mabo [No 2]* being a decision declaratory of the law did not alter the law by creating some previously non-existing right. Native title must have existed in 1987 when *Walden* was decided. Yet Brennan J was in no doubt that the fauna which had been taken by Mr Walden there were fauna which had vested in the Crown. The case stands as clear authority for at least the proposition that since its enactment s 7 has operated to vest property in fauna in the Crown.

149. There is some overseas authority for the proposition, if authority be needed, that when a statutory declaration of Crown ownership or property in fauna is coupled with a statutory exception permitting or recognising an aboriginal right or entitlement to take fauna (for example, for sustenance or other purposes), native title rights to take that fauna are not extinguished”[155]. That distinction is significant in the present case. The history of the legislation here shows that since 1924, fauna has been legislatively declared to be the property of the Crown; and from 1906 until 1974, Queensland legislation with respect to fauna was expressed not to apply to “any aboriginal killing any native [animal or fauna] for his own food”[156]. However that exception was excluded from the Act, and there has been no general statutory exception of that kind in force in Queensland since then.

150. The question then becomes, is property in, that is ownership by the Crown of the crocodiles which were taken by Mr Yanner so inconsistent with any native title right to it as to extinguish that right?

151. In *Wik Peoples v Queensland*^[157], Gummow J emphasised that a person who seeks to contend that native title has been extinguished by necessary implication from the provisions of a statute carries a heavy burden. In the same case, Kirby J said^[158]:

“There is a strong presumption that a statute is not intended to extinguish native title. The intention to extinguish native title must be clear and plain, either by the express provision of the statute or by necessary implication.” (footnotes omitted)

152. In both *Mabo [No 2]* and *Wik* the Justices of this Court discuss, at length, native title but attempt no definition of it. Perhaps this is because not only is it, as it has been described, fragile^[159], but also because to non-indigenous people it may be a somewhat elusive concept. But neither its fragility nor its elusiveness absolves the Court from identifying native title rights in any case calling for their consideration. In the former case Brennan J discussed some of its nature and incidents^[160]:

“Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs. The ascertainment may present a problem of considerable difficulty ...”

153. The language of the Justices of this Court when reference is made to native title has tended to be couched, as perhaps it only can be, in terms of “incidents”^[161], “nature”^[162], “rights”^[163], “traditions”^[164], “customs”^[165] and “entitlements”^[166].

154. In *Wik*, in construing Queensland statutes enacted long before *Mabo [No 2]* the Court was unable to answer the question whether there had been an extinguishment definitively because, as Toohey J pointed out^[167], there had not been evidence which focussed specifically on the traditions, customs and practices of the particular aboriginal group claiming the right which could be compared with the rights conferred by the leases granted by the Queensland government, to ascertain whether those rights were necessarily inconsistent with the exercise of the customs, traditions and practices of the aboriginal group claiming the right.

155. In this case there was evidence which was uncontradicted and uncontested, relevantly directed to the rights, traditions, customs and practices of the aboriginal group of which the appellant was a member, and findings

of them by the Magistrate of sufficient particularity to enable, indeed to compel, the carrying out of the exercise which the majority in *Wik* was unable to carry out in order to decide whether the leases extinguished wholly or partially any of the native title rights claimed.

156. That evidence and the findings I have summarised. They point inexorably to a direct collision between the custom or right claimed here, of taking and eating crocodiles, and the ownership of them by the State of Queensland. To the extent therefore that that custom or right may be an aspect or incident of native title enjoyed by the people of whom the appellant was one, that incident or right (or custom, entitlement, tradition or practice), however it might be designated, has been extinguished by the Act under which the appellant was charged. Its exercise was inconsistent with the ownership of the fauna by the Crown^[168]. Property means, in the Act, exactly that.

157. This case may be compared with *Fejo v Northern Territory*^[169]. There this Court held that a grant of land in fee simple was an act of sovereignty and that the bundle of rights going to make up a fee simple title necessarily conflicted with and excluded native title. The word “property” as used in s 7 of the Act has at least as exhaustive an operation and meaning as fee simple. *Fejo* also held that once such a grant was made it extinguished native title for all time so that it would not be revived if and when title lapsed and the Crown resumed ownership of the land the subject of the earlier grant. And, as Gummow J said in *Wik*^[170], “[i]f acts done before the commencement ... of the *Racial Discrimination Act 1975* (Cth) were effective to extinguish or impair native title, the *Native Title Act 1974* does not undo that result”.

158. The *Native Title Act* is not retrospective. It does not operate to create new rights or to revive native title rights that have been extinguished. In *Western Australia v The Commonwealth (Native Title Act Case)*, Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ said^[171]:

“An act which was wholly valid when it was done and which was effective then to extinguish or impair native title is unaffected by the *Native Title Act*. Such an act neither needs nor is given force and effect by the Act. But, as acts purporting to extinguish or impair native title might be impugned as inconsistent with the *Racial Discrimination Act* if they were done after that Act came into operation, the Parliament has chosen to include certain legislative and executive acts of the Crown within the definition of ‘past acts’.” (footnote omitted)

The *Fauna Conservation Act* (Q) relevantly answers the description of an Act which was wholly valid and effective when passed in relation to any native title right in respect of the taking of fauna.

159. On the view that I take of the case it is unnecessary to go any further. The decision of the majority of the Court of Appeal of Queensland was correct. I would dismiss the appeal with costs.

