28 APR 1995

ORIGINAL

Decision No.	**A 34/95**
IN THE MATTER	of the Resource Management Act 1991
AND	
IN THE MATTER	of four references under clause 14 of the First Schedule
BETWEEN	**E J LEITH**
	(RMA 222 & 228/94)
	D E HILL
	(RMA 227/94)
	D FRIESWIJK
	(RMA 246/94)
	Appellants
AND	**THE AUCKLAND CITY COUNCIL**
	Respondent

BEFORE THE PLANNING TRIBUNAL

Planning Judge DFG Sheppard (presiding)
Mr P A Catchpole
Mrs R Grigg

HEARING at AUCKLAND on 28, 29 and 30 March 1995

APPEARANCES

The appellants in person
Mr S O'Shea in person in support of D Frieswijk
Mr D A Kirkpatrick for the respondent

DECISION

INTRODUCTION

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These four appeals, which were heard together, all challenge (in various ways) the whole of the Hauraki Gulf Islands section of the Auckland City proposed district plan. They take the form of references under clause 14 of the First Schedule to the Resource Management Act of provisions of the plan in respect of which the appellants have lodged submissions; and by clause 15(2) of that schedule the references are appeals. The issues raised are all in the context of Great Barrier Island. No reference of that section of the proposed plan that proceeded to hearing concerned any other part of the Hauraki Gulf Islands.

The general thrust of these appeals was that the proposed plan inhibits reasonable development of rural land on Great Barrier Island in private ownership to an extent that is unnecessary and oppressive; that the proposed district plan does not secure the purpose of the Act and is not cost effective; that the respondent had not performed its duties under section 32 of the Act in respect of it; and that those deficiencies should result in the Tribunal directing the respondent to withdraw the plan or to modify it substantially (in ways that were not detailed).

The Hauraki Gulf islands to which the proposed district plan is to apply are some 50 islands in the Hauraki Gulf, of which the main ones are Waiheke and Great Barrier Islands. A high proportion of the land is held and administered by the Department of Conservation, particularly on Great Barrier Island where the Department administers some 68% of the land area. Because of the effect of section 4(3) of the Resource Management Act, the provisions of the Act about restricted coastal activities, and the respective functions of the Auckland Regional Council and the Auckland City Council, there is not one agency managing all the land and water within the islands under an integrated framework. Flora and fauna on the islands are significant, regionally and nationally. Although the islands have low permanent populations, there has been rapid growth of the visitor industry, and there is potential for further development.

THE PROPOSED DISTRICT PLAN

Application

The Auckland City district covers the isthmus of Auckland as well as the Hauraki Gulf islands. Section 73(3) provides that a district plan may be prepared in territorial sections. The Auckland City Council has chosen to prepare its district plan in three territorial sections. The Hauraki Gulf Islands section applies to the islands that were formally within the counties of Great Barrier Island and of Waiheke. The other sections apply to the Auckland isthmus and the central area respectively. The Hauraki Gulf Islands section is

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designed to replace the parts of the deemed (transitional) district plan that were formerly provisions of the Waiheke County District Scheme and the Great Barrier Island County District Scheme. Although the instrument that has been referred to the Tribunal is but one part of the Auckland City proposed district plan, for convenience we refer to that section in this decision as the proposed district plan.

Process

At a meeting on 10 September 1993 the City Council resolved to publicly notify the proposed district plan and adopted a list of reports and research materials as the documentation of its performance of its duties under section 32. The proposed district plan was publicly notified on 29 September 1992 and that was followed by a series of public meetings to explain and discuss the document. Submissions closed on 8 December 1992, by when some 868 submissions had been received. A summary of them was published on 16 April 1993 with the time for further submissions closing on 14 May 1993, by when some 794 further submissions had been received. Hearing of submissions continued from July to October, and the hearing committee's recommendations for decisions on the submissions were adopted by the City Council on 14 April 1994.

