

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**CIV-2016-404-002343
[2017] NZHC 1606**

BETWEEN ROYAL FOREST AND BIRD
PROTECTION SOCIETY OF NEW
ZEALAND INCORPORATED
Appellant

AND AUCKLAND COUNCIL
Respondent

AND HOUSING NEW ZEALAND
CORPORATION INCORPORATED
FEDERATED FARMERS OF NEW
ZEALAND INCORPORATED
STEVENSON GROUP LIMITED
FULTON HOGAN LIMITED
BROOKBY QUARRIES LIMITED
NEW ZEALAND TRANSPORT
AGENCY
WINSTONE AGGREGATES (A
DIVISION OF FLETCHER CONCRETE
AND INFRASTRUCTURE LTD)
TE ARAI GROUP
TRANSPower NEW ZEALAND
LIMITED
ENVIRONMENTAL DEFENCE
SOCIETY INCORPORATED
MAN O'WAR FARM LIMITED
COUNTIES MANUKAU DISTRICT
HEALTH BOARD
Section 301 parties

Hearing: On the papers

Judgment: 12 July 2017

JUDGMENT OF WYLIE J

This judgment was delivered by Justice Wylie
On 12 July 2017 at 1.30pm
Pursuant to r 11.5 of the High Court Rules
Registrar/Deputy Registrar

Date:.....

Introduction

[1] Counsel have filed a joint memorandum seeking to settle one aspect of an appeal brought by the Royal Forest and Bird Protection Society of New Zealand Incorporated against a decision of the respondent, Auckland Council, on the Proposed Auckland Unitary Plan.

[2] The Society's notice of appeal is dated 14 September 2016. It alleges three interrelated errors of law. The aspect of the appeal it now seeks to settle is the second alleged error of law dealing with the identification of new significant ecological areas in the coastal environment. These areas are referred to in the proposed plan as SEA-M's – significant ecological areas – marine.

[3] In order to approve the settlement, I must be satisfied that:

- (a) the decision challenged was made pursuant to an error of law;¹
- (b) the proposed resolution is consistent with the purposes and principles of both the Resource Management Act 1991 and the Local Government (Auckland Transitional Provisions) Act 2010;
- (c) the consent order is within the scope of the appeal; and
- (d) the proposed consent order can properly be made pursuant to r 20.19 of the High Court Rules 2016.

Background

[4] The appellant is an incorporated society and registered charity. It seeks to preserve and protect indigenous flora and fauna, and the natural features of this country's landscape. To this end it made a submission, and then a further submission, on various provisions contained in the notified version of the Council's Proposed Unitary Plan, which, relevant to this appeal, addressed the criteria to be used to identify new areas to be included in the plan by way of a SEA-M overlay.

¹ *Man O'War Farm Ltd v Auckland Council* [2017] NZHC 202 at [33].

[5] The Auckland Unitary Plan incorporates the regional policy statement, regional plan and regional coastal plan. In the notified version of the Proposed Unitary Plan, the criteria for identifying new SEA-M's were set out in Policy 1, Chapter B4.3.4 of the Regional Policy Statement section. During the hearing of submissions on the Unitary Plan before the Independent Hearings Panel established by the Local Government (Auckland Transitional Provisions) Act, the Council developed a more detailed set of criteria for identifying new SEA-M's in order, it claimed, to better "give effect" to Policy 11 of the New Zealand Coastal Policy Statement 2010. The revised criteria comprised six inclusion factors and four "exclusion indicators". An area was to be considered an area of significant indigenous vegetation and/or a significant habitat of indigenous fauna in the coastal marine area if it met one or more of the inclusion factors; it was to be excluded from consideration if it was plighted by one or more of the exclusion indicators.

[6] The proposed exclusion indicators were as follows:

Exclusion Indicators

- (a) It is a human-modified or artificial structure or habitat (unless they have been created specifically or primarily for the purpose of protecting or enhancing biodiversity).
- (b) It is a site maintained for aquaculture production of either native or non-indigenous marine fauna or flora.
- (c) It is a novel or synthetic ecosystem dominated by non-indigenous marine fauna or flora.
- (d) It is a habitat created by beach nourishment or coastal planting (unless they have been created specifically or primarily for the purpose of protecting or enhancing biodiversity).