- [1] The name of the tribe is sometimes spelled “Gungaletta”. The spelling “Gangalidda” was given by the appellant in his interview with police.
- [2] Native Title Act, s 211(1)(a) and (3)(a) and (b).
- [3] Native Title Act, s 211(1)(b).
- [4] Native Title Act, s 211(1)(c).
- [5] Native Title Act, s 211(2).
- [6] *Justices Act 1886* (Q), s 209.
- [7] *Eaton v Yanner; Ex parte Eaton* unreported, Court of Appeal of Queensland, 27 February 1998.
- [8] *Native Animals Protection Act 1906* (Q), s 9(c). See also the *Animals and Birds Act 1921* (Q), s 17(b) (which extended the exception to native birds as well as animals), the *Fauna Protection Act 1937* (Q), s 25, and the *Fauna Conservation Act 1952* (Q), s 78 (which further modified the exception by limiting its operation to Aboriginals not in employment on terms that included the provision of food by the employer).
- [9] The Fauna Authority was defined by s 5 as the Minister for the time being administering the Fauna Act “and subject to the Minister” the Director of National Parks and Wildlife appointed under the *National Parks and Wildlife Act 1975* (Q).
- [10] s 5.
- [11] s 5.
- [12] s 5.
- [13] s 6.
- [14] s 22.
- [15] s 24.
- [16] s 25.
- [17] s 24A.
- [18] s 27(1).
- [19] Fauna Act, Pt VI.
- [20] s 60.
- [21] s 54(1)(b)(i).
- [22] s 54(1)(b)(ii).
- [23] s 54(2).
- [24] *Animals and Birds Act 1921* (Q), s 8B (inserted by s 2(4) of the *Animals and Birds Act Amendment Act 1924* (Q)); *Fauna Protection Act 1937* (Q), s 16; *Fauna Conservation Act 1952* (Q), s 56.
- [25] Queensland, Legislative Assembly, *Parliamentary Debates* (Hansard), 12 September 1924 at 824-826.
- [26] Bentham, *An Introduction to the Principles of Morals and Legislation*, ed by W Harrison (1948) at 337, n 1; K Gray and S F Gray, “The Idea of Property in Land”, in Bright and Dewar (eds), *Land Law: Themes and Perspectives*, (1998) 15 at 15.
- [27] See, for example, *Minister of State for the Army v Dalziel* (1944) 68 CLR 261 at 285 per Rich J.
- [28] Gray, “Property in Thin Air”, (1991) 50 *Cambridge Law Journal* 252 at 252.
- [29] See, for example, Kohler and Palmer, “Information as Property” and Magnusson, “Proprietary Rights in Human Tissue”, in Palmer and McKendrick (eds), *Interests in Goods*, 2nd ed (1998) 3 and 25 respectively.
- [30] See, for example, *Colbeam Palmer Ltd v Stock Affiliates Pty Ltd* (1968) 122 CLR 25 at 34 per Windeyer J.
- [31] Gray, “Property in Thin Air”, (1991) 50 *Cambridge Law Journal* 252 at 299.
- [32] Jeremy Bentham recognised this long ago. Bentham pointed out that “in common speech in the phrase ‘the object of a man’s property’, the words ‘the object of’ are commonly left out; and by an ellipsis, which, violent as it is, is now become more familiar than the phrase at length, they have made that part of it which consists of the words ‘a man’s property’ perform the office of the whole”. See *An Introduction to the Principles of Morals and Legislation*, ed by W Harrison (1948) at 337, n 1.
- [33] K Gray and S F Gray, “The Idea of Property in Land”, in Bright and Dewar (eds), *Land Law: Themes and Perspectives*, (1998) 15 at 16.
- [34] *Jones v Skinner* (1835) 5 LJ Ch (NS) 87 at 90 per Lord Langdale MR. See also *Commissioner of Stamp Duties (Q) v Donaldson* (1927) 39 CLR 539 at 550 per Isaacs ACJ; *In re Prater; Desinge v Beare* (1888) 37 Ch D 481 at 483 per Lord Halsbury LC, 486 per Cotton LJ.
- [35] *Jones v Skinner* (1835) 5 LJ Ch (NS) 87 at 90 per Lord Langdale MR.
- [36] Pollock, *A First Book of Jurisprudence*, 4th ed (1918) at 178.
- [37] Blackstone, *Commentaries*, vol II at 14, 391, 395.
- [38] *Case of Swans* (1592) 7 Co Rep 15b at 17b [77 ER 435 at 438]; *Blades v Higgs* (1865) 11 HL Cas 621 at 638 [11 ER 1474 at 1481].
- [39] *Case of Swans* (1592) 7 Co Rep 15b at 17b [77 ER 435 at 438].
- [40] *Blades v Higgs* (1865) 11 HL Cas 621 at 631 [11 ER 1474 at 1478].
- [41] 252 US 416 at 434 (1920).
- [42] See also *Geer v Connecticut* 161 US 519 at 538-539, 541-542 (1896) per Field J, 543-544 per Harlan J; *Toomer v Witsell* 334 US 385 (1948); *Baldwin v Montana Fish and Game Commission* 436 US 371 (1978); *Hughes v Oklahoma* 441 US 322 (1979).
- [43] *Animals and Birds Act 1921* (Q), s 8B (inserted by the *Animals and Birds Act Amendment Act 1924* (Q), s 2(4)).
- [44] (1955) 92 CLR 630 at 641 per Dixon CJ, Williams, Webb, Fullagar and Kitto JJ.
- [45] *Toomer v Witsell* 334 US 385 at 402 (1948) per Vinson CJ (footnote omitted).
- [46] Queensland, Legislative Assembly, *Parliamentary Debates* (Hansard), 12 September 1924 at 825.

- [47] Pound, *An Introduction to the Philosophy of Law* (rev ed) (1954) at 111.
- [48] ss 24, 24A, 25, 27, 30, 60.
- [49] ss 71(2), 83(3).
- [50] s 67.
- [51] s 54(1)(a).
- [52] Native Title Act, s 223(1)(a).
- [53] Native Title Act, s 223(1)(b).
- [54] Native Title Act, s 223(1)(c); *Mabo v Queensland [No 2]* (1992) 175 CLR 1.
- [55] *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 69 per Brennan J, 110 per Deane and Gaudron JJ; *Western Australia v The Commonwealth (Native Title Act Case)* (1995) 183 CLR 373 at 439 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ; *Wik Peoples v Queensland* (1996) 187 CLR 1 at 84-85 per Brennan CJ; *Fejo v Northern Territory* (1998) 72 ALJR 1442 at 1451 per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ, 1468 per Kirby J; 156 ALR 721 at 736, 759.
- [56] (1998) 72 ALJR 1442 at 1451; 156 ALR 721 at 736. See also (1998) 72 ALJR 1442 at 1466 per Kirby J; 156 ALR 721 at 756-757.
- [57] *Wik Peoples v Queensland* (1996) 187 CLR 1 at 85 per Brennan CJ, 125 per Toohey J, 146-147 per Gaudron J, 185 per Gummow J, 247 per Kirby J.
- [58] *Melbourne Corporation v Barry* (1922) 31 CLR 174 at 188-190 per Isaacs J, 211-212 per Higgins J; *Williams v Melbourne Corporation* (1933) 49 CLR 142 at 148-149 per Starke J, 155-156 per Dixon J; *Brunswick Corporation v Stewart* (1941) 65 CLR 88 at 93-94 per Rich ACJ, 95 per Starke J; *Municipal Corporation of City of Toronto v Virgo* [1896] AC 88 at 93-94.
- [59] (1982) 158 CLR 327 at 358.
- [60] K Gray and S F Gray, “The Idea of Property in Land”, in Bright and Dewar (eds), *Land Law: Themes and Perspectives*, (1998) 15 at 27.
- [61] (1987) 163 CLR 561.
- [62] s 5.
- [63] s 5.
- [64] *Blades v Higgs* (1865) 11 HL Cas 621 at 631 [11 ER 1474 at 1478].
- [65] *Native Animals Protection Act 1906* (Q), s 9(c). The *Animals and Birds Act 1921* (Q), s 17(b), the *Fauna Protection Act 1937* (Q), s 25 and the *Fauna Conservation Act 1952* (Q), s 78 were to similar effect.
- [66] (1987) 163 CLR 561 at 566-567.
- [67] In *The Common Law* (1882), Oliver Wendell Holmes Jr said (at 215):
 “When we say that a man owns a thing, we affirm directly that he has the benefit of the consequences attached to a certain group of facts, and, by implication, that the facts are true of him. The important thing to grasp is, that each of these legal compounds, possession, property, and contract, is to be analyzed into fact and right, antecedent and consequent, in like manner as every other.”
- In a subsequent passage, he pointed out (at 220):
 “The law [of property] does not enable me to use or abuse this book which lies before me. That is a physical power which I have without the aid of the law. What the law does is simply to prevent other men to a greater or less extent from interfering with my use or abuse.” “fnB67”[68]
- cf *Planned Parenthood of Southeastern Pennsylvania v Casey, Governor of Pennsylvania* 505 US 833 at 954 (1992) per Rehnquist CJ (White, Scalia and Thomas JJ agreeing).
- [69] s 7(1).
- [70] (1859) Bell 93 [169 ER 1180].
- [71] *Wik Peoples v Queensland* (1996) 187 CLR 1 at 169.
- [72] Ben Ward & Ors on behalf of the Miriuwung and Gajerrong People; Walden & Ors; Northern Land Council; and the Cape York Land Council (Aboriginal Corporation).
- [73] Attorneys-General for the Commonwealth, South Australia, Western Australia and the Northern Territory.
- [74] *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 69-70, 111; *Wik* (1996) 187 CLR 1 at 124-126, 166, 203, 238; cf *Ward v Western Australia* (1998) 159 ALR 483 at 504.
- [75] *Mabo [No 2]* (1992) 175 CLR 1 at 70.
- [76] The Fauna Act has since been repealed by the *Nature Conservation Act 1992* (Q), which came into force on 19 December 1994.
- [77] Section 5 provided:
 “take’ includes -
 (a) in relation to fauna, hunt, shoot, kill, poison, net, snare, spear, trap, catch, pursue, disturb, stupefy, disable, pluck, injure, destroy or damage or attempt or permit any of those acts”. [78]
- Section 5 provided:
 “keep’ includes have in possession or under control in any place, whether for the use of or benefit of the person of whom the term is used or of another person, and although another person has the actual possession or custody of the thing in question”. [79]
- Eaton v Yanner; Ex parte Eaton*, unreported, 27 February 1998.
- [80] See *Mabo [No 2]* (1992) 175 CLR 1 at 70, 110; cf Grattan and McNamara, “The Common Law