The appellant Mr Leith claimed some submissions on the proposed district plan that had been lodged by residents of Waiheke Island showed evidence of plagiarism, and that the most grievous copying had been done in submissions made by one J Clarke. Mr Leith gave his belief that a prime submission could have only one author; he acknowledged that any other person or group may well deliver another submission with identical content derived from an independent process; but he submitted that when more than 30 prime submissions displayed identical wording, it was copying calculated to defeat the democratic process and to gain support for minority issues at the expense of farmers and land holders who have potential to make considerable contribution to sustainable land management. He described that as an abuse of the submission process. Mr Leith also complained that his submission on land unit classification and rules for Department of Conservation land had been misread by the respondent's committee.

Mr Hill asserted that the way in which objections were broken up into six or more elements was done to destroy the contents of the objections as a whole. He also claimed that in its decision the respondent had manipulated the objection, had been selective, and had only addressed what suited their purpose; and in doing so did not comply with the Act. Mr Hill was also critical of people who he said had "opposed most of the objections of Waiheke and Barrier farmers."

For the respondent, Mr Kirkpatrick submitted that the process followed by the respondent in preparing the proposed district plan was in accordance with s.74 and the First Schedule to the Act. He contended that dividing submissions according to topic is authorised by s.39, which directs a local authority to establish a procedure that is appropriate and fair in the circumstances; and is consistent with clause 10 of the First Schedule which indicates that decisions may state reasons for accepting or rejecting submissions, grouped by subject matter or individually.

On the question of multiple submissions from difference submitters in common form, Mr Kirkpatrick pointed out that clause 6 provides that any person may make a submission on a proposed plan; and contended that the respondent had no power to disregard or treat as invalid any submission on the basis of the identity of the submitter, but was obliged to have regard to the substance of the submissions made in respect of the proposed plan.

We accept that it is generally appropriate for a council to arrange the hearing of submissions according to subject-matter. Where an individual submission addresses a number of different provisions in a policy statement or plan, that will involve dividing the submission, and hearing the different parts with other submissions about the same provision. In that way those conducting the hearing can have the benefit of receiving all the evidence about that provision, and different points of view about it, in one sequence. That is efficient and practical, and is calculated to lead to better decisions. However it is important that the procedure adopted be fair as well as efficient. For example, there may be cases where some flexibility is needed to allow a person to present submissions out of order if he or she is unavoidably unable to do so at the time other submissions on the same topic are being heard.

We have considered Mr Hill's complaint about the division of his submission into its elements. It is apparent from reading the submission that as well as the general challenge to the plan, it refers to several particular provisions, such as controls on earthworks, drainage, scrubcutting, and permitted uses for farm production, rules for land unit 8, and validity of the maps. We see no fault in the council having adopted a procedure by which Mr Hill had the opportunity to present each part of his submission at a time when the committee was hearing other submissions on the same provision. That would not have prevented him from referring to his concerns about the individual provisions in support of his more general submission about the plan as a whole. We do not see how he felt that the practice adopted destroyed the contents of his objection as a whole.

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Mr Hill evidently felt that the decisions on the parts of his submissions were selective and did not do justice to the weight of the case he presented. Mr Leith considered that the committee had misread his submission on land-use classification and rules for Department of Conservation land. The reference by each of them of the whole proposed plan to this Tribunal has given them the opportunity of a full rehearing de novo, in which each of them has been allowed full opportunity to present his case as he chose, and to cross-examine the witnesses called for the respondent. The appeal hearing has replaced the council hearing with whatever defects (if any) it possessed.

We do not accept Mr Leith's argument about multiple submissions from different submitters in common form, for the reasons advanced by counsel for the respondent. We do not understand how the multiple submissions were calculated to defeat the statutory process. We accept that they may have represented support for attitudes rejected by some farmers and land-holders who have potential to make considerable contributions to sustainable land management. However the statutory procedure is designed to inform the relevant planning authority of attitudes from all sections of the community, including minority views, and those rejected by farmers and land-owners. That is consistent with the democratic process, and with sound public decision-making.