[7] The Independent Hearings Panel found that there was no compelling evidence to amend the criteria proposed by the Council and it recommended their adoption. The relevant provisions were relocated into Chapter L, Schedule 4 – Significant Ecological Areas – Marine Schedule.

[8] The Council adopted the Independent Hearings Panel's recommendations in the decisions version of the Proposed Unitary Plan released on 19 August 2016. It is this decision which is the subject of the Society's appeal.

The appeal

[9] The Royal Forest and Bird Protection Society appealed the issue to this Court pursuant to s 158(1) of the Local Government (Auckland Transitional Provisions) Act. It alleged that the respondent Council erred in law in adopting the Independent Hearing Panel's recommendation and including the exclusion indicators in Chapter L, Schedule 4 of the Proposed Unitary Plan.

[10] The Society asserted that the proposed exclusion indicators:

- (a) are an irrelevant consideration when determining whether an area contains significant indigenous vegetation and/or offers a significant habitat of indigenous fauna in the coastal marine area under s 6(c) of the Resource Management Act; and
- (b) do not give effect to Policy 11 of the New Zealand Coastal Policy Statement because they could have the effect of excluding areas of the coastal environment that fall to be protected under Policy 11, including those which provide habitats for threatened taxa.

[11] The Society submitted in its notice of appeal that the decision to include the exclusion indicators in the proposed Unitary Plan was unreasonable, and/or based on a logical fallacy, and/or unsupportable.

[12] The s 301 parties listed in the intitlement to these proceedings gave notice that they wish to be heard on the appeal pursuant to s 158(5) of the Local Government (Auckland Transitional Provisions) Act and s 301 of the Resource Management Act.

Position of other parties

[13] With the benefit of hindsight, the Council acknowledges that the exclusion indicators now contained in Chapter L, Schedule 4 of the decisions version of the Proposed Unitary Plan, as a result of recommendations made by it to the Independent Hearings Panel, could prevent some new areas of significant ecological

value from being protected under the SEA-M overlay, and that that is a legal error. It further acknowledges that retention of the exclusion indicators, and any resulting failure to identify SEA-M's, would:

- (a) not reflect the direction in s 6(c) of the Resource Management Act;
- (b) be inconsistent with the findings of the Court of Appeal in *Man O'War Station Ltd v Auckland Council*,²;
- (c) conflate ecological assessment with management considerations relating to human use or modification;
- (d) have the potential to result in the exclusion of areas that are required to be protected, or otherwise have their adverse effects managed, under Policy 11 of the New Zealand Coastal Policy Statement;
- (e) create an inconsistency between the identification of new SEA-M's and the identification of new significant ecological areas – terrestrial (SEA-T's); and
- (f) conflict with policies B7.2.2(3) and (4) in the Proposed Unitary Plan.

[14] Accordingly, the Council accepted that it is appropriate to delete the exclusion indicators from Chapter L, Schedule 4.

[15] All s 301 parties were asked for their view on the proposed amendments, and all either agreed with the same, or were willing to abide the decision of the Court. The New Zealand Transport Agency, Transpower New Zealand Limited, Stevenson Group Limited, Fulton Hogan Limited, Winston Aggregates and Brookby Quarries Limited agreed to abide the decision of the Court. The Housing Corporation's interest in the Society's appeal was limited to another error of law in the Society's notice of appeal, and it advised that it would abide the Court's decision. Federated Farmers of New Zealand advised that it would agree to the proposed amendment, but

² *Man O'War Station Ltd v Auckland Council* [2017] NZCA 24, [2017] NZRMA 121.

without expressing a view as to whether or not the Independent Hearings Panel's decision was erroneous in law, or on the reasons for the Society's and the Council's view that the Panel's decision was in error.

Error of law

[16] I am satisfied that there was an error of law in the Council's decision to include the exclusion indicators in the Proposed Unitary Plan.

[17] Section 6(c) of the Resource Management Act provides as follows:

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:

...

- (c) The protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna.

[18] A related provision – s 6(b), dealing with the protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development – was considered by the Court of Appeal in *Man O'War Station Ltd v Auckland Council*.³ One of the questions posed for the Court's consideration was whether or not the identification of an outstanding natural landscape for the purposes of s 6(b) should be informed by, or dependent upon, the protection afforded to the landscape under the Act, and/or the relevant planning instrument. The Court held that the issue of whether land has attributes sufficient to make it an outstanding landscape within the ambit of s 6(b) requires an essentially factual assessment based upon the inherent quality of the landscape itself.⁴

[19] The structure of s 6(b) and (c) is the same. I agree with the Society and the Council that the same principle must apply to the identification of an area as a significant ecological area qualifying for protection under s 6(c). The exclusion indicators, dealing as they do with modified areas, have the potential to cut across

³ *Man O'War Station Ltd v Auckland Council*, above n 2.