- Construct of Native Title”, (1999) 8 *Griffith Law Review* 50 at 63-65.
- [81] A term also defined in s 5; see Section VI of these reasons.
- [82] (1992) 175 CLR 1 at 58.
- [83] See *Western Australia v The Commonwealth (Native Title Act Case)* (1995) 183 CLR 373 at 459; *The Commonwealth v Tasmania (The Tasmanian Dam Case)* (1983) 158 CLR 1 at 274-275.
- [84] *Wik* (1996) 187 CLR 1 at 177.
- [85] (1996) 187 CLR 1 at 169.
- [86] *Mabo [No 2]* (1992) 175 CLR 1 at 66-67.
- [87] *Mabo [No 2]* (1992) 175 CLR 1 at 89.
- [88] *Mabo [No 2]* (1992) 175 CLR 1 at 58.
- [89] *Mabo [No 2]* (1992) 175 CLR 1 at 57.
- [90] *Mabo [No 2]* (1992) 175 CLR 1 at 109-110.
- [91] *Mabo [No 2]* (1992) 175 CLR 1 at 61, 110.
- [92] *Fejo v Northern Territory* (1998) 72 ALJR 1442 at 1452, 1454; 156 ALR 721 at 737, 739.
- [93] (1996) 187 CLR 1.
- [94] (1998) 72 ALJR 1442 at 1451-1454; 156 ALR 721 at 736-740.
- [95] *Fejo* (1998) 72 ALJR 1442 at 1452; 156 ALR 721 at 737.
- [96] *Mabo [No 2]* (1992) 175 CLR 1 at 58.
- [97] *Commentaries on the Laws of England*, vol 2 at 177.
- [98] (1811) 18 Ves Jun 384 at 390 [34 ER 362 at 364]. See also *Commissioner of Stamp Duties (NSW) v Perpetual Trustee Co Ltd* (1915) 21 CLR 69 at 77, 87; *In re Waugh (deceased)* [1955] NZLR 1129 at 1130.
- [99] *Judicature Act 1876* (Q), s 5(4); *Property Law Act 1974* (Q), s 17.
- [100] *Native Title Act Case* (1995) 183 CLR 373 at 454; *Wik* (1996) 187 CLR 1 at 167-168.
- [101] *Native Title Act Case* (1995) 183 CLR 373 at 435-438; *North Ganalanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595 at 613-614.
- [102] For example, *Fauna Conservation Act 1952* (Q), repealed by s 4(1) of the Fauna Act.
- [103] cf *McQuaker v Goddard* [1940] 1 KB 687 at 695, 699.
- [104] *Geer v Connecticut* 161 US 519 at 539-540 (1896). Field J was in dissent, but the majority decision was overruled in *Hughes v Oklahoma* 441 US 322 (1979).
- [105] *Blades v Higgs* (1865) 11 HL Cas 621 [11 ER 1474].
- [106] In *May v Burdett* (1846) 9 QB 101 at 110-111 [115 ER 1213 at 1217], Lord Denman CJ said: “[w]hoever keeps an animal accustomed to attack and bite mankind, with knowledge that it is so accustomed, is prima facie liable in an action on the case at the suit of any person attacked and injured by the animal, without any averment of negligence or default in the securing or taking care of it”; *Besozzi v Harris* (1858) 1 F & F 92 [175 ER 640]. It is unnecessary to consider, for the purposes of construing s 7 of the Fauna Act as enacted in 1974, the effect, if any, of the subsequent decision of *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 on this branch of the tort law.
- [107] Pollock and Wright, *Possession in the Common Law*, (1888) at 231.
- [108] Section 7(1) was amended on 15 May 1984 by the *Fauna Conservation Act and Another Act Amendment Act 1984* (Q) (“the 1984 Amendment Act”), s 5. The words “otherwise than in contravention of this Act” were inserted after the phrase “taken or kept”. Nothing turns on this amendment.
- [109] *Breen v Williams* (1996) 186 CLR 71 at 80-81, 88-90, 101-102, 126-129.
- [110] *Wheeler v Baldwin* (1934) 52 CLR 609 at 632-633.
- [111] *National Trustees Executors and Agency Co of Australasia Ltd v Federal Commissioner of Taxation* (1954) 91 CLR 540 at 583.
- [112] *Breen v Williams* (1996) 186 CLR 71 at 81, 90; *Cadbury Schweppes Inc v FBI Foods Ltd* [1999] 1 SCR 142 at 156.
- [113] “Some Fundamental Legal Conceptions as Applied in Judicial Reasoning”, (1913) 23 *Yale Law Journal* 16 at 21.
- [114] *The Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 at 73-74; *Don King Productions Inc v Warren* [1999] 3 WLR 276 at 314-316; [1999] 2 All ER 218 at 232-234.
- [115] *Wily v St George Partnership Banking Ltd* (1999) 84 FCR 423 at 431.
- [116] “Some Fundamental Legal Conceptions as Applied in Judicial Reasoning”, (1913) 23 *Yale Law Journal* 16 at 21-22. See also Gray and Gray, “The Idea of Property in Land”, in Bright and Dewar (eds), *Land Law: Themes and Perspectives*, (1998) 15 at 27-30.
- [117] (1997) 191 CLR 471 at 544-545.
- [118] *Maguire v Simpson* (1977) 139 CLR 362 at 371-373. See Finn, “Claims Against the Government Legislation”, in Finn (ed), *Essays on Law and Government*, vol 2, *The Citizen and the State in the Courts*, (1996) 25 at 26-32.
- [119] Leeming, “The Liability of the Government under the Constitution”, (1998) 17 *Australian Bar Review* 215 at 216-219.
- [120] *Crown Proceedings Act 1980* (Q), s 4(2)(a) and Sched.
- [121] Section 108 states:
- “Every law in force in a Colony which has become or becomes a State, and relating to any matter within the powers of the Parliament of the Commonwealth, shall, subject to this Constitution, continue in force in the State; and, until provision is made in that behalf by the Parliament of the Commonwealth, the Parliament of the State shall have such powers of alteration and of repeal in respect of any such law as the Parliament of the Colony had until the Colony became a State.” [122]

See *Sue v Hill* (1999) 73 ALJR 1016 at 1034-1035, 1049; 163 ALR 648 at 673-674, 693. Section 31(3)(a) of the *Acts Interpretation Act 1954* (Q) defined “the Crown” but merely in terms of the particular monarch at the time.

[123] This provided:

“**Petitioner may sue as in ordinary cases.** Any such petitioner may sue such nominal defendant at law or in equity in any competent court and every such case shall be commenced in the same way and the proceedings and rights of parties therein shall as nearly as possible be the same and judgment and costs shall follow on either side as in an ordinary case between subject and subject at law or in equity.”[124]

Section 5 defined “open season” to mean, in relation to any fauna, “the period declared by Order in Council under this Act during which that fauna may be taken”.

[125] [1921] 1 AC 401.