Nothing that has been brought to our attention by the appellants concerning the process followed by the respondent in dealing with submissions on the proposed district plan would justify our directing the respondent to withdraw the plan, or to make any substantial amendment to it.

Content

The respondent had concluded that some form of regulatory system provided through the district plan was the most appropriate and cost-effective means to manage land in the Hauraki Gulf Islands to preserve and maintain the integrity of the natural environment; but that provided land-use activities sustained the inter-relationships between the different components of the natural environment, there was no necessity to constrain activities in terms of land use type, other than where they are likely to have significant social and economic effects such that the likelihood of sustainable use of the natural environment would be prejudiced.

Landscape analysis led the council's advisers to the conclusion that the most appropriate management techniques would in general be related to natural management units such as drainage catchments and landscape types. Within each catchment, discrete types of

landform and landscape units were identified and analysed for soil, slope, vegetation, erosion and other elements; and from that analysis ten land units were identified for Great Barrier Island and rural parts of Waiheke Island and some other islands. Each of the ten land units identified on Great Barrier Island is found in differing combinations within each of the catchments.

The proposed district plan uses a layered technique to identify levels of resource management control (progressing from more general to more particular), defining strategic management areas, land units, policy areas, and sites of ecological significance and sensitive areas. The boundaries of those various areas generally follow natural features rather than cadastral boundaries, which enables the controls to be more subtle and sophisticated than those applied with the zoning technique. In "policy areas" controlled activity consent procedures are used to secure outcomes according to stated policies. The boundaries of the areas in the different levels are delineated on transparent sheets (foils) which can be overlaid on aerial photographs of each strategic management area catchment. A set of performance standards is provided for each land unit, and in general an activity that meets the standards is a permitted activity; and if not, a discretionary activity. There are exceptions for specified types of activity which are prescribed as discretionary activities and prohibited activities.

Mr Kirkpatrick submitted that a district plan may prescribe and categorise for the consequence of non-compliance with specified standards, and may restrict the exercise of a consent authority's discretion to particular standards specified in the plan. He relied on the Tribunal's decision in *Re an application by the Christchurch City Council* [1995] NZRMA 129 in which the Tribunal had held that it is lawful for a district plan to contain a rule in respect of permitted activities in the form:

> Any activity which complies with the standards specified for the zone,

where the standards specified go to the effects which activities have on the environment rather than to their purpose.

We accept that submission, and address below the various grounds advanced by the appellants for their challenges to the proposed district plan as a whole. There is nothing about the general basis and arrangement of the plan that would cause us to direct that it be withdrawn.

AMENDMENT ACT APPLICABLE

As mentioned, the hearing of submissions on the Hauraki Gulf Islands section of the proposed plan started on 12 July 1993, which was five days after the Resource Management Amendment Act 1993 commenced. Mr Kirkpatrick submitted that the effect of section 230 of the Amendment Act is that the amended version of the Act is applicable to these appeals. There was no submission to the contrary, and we accept that in general that is so.

Mr Kirkpatrick also submitted that the version of section 32 applicable to the appeals is that incorporating the amendments made by section 2 of the Resource Management Amendment Act (No. 2) 1994, although as this section of the proposed plan had been prepared and notified prior to the passage of either of the amendment acts, the original version of section 32 had been applicable to that process at the time. We agree with counsel's view that there is no practical significance of the point for this case, in that the council's duties were prescribed in subsection (1) of section 32, a subsection which has not been amended.

NO PRESUMPTION OR ONUS

Under the former Town and Country Planning Acts, it was established (by the Supreme Court judgment in *Wellington Club v Carson* [1972] NZLR 698, 703; (1972) 4 NZTPA 309, 314) that appeals about proposed planning instruments were to be by rehearing de novo, and that there was no presumption in favour of the planning authority's policies, or the planning details of the instrument challenged, or the authority's decisions on objections. Each aspect was to stand or fall on its own merits when tested by objections and the challenge of alternatives or modification.