⁴ At [61].

s 6(c) and the findings made by the Court of Appeal in *Man O'War Station*. An area may still qualify for protection under s 6(c) notwithstanding modification.

[20] Further, the exclusion indicators potentially cut across the New Zealand Coastal Policy Statement. It states policies in order to achieve the purpose of the Resource Management Act in relation to the coastal environment of New Zealand. Relevantly, Policy 11 provides as follows:

Indigenous biological diversity (biodiversity)

To protect indigenous biological diversity in the coastal environment:

- (a) avoid adverse effects of activities on:
 - (i) indigenous taxa that are listed as threatened or at risk in the New Zealand Threat Classification System lists;
 - (ii) taxa that are listed by the International Union for Conservation of Nature and Natural Resources as threatened;
 - (iii) indigenous ecosystems and vegetation types that are threatened in the coastal environment, or are naturally rare;
 - (iv) habitats of indigenous species where the species are at the limit of their natural range, or are naturally rare;
 - (v) areas containing nationally significant examples of indigenous community types; and
 - (vi) areas set aside for full or partial protection of indigenous biological diversity under other legislation; and
- (b) avoid significant adverse effects and avoid, remedy or mitigate other adverse effects of activities on:
 - (i) areas of predominantly indigenous vegetation in the coastal environment;
 - (ii) habitats in the coastal environment that are important during the vulnerable life stages of indigenous species;
 - (iii) indigenous ecosystems and habitats that are only found in the coastal environment and are particularly vulnerable to modification, including estuaries, lagoons, coastal wetlands, dunelands, intertidal zones, rocky reef systems, eelgrass and saltmarsh;
 - (iv) habitats of indigenous species in the coastal environment that are important for recreational, commercial, traditional or cultural purposes;

- (v) habitats, including areas and routes, important to migratory species; and
- (vi) ecological corridors, and areas important for linking or maintaining biological values identified under this policy.

[21] The Resource Management Act records that the purpose of a regional policy statement is to achieve the purpose of the Act, by providing an overview of the resource management issues of the region, and the policies and methods to achieve integrated management of the natural and physical resources of the whole region.⁵ A regional policy statement must give effect to a national policy statement.⁶

[22] The Supreme Court noted in *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd*⁷ that the Resource Management Act envisages the formulation and promulgation of a cascade of planning documents, each intended, ultimately, to give effect to s 5 and Part 2 of the Act more generally.⁸

[23] I am satisfied that the inclusion of the exclusion indicators in the Proposed Unitary Plan is potentially contrary to Policy 11 of the New Zealand Coastal Policy Statement. They have the potential to result in the exclusion of areas in the coastal environment where Policy 11 requires that indigenous biological diversity should be protected by the avoidance of adverse effects.

[24] There are other more pragmatic difficulties with the adoption of the exclusion indicators in the Proposed Unitary Plan:

- (a) The incorporation of the exclusion indicators for new SEA-M's is inconsistent with the way in which SEA-T's are identified in the Plan. The relevant policies for SEA-M's and SEA-T's are both designed to respond to the respondent Council's function under s 30(1)(ga) of the Resource Management Act, namely to establish, implement and review "objectives, policies, and methods for maintaining indigenous

⁵ Resource Management Act 1991, s 59.

⁶ Section 62(3).

⁷ *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593.

⁸ At [30].

biological diversity”. There is no obvious justification for the inconsistency in the decisions version of the Plan.

- (b) The incorporation of the exclusion indicators arguably conflicts with the directions contained in Polices B7.2.2(3) and (4) in the Proposed Unitary Plan.

[25] Having considered the various issues raised, I am satisfied that the respondent Council did err in law when it adopted the Independent Hearings Panel’s recommendation and included the exclusion indicators in Chapter L, Schedule 4.