[126] [1921] 1 AC 401 at 409. See also *The Commonwealth v New South Wales* (1923) 33 CLR 1 at 45; *Perth Corporation v Crystal Park Ltd* (1940) 64 CLR 153 at 168; *Bathurst City Council v PWC Properties Pty Ltd* (1998) 72 ALJR 1470 at 1480-1483; 157 ALR 414 at 427-431.

[127] (1987) 163 CLR 561 at 582.

[128] See *Case of Swans* (1592) 7 Co Rep 15b [77 ER 435]; Chitty, *A Treatise on the Law of the Prerogatives of the Crown*, (1820) at 142-144. As to the meaning of “royalties of the Crown”, see *Stanton v Federal Commissioner of Taxation* (1955) 92 CLR 630 at 641.

[129] Earl of Selborne LC in *Bradlaugh v Clarke* (1883) 8 App Cas 354 at 358 said that it is an “incontestable proposition of law, that ‘where a penalty is created by statute, and nothing is said as to who may recover it, and it is not created for the benefit of a party grieved, and the offence is not against an individual, it belongs to the Crown, and the Crown alone can maintain a suit for it’”. This construction of the Fauna Act is supported by the saving provision in s 84 and by s 85 which provided that “all penalties, costs, fees, royalty and compensation recovered under this Act shall be paid into and form part of the Consolidated Revenue Fund”.

[130] The Fauna Act was amended by: *Fauna Conservation Act and Another Act Amendment Act 1976* (Q), Pt II; *Fauna Conservation Act Amendment Act 1979* (Q); the 1984 Amendment Act, Pt II; *Deer Farming Act 1985* (Q), s 4(1), Sched 2; *Fauna Conservation Act and Another Act Amendment Act 1989* (Q), Pt III.

[131] (1996) 187 CLR 1.

[132] (1996) 187 CLR 1 at 185. See also *Fejo* (1998) 72 ALJR 1442 at 1451; 156 ALR 721 at 736.

[133] *Fejo* (1998) 72 ALJR 1442 at 1452; 156 ALR 721 at 737.

[134] (1996) 187 CLR 1 at 171. See Grattan and McNamara, “The Common Law Construct of Native Title”, (1999) 8 *Griffith Law Review* 50 at 78.

[135] (1996) “/au/cases/cth/high_ct/187clr1.html” 187 CLR 1 at 203.

[136] (1999) 73 ALJR 345; 160 ALR 638.

[137] (1999) 73 ALJR 345 at 372; 160 ALR 638 at 674-675.

[138] (1995) 183 CLR 373 at 474.

[139] In *R v Sundown* (1999) 170 DLR (4th) 385 at 398-399, the Supreme Court of Canada gave some consideration to the relevance of the means by which a treaty right to hunt may be pursued in that country by First Nation peoples. However the different history of that country, its first inhabitants, treaties made there and its legislation might give rise to different considerations from those of relevance to this country. Similarly in *McRitchie v Taranaki Fish and Game Council* [1999] 2 NZLR 139 the different legislative regime and the Treaty of Waitangi give rise to matters which are not relevant to this case.

[140] For a discussion of the evidentiary problems thrown up by a case of this kind see *Mabo v State of Queensland* [1992] 1 Qd R 78 at 84ff per Moynihan J.

[141] By Order-in-Council dated 29 August 1974 and published in the Government Gazette on 31 August 1974, the operation of the Act was extended to cover crocodiles.

[142] (1987) 163 CLR 561.

[143] *Walden v Hensler* (1987) 163 CLR 561 at 566.

[144] (1865) 11 HL Cas 621 at 631 [11 ER 1474 at 1478-1479].

[145] *Walden v Hensler* (1987) 163 CLR 561 at 566-567.

[146] For a discussion of the changing nature of these preoccupations, see Itzkowitz, *Peculiar Privilege: A Social History of English Foxhunting 1753-1885* (1977).

[147] See *The Crown v Murphy* (1990) 64 ALJR 593 at 596-597; 95 ALR 493 at 498-499.

[148] For a discussion of Darwin’s influence in this respect, see Verney, *Animals in Peril* (1979) at 176-184.

[149] Hutton and Connors, *A History of the Australian Environment Movement* (1999) at 21. For a discussion of the emergence and manifestation of this consciousness at the same time in the United States and Europe, see Verney, *Animals in Peril* (1979); for a discussion of its emergence and manifestation in Britain, see Ritvo, “Animals in Nineteenth-Century Britain”, in Manning and Serpell (eds), *Animals and Human Society* (1994) 106.

[150] Section 8A was inserted by *Animals and Birds Act Amendment Act 1924* (Q), s 2(4).

- [151] *Fauna Protection Act 1937* (Q), s 15; *Fauna Conservation Act 1952* (Q), s 6(2).
- [152] A landowner has, generally speaking, a right to extract the gas and oil beneath his or her land, including gas and oil which is there by the power of “self-transmission” (*Brown v Spilman* 155 US 665 (1895); *Ohio Oil Company v Indiana (No 1)* 177 US 190 (1900); *DuLaney v Oklahoma State Department of Health* 868 P 2d 676 (1993)). However, ownership of gas and oil is subject to the possibility of escape and loss of title. This is reflected in what is known as the “rule of capture”, which is that “the owner of a tract of land acquires title to the oil or gas he or she produces from wells on his or her land even though part of the oil or gas may have migrated from adjoining lands, without incurring liability to the adjoining land for drainage” (38 Am Jur 2d, Gas and Oil at §10). Thus, a landowner is entitled to extract gas or oil from his property to capture the contents of the pool regardless whether this diminishes the availability of the gas or oil to his neighbours.
- [153] (1987) 163 CLR 561.
- [154] (1992) 175 CLR 1.
- [155] *R v Alphonse* (1993) 80 BCLR (2d) 17 at 26-27. See also *Ward v Western Australia* (1998) 159 ALR 483 at 615.
- [156] See *Native Animals Protection Act 1906* (Q), s 9(c); *Animals and Birds Act 1921* (Q), ss 8A, 17(b); *Fauna Protection Act 1937* (Q), ss 15, 25; *Fauna Conservation Act 1952* (Q), ss 6(2), 78.
- [157] (1996) 187 CLR 1 at 185.
- [158] *Wik Peoples v Queensland* (1996) 187 CLR 1 at 247.
- [159] See, for example, *Fejo v Northern Territory* (1998) 72 ALJR 1442 at 1466; 156 ALR 721 at 756.
- [160] *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 58.
- [161] See, for example, *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 58 per Brennan J; *Wik Peoples v Queensland* (1996) 187 CLR 1 at 185 per Gummow J.
- [162] See, for example, *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 58 per Brennan J; *Wik Peoples v Queensland* (1996) 187 CLR 1 at 185 per Gummow J.
- [163] See, for example, *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 60 per Brennan J; *Wik Peoples v Queensland* (1996) 187 CLR 1 at 126 per Toohey J, 185, 203 per Gummow J.
- [164] See, for example, *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 58, 61 per Brennan J; *Wik Peoples v Queensland* (1996) 187 CLR 1 at 126 per Toohey J; cf *Fejo v Northern Territory* (1998) 72 ALJR 1442 at 1452; 156 ALR 721 at 737.
- [165] See, for example, *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 58, 61 per Brennan J; *Wik Peoples v Queensland* (1996) 187 CLR 1 at 126 per Toohey J; cf *Fejo v Northern Territory* (1998) 72 ALJR 1442 at 1452; 156 ALR 721 at 737.
- [166] See, for example, *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 61-62 per Brennan J; *Walden v Hensler* (1987) 163 CLR 561 at 565 per Brennan J.
- [167] *Wik Peoples v Queensland* (1996) 187 CLR 1 at 126.
- [168] *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 50, 64, 68-70, 89-90, 110-111, 195-196; *Western Australia v The Commonwealth (Native Title Act Case)* (1995) 183 CLR 373 at 418, 422, 433-434, 452-453, 492, 495; *Wik Peoples v Queensland* (1996) 187 CLR 1 at 84-86, 126, 132-133, 135, 146-147, 168-169, 185, 203, 214, 243, 244, 247.
- [169] (1998) 72 ALJR 1442; 156 ALR 721.
- [170] *Wik Peoples v Queensland* (1996) 187 CLR 1 at 167-168.
- [171] (1995) 183 CLR 373 at 454.