Under the Resource Management Act 1991, the authority of the Planning Tribunal on an appeal under clause 14 of the First Schedule is described in clause 15(2) as being to "confirm, or direct the local authority to modify, delete or insert, any provision which is referred to it." We hold that the conferring of those powers implies that in such proceedings the Tribunal has to conduct a rehearing de novo in the same way as it did on appeals under the former Town and Country Planning Acts challenging the contents of proposed planning instruments, and that the dicta of Mr Justice Woodhouse (as he then was) in the *Wellington Club* case are applicable. We consider that the position under the Resource Management Act is correctly stated in the following passage in K A Palmer *Local Government Law in New Zealand* 2nd edition 1993 at page 646:

> "As a matter of principle an appeal to the Planning Tribunal is a true hearing de novo, with a complete rehearing of all evidence afresh. ... Accordingly, in appeals relating to content of a regional or district plan ... no onus rests on the appellant to prove that the decision of the body at first instance is incorrect. The appeal is more in the nature of an inquiry into the merits, in accordance with the statutory objectives and existing provisions of policy statements and planning. There is no presumption that the council decision is correct. Where an appeal relates to a rule, which brings into question a policy statement or other plan provision, there is no presumption that the related policy, plan, or rule is necessarily appropriate or correct."

EXISTING USE RIGHTS

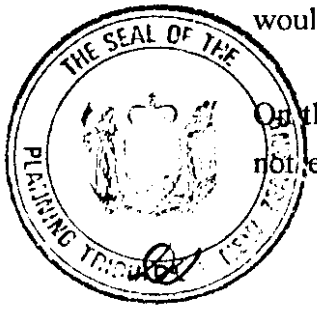
Mr Frieswijk claimed that he had existing use rights of his land for farming and for firewood cutting. He expressed his opposition to a rule limiting the height of manuka and kanuka that may be cut as a permitted activity, claiming that there should be no restriction of cutting of tea tree on farmland. He claimed that the plan disallows his existing use right unless he goes through the resource management process, which he said would prove very expensive.

Mr Leith took exception to a statement in the proposed district plan that land-use consent will be required for a use of land that contravenes the plan unless the activity "strictly" complies with section 10 which protects certain existing uses. He asked how an existing use can be strictly enforced. He also asserted that all farming (except those types unacceptable to the community such as mustelids) is an existing use and protected by section 10. Mr Leith also referred to the fee charged by the council for a certificate of compliance in respect of an existing use, which he deposed was equivalent almost to the price of half a ton of fertiliser.

Mr Hill also claimed that "every farmer has an existing [use] right to farm his land".

For the respondent, Mr Kirkpatrick contended that the appellants had misunderstood the nature and effect of the rights conferred by section 10. He submitted that rights under section 10 exist and have effect no matter what the plan contains, and notwithstanding any rule in the plan; and that the primary issue on whether such rights exist turns on proof of lawful establishment and comparison of the effects of the use. He pointed out that the proposed district plan does not purport to provide otherwise; and he agreed that if it did it would be ineffectual, so the concerns of the appellants are unfounded.

On the appellant's claim to existing use rights, Mr Kirkpatrick submitted that whether or not each of them has existing use rights for farming and firewood harvesting activities



raises questions of fact that fall to be decided on the facts of each case when a decision is required. He contended that it is not correct that those activities are not a use of land within the meaning of section 9 (referring to section 9(4)(e)) and that there is no exception for farming or firewood harvesting. Counsel contended that farming is permitted subject to restrictions to avoid, remedy or mitigate adverse effects on the environment. In cross-examination by Mr Leith, the respondent's planning witness, Mr B L Kaye, agreed that some activities are done at infrequent intervals, and that difficulties arise in interpretation of the Act in those cases.

Section 10 provides for continuation of existing uses of land that contravene the district plan in the conditions specified in that section. The effect is to remove from councils a restraint that they might otherwise feel from making provisions which respond to the purpose of the Act in current and likely conditions, because some uses have already been lawfully established under earlier regimes. So it is not a sound criticism of a proposed plan that existing uses would contravene the plan. Even if the plan restricts or prohibits such a land use, the use may be continued to the extent that the conditions prescribed by section 10 are met.