Resource Management Act/Local Government (Auckland Transitional Provisions) Act

[26] For the reasons identified in [17]-[23], I am satisfied that the proposed settlement detailed in the memorandum filed by the parties is consistent with the purpose and principles of the Resource Management Act. It will better enable effect to be given to s 6(c) of the Act, and it will accord with the statutory directives giving pre-eminence to national policy statements.

[27] There is nothing inconsistent with the proposed resolution of the appeal in the Local Government (Auckland Transitional Provisions) Act.

Scope of appeal

[28] The consent order sought is within the scope of the Society’s appeal. It is proposed that the clause putting the exclusion indicators in place and the indicators themselves be deleted. That is essentially the relief that was sought by the Society.

Rule 20.19

[29] Rule 20.19 of the High Court Rules provides as follows:

Powers of court on appeal

- (1) After hearing an appeal, the court may do any 1 or more of the following:
 - (a) make any decision it thinks should have been made:

- (b) direct the decision-maker—
 - (i) to rehear the proceedings concerned; or
 - (ii) to consider or determine (whether for the first time or again) any matters the court directs; or
 - (iii) to enter judgment for any party to the proceedings the court directs;
- (c) make any order the court thinks just, including any order as to costs.

...

[30] Clearly the Court has jurisdiction to approve the settlement and make the decision it considers should have been made by the Council.

[31] In *Ancona Properties Ltd v Auckland Council*,⁹ Whata J expressed the view that agreed changes can trigger a right of appeal to the Environment Court, unless such a course would be futile. The Judge considered that this is because approval of the agreed outcome is tantamount to the Council rejecting the Independent Hearings Panel's decision. He considered that, on issues of substance where an interested party could be genuinely interested in challenging the outcome, the statutory right of appeal to the Environment Court falls for consideration.

[32] The Court should not lightly approve a settlement if it could potentially deprive a party of a right of appeal. In such cases it should give earnest consideration to remitting the matter back to the Council or sending it to the Environment Court.

[33] Having considered the various materials before me, and taking into account that all s 301 parties who have expressed an interest in the issue either consent to the proposed amendments or abide the decision of the Court, I cannot see that it is necessary to remit the matter back to the Council or send it to the Environment Court. It would be futile to do so. All interested parties have been given an opportunity to contest the relief sought, and none have sought to take advantage of that opportunity.

⁹ *Ancona Properties Ltd v Auckland Council* [2017] NZHC 594 at [4]-[5].

Orders

[34] Accordingly, I order as follows:

- (a) The consent order sought by the parties in this matter is granted.
- (b) The decision of the Council released on 19 August 2016 is amended as per Annexure A to this judgment.
- (c) There is no order as to costs.
- (d) The draft consent order submitted by the parties is approved.

Wylie J

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Annexure “A”

Amendments to Chapter L: Schedule 4

Schedule 4 Significant Ecological Areas – Marine Schedule

Factors for assessing ecological value [rps]

An area shall be considered an area of significant indigenous vegetation and/or a significant habitat of indigenous fauna in the coastal marine area if it meets one or more of the sub-factors (1) to (6) below, with factors (1) to (5) being applied first, and factor (6) last to identify gaps in representation across marine habitats and ecosystems, and to identify best examples of each habitat or ecosystem. These factors are also referred to in B7.2.2(3).

~~Areas are not considered to be of significant ecological value — marine if they meet one of the exclusion indicators identified in (7)(a) to (d).~~

These factors have been used to determine the areas included in Schedule 4 Significant Ecological Areas – Marine Schedule, and will be used to assess proposed future additions to the schedule.

FACTORS:

(1) RECOGNISED INTERNATIONAL OR NATIONAL SIGNIFICANCE

Sub-factor:

- (a) it is an area identified as internationally or nationally significant for either indigenous marine ecosystems or biodiversity, or with reference to the species that utilise these ecosystems.