Note from E-LAW U.S.: This opinion contains several spelling mistakes made in the original opinion from which we transcribed. Also, our original is illegible in two spots. The first omission is of one or two letters. The second is of about 10 words. These two spots are noted in the text in [brackets].

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: NYALALI, C.J., MAKAME, J.K., and KISANGA, J.A.)

CIVIL APPEAL NO. 31 OF 1994

HON. ATTORNEY GENERAL APPELLANT

VERSUS

1. LOHAY AKNONAAY

2. JOSEPH LOHAY

RESPONDENT

(Appeal from the Judgement of the High Court of Tanzania at Arusha)

(Justice Munuo)

dated 21st October, 1993

in

The High Court Miscellaneous Civil Cause No. 1 of 1993

JUDGEMENT OF THE COURT

NYALALI, C.J.:

This case clearly demonstrates how an understanding of our Country's past is crucial to a better understanding of our present, and why it is important while understanding our past, to avoid living in that past. The respondents, namely, Lohay Akonaay and Joseph Lohay are father and son, living in the village of Kambi ya Simba, Mbulumbulu Ward, [unreadable name of district] ...bald District, in Arusha Region. In January 1987 they successfully instituted a suit in the Court of the Resident Magistrate for Arusha Region for recovery of a piece of land held under customary law. An eviction order was subsequently issued for eviction of the judgement debtors and the respondents were given possession of the piece of land in question. There is currently an appeal pending in the High Court at Arusha against the judgement of the trial court. This is Arusha High Court Civil Appeal No. 6 of 1991. While this appeal was pending, a new law, which came into force on the 28th December 1992, was enacted by the Parliament, declaring the extinction of customary rights in land, prohibiting the payment of compensation for such extinction, ousting the jurisdiction of the courts, terminating proceedings pending in the courts, and prohibiting the enforcement of any court decision or decree concerning matters in respect of which jurisdiction was ousted. The law also established, inter alia, a tribunal with exclusive jurisdiction to deal with the matters taken out of the jurisdiction of the courts. This new law is the Regulation of Land Tenure (Established Villages) Act, 1992, Act No. 22 of 1992, hereinafter called Act No. 22 of 1992.

Aggrieved by this new law, the respondents petitioned against the Attorney-General in the High Court, under articles 30 (3) and 26 (2) of the Constitution of the United Republic of Tanzania, for a declaration to the effect that the new law is unconstitutional and consequently null and void. The High Court, Munuo, J., granted the petition and ordered the new law struck off the statute book. The Attorney-General was aggrieved by the judgement and order of the High Court, hence he sought and obtained leave to appeal to this Court. Mr. Felix Mrema, the learned Deputy Attorney-General, assisted by Mr. Sasi Salula, State Attorney, appeared for the Attorney-General, whereas Messrs Lobulu and Sang'ka, learned advocates, appeared for the respondents.

From the proceedings in this court and the court below, it is apparent that there is no dispute between the parties that during the colonial days, the respondents acquired a piece of land under customary law. Between 1970 and 1977 there was a country-wide operation undertaken in the rural areas by the Government and the ruling party, to move and settle the majority of the scattered rural population into villages on the mainland of Tanzania. One such village was Kambi ya Simba village, where the residents reside. During this exercise, commonly referred to as Operation Vijiji, there

was wide-spread re-allocation of land between the villagers concerned. Among those affected by the operation were the respondents, who were moved away from the land they had acquired during the colonial days to another piece of land within the same village. The respondents were apparently not satisfied with this reallocation and it was for the purpose of recovering their original piece of land that they instituted the legal action already mentioned. Before the case was concluded in 1989, subsidiary legislation was made by the appropriate Minister under the Land Development (Specified Areas) Regulations, 1986 read together with the Rural Lands (Planning and Utilization) Act, 1973, Act No. 14 of 1973 extinguishing all customary rights in land in 92 villages listed in a schedule. This is the Extinction of Customary Land Right Order, 1987 published as Government Notice No. 88 of 13th February 1987. The order vested the land concerned in the respective District Councils having jurisdiction over the area where the land is situated. The respondents' village is listed as Number 22 in that schedule [unreadable text: about 10 words] Order, including the respondents' village, are in areas within Arusha Region.

The Memorandum of appeal submitted to us for the appellant contains nine grounds of appeal, two of which, that is ground number 8 and 9 were abandoned in the course of hearing the appeal. The remaining seven grounds of appeal read as follows:

1. That the Honourable Trial Judge erred in fact and law in holding that a deemed Right of Occupancy as defined in section 2 of the Land Ordinance Cap 113 is "property" for the purposes of Article 24(1) of the Constitution of the United Republic of Tanzania 1977 and as such its deprivation is unconstitutional.
2. That the Honourable Trial Judge erred in law and fact in holding that section 4 of the Regulation of Land Tenure (Established Villages) Act, 1992, precludes compensation for unexhausted improvements.
3. That the Honourable Trial Judge erred in law and fact in holding that any statutory provision ousting the jurisdiction of the courts is contrary to the Constitution of the United Republic of Tanzania.
4. That the Honourable Trial Judge erred in law by holding that the whole of the Regulation of Land Tenure (Established Villages) Act 1992 is unconstitutional.
5. That the Honourable Trial Judge erred in law and fact in holding that the Regulation of Land Tenure (Established Villages) Act 1992 did acquire the Respondents' land and reallocated the same to other people and in holding that the Act was discriminatory.
6. That having declared the Regulation of Land Tenure (Established Villages) Act 1992 unconstitutional, the Honourable Judge erred in law in proceeding to strike it down.

7. The Honourable Trial Judge erred in fact by quoting and considering a wrong and non-existing section of the law.

The respondents on their part submitted two notices before the hearing of the appeal. The first is a Notice of Motion purportedly under Rule 3 of the Tanzania Court of Appeal Rules, 1979, and the second, is a Notice of Grounds for affirming the decision in terms of Rule 93 of the same. The Notice of Motion sought to have the court strike out the grounds of appeal numbers 1, 5, 8 and 9. After hearing both sides, we were satisfied that the procedure adopted by the respondents was contrary to rules 45 and 55 which require such an application to be made before a single judge. We therefore ordered the Notice of Motion to be struck off the record.

As to the Notice of Grounds for affirming the decision of the High Court, it reads as follows:

1. As the appellant had not pleaded in his Reply to the Petition facts or points of law showing controversy, the court ought to have held that the petition stands unopposed.
2. Since the Respondents have a court decree in their favour, the Legislature cannot nullify the said decree as it is against public policy, and against the Constitution of Tanzania.
3. As the Respondents have improved the land, they are by that reason alone entitled to compensation in the manner stipulated in the Constitution and that compensation is payable before their rights in land could be extinguished.
4. Possession and use of land constitute “property” capable of protection under the Constitution of Tanzania. Act No. 22 is therefore unconstitutional to the extent that it seeks to deny compensation for loss of use; it denies right to be heard before extinction of the right.
5. Operation Vijiji gave no person a right to occupy or use somebody else’s land, hence no rights could have been acquired as a result of that “operation”.
6. The victims of Operation Vijiji are entitled to reparations, The Constitution cannot therefore be interpreted to worsen their plight.
7. The land is the Respondents’ only means to sustain life. Their rights therein cannot therefore be extinguished or acquired in the manner the Legislature seeks to do without violating the Respondents’ constitutional right to life.