People such as the appellants who seek to rely on the rights to continue existing land uses afforded by section 10 are not required to obtain resource consent to do so. They may either continue the use without further formality, and rely on the provisions of section 10 if challenged; or if they seek the assurance of some official recognition that the use is protected by that provision, they can apply to the council for a certificate of compliance under section 139 (paying the proper fee). If a certificate is refused, they can appeal to this Tribunal. Otherwise, if there is a dispute, they can apply to this Tribunal for a declaration. However a reference under clause 14 of the First Schedule is not an appropriate way to obtain a decision on a claim to existing use rights.

The proposed district plan is written without reference to existing use rights, but it contains a summary of those rights (paragraph 2.2.12) referring to the relevant section of the Act. As Mr Kirkpatrick pointed out, the contents of the plan cannot deprive anyone of rights they may have under section 10; and they do not purport to provide otherwise. The plan does not and cannot disallow existing use rights in accordance with the law. Indeed the express reference to section 10 is an acknowledgment to the contrary.

We accept that difficulties can sometimes arise in the application of provisions such as section 10 to activities that are done at infrequent intervals. (See K A Palmer *Local Government Law in New Zealand* 2nd edition 580). However, in general seasonal

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activities are readily accommodated by the 12-month discontinuation condition in section 10(2).

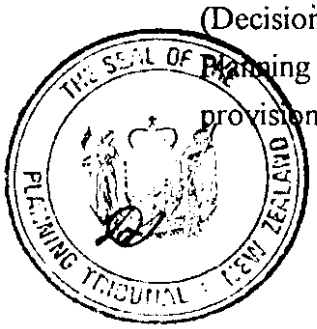
We do not accept that farming, or clearing of tea tree, must be a permitted activity on all land and in all circumstances. Some restrictions may be necessary to achieve the sustainable management of natural and physical resources; and for that purpose, it may be necessary to control, or even prohibit, some farming activities in some areas. We do not accept the appellants' general claims that farming should be free of restriction. Nor do we accept Mr Leith's complaint about the statement in the proposed district plan that resource consent is required for land uses that contravene the plan unless the activity "strictly" complies with section 10. The rights provided by section 10 create an exemption from compliance with the plan. That exemption should only be allowed for uses that meet the conditions prescribed by the section. In all other cases, the intention of the Act is that the plan is to prevail. There is no room for allowing continuation of uses that contravene the plan and do not meet the conditions prescribed by section 10 on the basis that section 10 is not to be applied strictly.

In summary, we hold that there is nothing about rights to continue existing land uses that would justify our directing the respondent to withdraw its proposed district plan or to make substantial modifications to it.

SPECIFICATION OF RELIEF

None of the references states what is sought by the appellant at all specifically. After the words "relief sought" they state respectively: "withdrawal of and/or substantial modification of the proposed plan" (Appeal RMA 222/94); "being redrafted to comply with the Resource Act provision of proper accurate planning maps" (227/94); "withdrawal of and a substantial modification of the proposed plan/redrafting of philosophy related to land units" (228/94); and "withdrawal of plan, and/or, substantial modification to preserve the degree of flexibility and freedom of operation that existed under the present operational scheme, vis rural open space and rural bush [zones]" (246/94).

Counsel for the respondent, Mr Kirkpatrick, submitted that it is not for the Tribunal to unravel what the appellants' seek, nor for the respondent to enter into a guessing game when preparing its case, citing the Tribunal's decision in *Fasher v Taupo County Council* (Decision W59/85). Mr Kirkpatrick reminded us that in respect of the Town and Country Planning Act 1953 the Tribunal had held that where an appeal did not propose specific provisions for a district scheme to replace those alleged to be defective, the Tribunal could



decline jurisdiction, citing *Waitemata County Council v Henderson Borough Council* (1976) 6 NZTPA 13. Counsel submitted that the same principle applies under the Resource Management Act, and referred to clause 14(4)(a) of the First Schedule which requires that in a reference to the Tribunal the relief sought is to be stated. He contended that it is a prime requirement that a reference state the reasons for the reference and the relief sought; and that, as under the former Town and Country Planning Acts, the reasons and relief must be clear and cogent.