(2) THREAT STATUS AND RARITY

Sub-factors:

- (a) it is a habitat that is required to provide for the life cycle of a marine plant or animal that is locally rare and has been assessed under the New Zealand Threat Classification System (NZTCS), and determined to have a national ‘At Risk’ conservation status of Naturally Uncommon, Relict, Recovering and Declining; or
- (b) it is a habitat that is required to provide for the life cycle of a plant or animal that occurs naturally in Auckland and has been assessed as having a regional threatened conservation status including Regionally Critical, Endangered and Vulnerable and Serious and Gradual Decline; or
- (c) it is a habitat that is required to provide for the life cycle of a plant or animal that occurs naturally in Auckland and has been assessed by a nationally or internationally recognised assessment process (e.g. NZTCS, IUCN) and

determined to have a threatened conservation status including Critical, Endangered, or Vulnerable; or

- (d) it is a habitat that occurs naturally in Auckland and is required to provide for the life cycle of a marine animal that is listed as a Protected Species in Schedule 7A of the Wildlife Act (1953); or
- (e) it is an indigenous marine habitat or ecosystem that occurs naturally in Auckland and has been assessed by the Council or other national assessment process to be threatened based on evidence and expert advice; or
- (f) it is an indigenous vegetation or habitat of indigenous fauna that occurs within an indigenous coastal ecosystem as identified in NZCPS Policy 11b(iii) as being particularly vulnerable to modification.

(3) UNIQUENESS OR DISTINCTIVENESS

Sub-factors:

- (a) it is a habitat for a marine plant or animal that is endemic or near-endemic to the Auckland region; or
- (b) it is an indigenous ecosystem that is endemic to the Auckland region or supports ecological assemblages, structural forms or unusual combinations of species that are endemic to the Auckland region; or
- (c) it is a habitat that supports occurrences of a plant, animal or fungi that are the largest specimen or largest population of the indigenous species in Auckland or New Zealand.

(4) DIVERSITY

Sub-factors:

- (a) it is an intact habitat sequence extending across an environmental gradient, and including both floral and faunal habitat components; or
- (b) it includes a large number of intertidal and/or subtidal habitats; or
- (c) it is a habitat type that supports a high species richness for its type.

(5) STEPPING STONES, BUFFERS AND MIGRATION PATHWAYS

Sub-factors:

- (a) it is a site which makes an important contribution to the resilience and ecological integrity of surrounding areas; or

- (b) it is part of a network of sites that cumulatively provide important habitat for indigenous fauna or when aggregated make an important contribution to ecological function and integrity; or
- (c) it is an example of an indigenous ecosystem, or habitat of indigenous fauna that is used by key species permanently or intermittently for an essential part of their life cycle, including migratory pathways, roosting or feeding areas; or
- (d) it is an example of an ecosystem, indigenous vegetation or habitat of indigenous fauna, that is immediately adjacent to, and provides protection for, indigenous biodiversity in an existing protected natural area (established for the purposes of biodiversity protection for either terrestrial or marine protection) or an area identified as significant under the 'threat status and rarity' or 'uniqueness' criteria.

(6) REPRESENTATIVENESS

Sub-factors:

- (a) it is an example of an indigenous marine ecosystem (including both intertidal and sub-tidal habitats, and including both faunal and floral components) that makes up part of at least 10% of the natural extent of each of Auckland's original marine ecosystem types and reflecting the environmental gradients of the region; and
- (b) it is an example of an indigenous marine ecosystem, or habitat of indigenous marine fauna (including both intertidal and sub-tidal habitats, and including both faunal and floral components), that is characteristic or typical of the natural marine ecosystem diversity of Auckland; or
- (c) it is a habitat that is important to indigenous species of Auckland, either seasonally or permanently, including for migratory species and species at different stages of their life cycle (and including refuges from predation, or key habitat for feeding, breeding, spawning, roosting, resting, or haul out areas for marine mammals); or
- (d) it is an ecosystem that contains an intact ecological sequence across an environmental gradient (e.g. intact intertidal vegetation sequence including seagrass, mangrove, saltmarsh, and terrestrial coastal vegetation); or
- (e) it is an ecosystem that contains a large number of marine habitat types, with the full range of habitats represented that is typical for that depth and exposure within the Auckland region; or
- (f) it is a habitat or ecosystem of particular importance for indigenous or migratory species.

~~(7) — EXCLUSION INDICATORS~~

- ~~(a) — It is a human modified or artificial structure or habitat (unless they have been created specifically or primarily for the purpose of protecting or enhancing biodiversity).~~
- ~~(b) — It is a site maintained for aquaculture production of either native or non-indigenous marine fauna or flora.~~
- ~~(c) — It is a novel or synthetic ecosystem dominated by non-indigenous marine fauna or flora.~~
- ~~(d) — It is a habitat created by beach nourishment or coastal planting (unless they have been created specifically or primarily for the purpose of protecting or enhancing biodiversity).~~