For purposes of clarity, we are going to deal with the grounds of appeal one by one, and in the process, take into account the grounds submitted by the respondents for affirming the decision wherever they are relevant to our decision.

Ground number one raises an issue which has far-reaching consequences to the majority of the people of this country,

who depend on land for their livelihood. Article 24 of the Constitution of the United Republic of Tanzania recognizes the right of every person in Tanzania to acquire and own property and to have such property protected. Sub-article (2) of that provision prohibits the forfeiture or expropriation of such property without fair compensation. It is the contention of the Attorney-General, as eloquently articulated before us by Mr. Felix Mrema, Deputy Attorney-General, that a “right of occupancy” which includes customary rights in land as defined under section 2 of the Land Ordinance, Cap 113 of the Revised Laws of Tanzania Mainland, is not property within the meaning of article 24 of the Constitution and is therefore not protected by the Constitution. The Deputy Attorney-General cited a number of authorities, including the case of *AMODU TIJAN VS THE SECRETARY SOUTHERN NIGERIA* (1921) 2 A.C. 399 and the case of *MTORO BIN MWAMBA VS THE ATTORNEY GENERAL* (1953) 20 E.A.C.A. 108, the latter arising from our own jurisdiction. The effect of these authorities is that customary rights in land are by their nature not rights of ownership of land, but rights to use or occupy land, the ownership of which is vested in the community or communal authority. The Deputy Attorney-General also contended to the effect that the express words of the Constitution under Article 24 makes the right to property, “subject to the relevant laws of the land.”

Mr. Lobulu for the respondents has countered Mr. Mrema’s contention by submitting to the effect that whatever the nature of customary rights in land, such rights have every characteristic of property, as commonly known, and therefore fall within the scope of article 24 of the Constitution. He cited a number of authorities in support of that position, including the Zimbabwe case of *HEWLETT VS MINISTER OF FINANCE* (1981) ZLR 573, and the cases of *SHAH VS ATTORNEY-GENERAL* (N.2) 1970 EA 523 and the scholarly article by Thomas Allen, lecturer in Law, University of Newcastle, published in the *International and Comparative Law Quarterly*, Vol. 42, July 1993 on “Commonwealth constitutions and the right not to be deprived of property.”

Undoubtedly the learned trial judge, appears to have been of the view that customary or deemed rights of occupancy are properly within the scope of article 24 of the Constitution when she stated in her judgement:

“I have already noted earlier on that the petitioner legally possess the suit land under customary land tenure under section 2 of the Land Ordinance cap 113. They have not in this application sought any special status, rights or privileges and the court has not conferred any on the petitioners. Like all other law abiding citizens of this country, the petitioners are equally entitled to basic human rights including the right to possess the deemed rights of occupancy they lawfully acquired pursuant to Article 24 (1) of the Constitution and section 2 of the Land Ordinance, Cap 113.”

Is the trial judge correct? We have considered this momentous issue with the judicial care it deserves. We realize that if the Deputy Attorney-General is correct, then most of the inhabitants of the Tanzania mainland are no better than squatters in their own country. It is a serious proposition. Of course if that is the correct position in law, it is our duty to agree with the Deputy Attorney-General, without fear or favour, after closely examining the relevant law and the principles underlying it.

In order to ascertain the correct legal position, we have had to look at the historical background of the written law of land tenure on the mainland of Tanzania, since the establishment of British Rule. This exercise has been most helpful in giving us an understanding of the nature of rights or interests in land on the mainland of Tanzania. This historical background shows that the overriding legal concern of the British authorities, no doubt under the influence of the Mandate of the League of Nations and subsequently of the Trusteeship Council, with regard to land, was to safeguard, protect, and not to derogate from, the rights in land of the indigenous inhabitants. This is apparent in the Preamble to what was then known as the Land Tenure Ordinance, Cap 113 which came into force on 26 January, 1923. The Preamble reads:

“Whereas it is expedient that the existing customary rights of the natives of the Tanganyika Territory to use and enjoy the land of the Territory and the natural fruits thereof in sufficient quantity to enable them to provide for the sustenance of themselves their families and their posterity should be assured, protected and preserved;

AND WHEREAS it is expedient that the rights and obligations of the Government in regard to the whole of the lands within the Territory and also the rights and obligations of cultivators or other persons claiming to have an interest in such lands should be defined by law.

BE IT THEREFORE ENACTED by the Governor and Commander-in-Chief of the Tanganyika Territory as follows . . .”

It is well known that after a series of minor amendments over a period of time, the Land Tenure Ordinance assumed its present title and form as the Land Ordinance, Cap 113. Its basic features remain the same up to now. One of the basic features is that all land is declared to be public land and is vested in the governing authority on trust for the benefit of the indigenous inhabitants of this country. This appears in section 3 and 4 of the Ordinance.

The underlying principle of assuring, protecting and preserving customary rights in land is also reflected under article 8 of the Trusteeship Agreement, under which the mainland of Tanzania was entrusted by the United Nations to the British Government. Article 8 reads:

“In framing laws relating to the holding or transfer of land and natural resources, the Administering Authority shall take into consideration native laws and customs, and shall respect the rights and safeguard the interests, both present and future, of the native population. No native land or natural resources may be transferred except between natives, save with the previous consent of the competent public authority. No real rights over native land or natural resources in favour of non-natives may be created except with the same consent.”

With this background in mind, can it be said that the customary or deemed rights of occupancy recognized under the Land Ordinance are not property qualifying for protection under article 24 of the Constitution? The Deputy Attorney-General has submitted to the effect that the customary or deemed rights of occupancy, though in ordinary parlance may be regarded as property, are not constitutional property within the scope of Article 24 because they lack the minimum characteristics of property as outlined by Thomas Allen in his article earlier mentioned where he states:

“The precise content of the bundle of rights varies between legal systems, but nonetheless it is applied throughout the Commonwealth. At a minimum, the bundle has been taken to include the right to exclude others from the thing owned, the right to use or receive income from it, and the right to transfer to others. According to the majority of Commonwealth cases, an individual has property once he or she has a sufficient quantity of these rights in a thing. What is ‘sufficient’ appears to vary from case to case, but it is doubtful that a single strand of the bundle would be considered property on its own.”

According to the Deputy Attorney-General, customary or deemed rights of occupancy lack two of the three essential characteristics of property. First, the owner of such a right cannot exclude all others since the land is subject to the superior title of the President of the United Republic in whom the land is vested. Second, under section 4 of the Land Ordinance, the occupier of such land cannot transfer title without the consent of the President.

With due respect to the Deputy Attorney-General, we do not think that his contention on both points is correct. As we have already mentioned, the correct interpretation of S.4 and related sections above mentioned is that the President holds public land on trust for the indigenous inhabitants of that land. From this legal position, two important things follow. Firstly, as trustee of public land, the President’s power is limited in that he cannot deal with public land in a manner in which he wishes or which is detrimental to the beneficiaries of public land. In the words of s. 6(1) of the Ordinance, the President may deal with public land only “where it appears to him to be in the general interests of Tanganyika.” Secondly, as trustee, the President cannot be the beneficiary of public land. In other words, he is excluded from the beneficial interest.

With regard to the requirement of consent for the validity of title to the occupation and use of public lands, we do not think that the requirement applied to the beneficiaries of public land, since such an interpretation would lead to the absurdity of transforming the inhabitants of this country, who have been in occupation of land under customary law from time immemorial, into mass squatters in their own country. Clearly that could not have been the intention of those who enacted the Land Ordinance. It is a well known rule of interpretation that a law should not be interpreted to lead to an absurdity. We find support from the provisions of article 8 of the Trusteeship Agreement which expressly exempted dispositions of land between the indigenous inhabitants from the requirement of prior consent of the governing authority. In our considered opinion, such consent is required only in cases involving disposition of land by indigenous inhabitants or natives to non-natives in order to safeguard the interests of the former. We are satisfied in our minds that the indigenous population of this country are validly in occupation of land as beneficiaries of such land under customary law and any disposition of land between them under customary law is valid and requires no prior consent from the President.

We are of course aware of the provisions of the Land Regulations, 1948 and specifically regulation 3 which requires every disposition of a Right of Occupancy to be in writing and to be approved by the President. In our considered opinion the Land Regulations apply only to a Right of Occupancy granted under s.6 of the Land Ordinance and have no applicability to customary or deemed rights of occupancy, where consent by a public authority is required only in the case of a transfer by a native to a non-native. A contrary interpretation would result in the absurdity we have mentioned earlier.

As to the contention by the Deputy Attorney-General to the effect that the right to property under Article 24 of the Constitution is derogated from by the provision contained therein which subjects it to "the relevant laws of the land," we do not think that, in principle, that expression, which is to be found in other parts of the Constitution, can be interpreted in a manner which subordinates the Constitution to any other law. It is a fundamental principle in any democratic society that the Constitution is supreme to every other law or institution. Bearing this in mind, we are satisfied that the relevant proviso means that what is stated in the particular part of the Constitution is to be exercised in accordance with relevant law. It hardly needs to be said that such regulatory relevant law must not be inconsistent with the Constitution.

For all these reasons therefore we have been led to the conclusion that customary or deemed rights in land, though by their nature are nothing but rights to occupy and use the land, are nevertheless real property protected by the provisions of article 24 of the Constitution. It follows therefore that deprivation of a customary or deemed right

of occupancy without fair compensation is prohibited by the Constitution. The prohibition of course extends to a granted right of occupancy. What is fair compensation depends on the circumstances of each case. In some cases a reallocation of land may be fair compensation. Fair compensation however is not confined to what is known in law as unexhausted improvements. Obviously where there are unexhausted improvements, the constitution as well as the ordinary land law requires fair compensation to be paid for its deprivation.

We are also of the firm view that where there are no unexhausted improvement, but some effort has been put into the land by the occupier, that occupier is entitled to protection under Article 24 (2) and fair compensation is payable for deprivation of property. We are led to this conclusion by the principle, stated by Mwalimu Julius K. Nyerere in 1958 and which appears in his book "Freedom and Unity" published by Oxford University Press, 1966. Nyerere states, inter alia:

"When I use my energy and talent to clear a piece of ground for my use it is clear that I am trying to transform this basic gift from God so that it can satisfy a human need. It is true, however, that this land is not mine, but the efforts made by me in clearing the land enable me to lay claim of ownership over the cleared piece of ground. But it is not really the land itself that belongs to me but only the cleared ground which will remain mine as long as I continue to work on it. By clearing that ground I have actually added to its value and have enabled it to be used to satisfy a human need. Whoever then takes this piece of ground must pay me for adding value to it through clearing it by my own labour."

This in our view, deserves to be described as "the Nyerere Doctrine of Land Value" and we fully accept it as correct in law.

We now turn to the second ground of appeal. This one poses no difficulties. The genesis of this ground of appeal is the finding of the trial judge where she states,

"In the light of the provisions of Article 24 (1) and (2) of the Constitution, section 3 and 4 of Act No. 22 of 1992 violate the Constitution by denying the petitioners the right to go on possessing their deemed rights of occupancy and what is worse, denying the petitioners compensation under section 3 (4) of Act No. 22 of 1992."

Like both sides to this case, we are also of the view that the learned trial judge erred in holding that the provisions of section 4 of Act. No. 22 of 1992 denied the petitioners or any other occupier compensation for unexhausted improvements. The clear language of that section precludes compensation purely on the basis of extinction of customary rights in land. The section reads:

“No compensation shall be payable only on account of loss of any right or interest in or over land which has been extinguished under section 3 of this Act.”

But as we have already said, the correct constitutional position prohibits not only deprivation of unexhausted improvements without fair compensation, but every deprivation where there is value added to the land. We shall consider the constitutionality of section 4 later in this judgement.

Ground number 3 attacks the finding of the trial judge to the effect that the provisions of Act No. 22 of 1992 which oust the jurisdiction of the Courts from dealing with disputes in matters covered by the Act are unconstitutional. The relevant part of the judgement of the High Court reads as follows:

“The effect of sections 5 and 6 of Act No. 22 of 1992 is to oust the jurisdiction of the Courts of law in land disputes arising under the controversial Act No. 22 of 1992 and exclusively vesting such jurisdiction in land tribunals. Such ousting of the courts jurisdiction by section 5 and 6 of Act No. 22/92 violates Articles 30(1), (3), (4) and 108 of the Constitution.”

The Deputy Attorney-General has submitted to the effect that the Constitution allows, specifically under article 13 (6) (a), for the existence of bodies or institutions other than the courts for adjudication of disputes. Such bodies or institutions include the Land Tribunal vested with exclusive jurisdiction under section 6 of Act No. 22 of 1992. We are grateful for the interesting submission made by the Deputy Attorney-General on this point, but with due respect, we are satisfied that he is only partly right. We agree that the Constitution allows the establishment of quasi-judicial bodies, such as the Land Tribunal. What we do not agree is that the Constitution allows the courts to be ousted of jurisdiction by conferring exclusive jurisdiction on such quasi-judicial bodies. It is the basic structure of a democratic Constitution that state power is divided and distributed between three state pillars. These are the Executive, vested with executive power; the Legislature vested with legislative power; and the Judicature vested with judicial powers. This is clearly so stated under article 4 of the Constitution. This basic structure is essential to any democratic constitution and cannot be changed or abridged while retaining the democratic nature of the constitution. It follows therefore that wherever the constitution establishes or permits the establishment of any other institution or body with executive or legislative or judicial power, such institution or body is meant to function not in lieu of or in derogation of these three central pillars of the state, but only in aid of and subordinate to those pillars. It follows therefore that since our Constitution is democratic, any purported ouster of jurisdiction of the ordinary courts to deal with any justiciable dispute is unconstitutional. What can properly be done wherever need

arises to confer adjudicative jurisdiction on bodies other than the courts, is to provide for finality of adjudication, such as by appeal or review to a superior court, such as the High Court or Court of Appeal.

Let us skip over ground number 4 which is the concluding ground of the whole appeal. We shall deal with it later. For now, we turn to ground number 5. This ground relates to that part of the judgement of the learned trial judge, where she states:

“It is reverse discrimination to confiscate the petitioners deemed right of occupancy and reallocate the same to some other needy persons because by doing so the petitioners are deprived of their right to own land upon which they depend for a livelihood which was why they acquired it back in 1943.”

There is merit in this ground of appeal. Act No. 22 of 1992 cannot be construed to be discriminatory within the meaning provided by Article 13(5) of the Constitution. Mr. Sang’ka’s valiant attempt to show that the Act is discriminatory in the sense that it deals only with people in the rural areas and not those in the urban areas was correctly answered by the Deputy Attorney-General that the Act was enacted to deal with a problem peculiar to rural areas. We also agree with the learned Deputy Attorney-General, that the act of extinguishing the relevant customary or deemed rights of occupancy did not amount to acquisition of such rights. As it was stated in the Zimbabwe case of HEWLETT VS MINISTER OF FINANCE cited earlier where an extract of a judgement of Viscount Dilhorne is reproduced stating:

“Their Lordships agree that a person may be deprived of his property by mere negative or restrictive provision but it does not follow that such a provision which leads to deprivation also leads to compulsory acquisition or use.”

It is apparent that, during Operation Vijiji what happened was that some significant number of people were deprived of their pieces of land which they held under customary law, and were given in exchange other pieces of land in the villages established pursuant to Operation Vijiji. This exercise was undertaken not in accordance with any law but purely as a matter of government policy. It is not apparent why the government chose to act outside the law, when there was legislation which could have allowed the government to act according to law, as it was bound to. We have in mind the Rural Lands (Planning and Utilization) Act, 1973, Act No. 14 of 1973, which empowers the President to declare specified areas to regulate land development and to make regulations to that effect, including regulations extinguishing customary rights in land and providing for compensation for unexhausted improvements, as was done in the case of Rufiji District under Government Notice Nos. 25 of 10th May 1974 and 216 of 30th August 1974. The inexplicable failure to act

according to law, predictably led some aggrieved villagers to seek remedies in the courts by claiming recovery of the lands they were dispossessed during the exercise. Not surprisingly most succeeded. To avoid the unravelling of the entire exercise and the imminent danger to law and order, the Land Development (Specified Areas) Regulations, 1986 and the Extinction of Customary Land Rights Order, 1987 were made under Government Notice No. 659 of 12th December 1986 and Government Notice No. 88 of 13th February 1987 respectively. As we have already mentioned earlier in this judgement, Government Notice No. 88 of 13th February 1987 extinguished customary land rights in certain villages in Arusha Region, including the village of Kambi ya Simba where the respondents come from. We shall consider the legal effect of this Government Notice later in this judgement.

For the moment we must turn to ground number 6 of the appeal. Although the Deputy Attorney-General was very forceful in submitting to the effect that the learned trial judge erred in striking down from the statute book those provisions of Act No. 22 of 1992 which she found to be unconstitutional, he cited no authority and indicated no appropriate practice in countries with jurisdiction similar on what may be described as the authority or force of reason by arguing that the Doctrine of Separation of Powers dictates that only the Legislature has powers to strike out a statute from the statute book. We would agree with the learned Deputy Attorney-General in so far as valid statutes are concerned. We are unable, on the authority of reason, to agree with him in the case of statutes found by a competent court to be null and void. In such a situation, we are satisfied that such court has inherent powers to make a consequential order striking out such invalid statute from the statute book. We are aware that in the recent few weeks some legislative measures have been made by the Parliament concerning this point. Whatever those measures may be, they do not affect this case which was decided by the High Court a year ago.

Ground number 7 is next and it poses no difficulty at all. It refers to that part of the High Court's judgement where the learned trial judge states:

"Furthermore section 3(4) of Act No. 22 of 1992 forbids any compensation on account of the loss of any right or interest in or over land which has been extinguished under section 3 of Act No. 22 of 1992."

As both sides agree, the reference to section 3(4) must have been a slip of the pen. There is no such section. The learned trial judge must have been thinking of section 4 and would undoubtedly have corrected the error under the Slip Rule had her attention been drawn to it.

We must now return to ground number 4. The genesis of this ground is that part of the judgement of the trial court where it states:

"For reasons demonstrated above the court finds that sections 3, 4, 5 and 6 of Act No. 22 /92 the Regulation of Land Tenure (Established Villages) Act 1992 violate some provisions of the Constitution thereby contravening Article 64(5) of the Constitution. The unconstitutional Act No. 22 of 1992 is hereby declared null and void and accordingly struck down"

The learned Deputy Attorney-General contends in effect that the learned trial judge, having found only four sections out of twelve to be unconstitutional ought to have confined herself only to striking down the four offending sections and not the entire statute. There is merit in this ground of appeal. There is persuasive authority to the effect that where the unconstitutional provisions of a statute may be severed leaving the remainder of the statute functioning, then the court should uphold the remainder of the statute and invalidate only the offending provisions.

See the case of Attorney-General of Alberta vs Attorney-General of Canada (1947) AC 503.

In the present case, for the reasons we have given earlier, we are satisfied that sections 3 and 4 which provide for the extinction of customary rights in land but prohibit the payment of compensation with the implicit exception of unexhausted improvements only are violative of Article 24(1) of the Constitution and are null and void. Section 4 would be valid if it covered compensation for value added to land within the scope of the Nyerere Doctrine of Land Value.

But as we have pointed out earlier in this judgement, this finding has no effect in the villages of Arusha Region including Kambi ya Simba, which are listed in the schedule to Government Notice No. 88 of 1987. The customary rights in land in those listed villages were declared extinct before the provisions of the Constitution, which embody the Basic Human Rights became enforceable in 1988 by virtue of the provisions of section 5(2) of the Constitution (Consequential, Transitional and Temporary Provisions) Act, 1984. This means that since the provisions of Basic Human Rights are not retrospective, when the Act No. 22 of 1992 was enacted by the Parliament, there were no customary rights in land in any of the listed villages of Arusha Region. This applies also to other areas, such as Rufiji District where, as we have shown, customary rights in land were extinguished by law in the early 1970s. Bearing in mind that Act No. 22 of 1992, which can correctly be described as a draconian legislation, was prompted by a situation in some villages in Arusha Region, it is puzzling that a decision to make a new law was made where no new law was needed. A little research by the Attorney-General's Chambers would have laid bare the indisputable fact that customary rights in land in the villages concerned had been extinguished a year before the Bill of Rights came into force. With due respect to those concerned, we feel that this was unnecessary panic characteristic of people used to living in our past rather than in our present which is governed by a constitution

embodying a Bill of Rights. Such behavior does not augur well for good governance.

With regard to section 5(1) and (2) which prohibits access to the courts or tribunal, terminates proceedings pending in court or tribunal and prohibits enforcement of decisions of any court or tribunal concerning land disputes falling within Act No. 22 of 1992, we are satisfied, like the learned trial judge, that the entire section is unconstitutional and therefore null and void, as it encroaches upon the sphere of Judicature contrary to Article 4 of the Constitution, and denies an aggrieved party remedy before an impartial tribunal contrary to Article 13(6)(a) of the same constitution.

The position concerning section 6 is slightly different. That section reads:

“No proceeding may be instituted under this Act, other than in the Tribunal having jurisdiction over the area in which the dispute arises.”

Clearly this section is unconstitutional only to the extent that it purports to exclude access to the courts. The offending parts may however be severed so that the remainder reads, “Proceedings may be instituted under this Act in Tribunal having jurisdiction over the area in which the dispute arises”. This would leave the door open for an aggrieved party to seek a remedy in the courts, although such courts would not normally entertain a matter for which a special forum has been established, unless the aggrieved party can satisfy the court that no appropriate remedy is available in the special forum.

The remainder of the provisions of Act No. 22 of 1992 including section 7, which can be read without the proviso referring to the invalidated section 3, can function in respect

of the matters stated under s.7 of the Act. To that extent therefore the learned trial judge was wrong in striking down the entire statute. To that extent we hereby reverse the decision of the court below. As neither side is a clear winner in this case, the appeal is partly allowed and partly dismissed. We make no order as to costs.

DATED at DAR ES SALAAM this 21st day of December, 1994.

F. L. NYALALI
CHIEF JUSTICE

L. M. MAKAME
JUSTICE OF APPEAL

R. H. KISANGA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

(B. M. LUANDA)
SENIOR DEPUTY REGISTRAR

Cases Listed by Country
Cases Listed by Topic