We agree. Even though the appellants' submissions and references were evidently prepared without professional assistance, in choosing to invoke the opportunities provided by the Resource Management Act to lodge them, it was to be expected that they would comply with the requirements made under the Act about the form and content of submissions and references.

The following propositions from the decisions cited were formulated by reference to appeals about the contents of district schemes under the former Town and Country Planning Acts. However the Tribunal's function on appeals under clause 14 of the First Schedule to the Resource Management Act is essentially the same as the function it had on those appeals under the former legislation. We consider that the following propositions remain applicable to references under the Resource Management Act. The Tribunal is not itself a planning authority with executive functions of identifying and evaluating specific provisions for a planning instrument (*Waimea Residents Association v Chelsea Investments* (High Court, Wellington, M616/81; 16 December 1981, Davison CJ). It is imperative to spell out specifically in the reference the relief sought, so that the evidence and the Tribunal's attention can be focused on the scope of the inquiry (*Fletcher Forests v Taumarunui County Council* (1983) 11 NZTPA 233). It is not for the Tribunal to unravel what the appellants seek (*Fasher v Taupo County Council*); and appellants need to come prepared to make a positive contribution by specifying what they claim should be in the planning instrument in place of that which is challenged (*McCrary v Great Barrier Island County Council* Decision A50/87).

The present references fail to identify relief that could be granted other than a direction for withdrawal of the proposed district plan. No modification to the plan that would meet the appellants' cases has been specified with any particularity at all. The result is that the respondent had nothing specific to focus its evidence on, and the Tribunal is consequently not able to give adequate consideration to amendments to the proposed district plan that it might direct the respondent to make if any of the appellants' challenges is found to be justified.

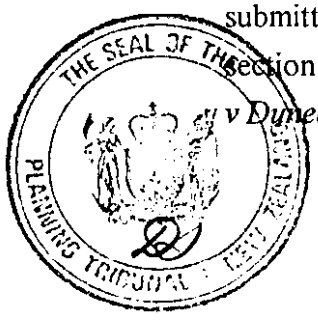
Despite that, in this case we have heard the appellants' cases in full; and having done so we are giving our decision on the matters raised by them at the appeal hearing. However those making references to the Tribunal of provisions of planning instruments in future should be aware of the importance of specifying with particularity the relief that is sought. The Tribunal may well decline jurisdiction to entertain references that do not comply with that requirement of the law, as the former Appeal Board did in *Waitemata County Council v Henderson Borough Council* cited by Mr Kirkpatrick.

SECTION 32 DUTIES

Mr Leith asserted that having regard to all the duties imposed by section 32, a full balanced assessment had not been made, and that the proposed district plan neither meets the requirements of the Resource Management Act nor makes the best use of the options available. He contended that section 32 analysis does not achieve a thing unless it is full and fairly balanced by wide consideration of all the issues, not just the protection of the natural and physical landform or resources, but the sustainable management of them embracing principles of protection and preservation, and that the proposed district plan does not make adequate provisions for fire breaks, but restricts the activities of people; and that the plan is not a local plan for people living in the local environment, but is "city inspired".

In cross-examination it was put to Mr Leith that he had not raised his section 32 challenge in his submission. He answered that there is a challenge there, an indication referring to the council's duty to consider alternatives, or along those lines. When pressed, the witness agreed that he had not made the challenge specifically in the submission or appeal about the whole plan, though he claimed to have done so in his appeal about the airfield (a separate appeal the subject of a separate hearing with related appeals and the subject of another decision). Mr Leith also agreed in cross-examination that there had been an evaluation of costs and benefits and a consideration of alternatives, but he did not accept that it had been adequate or in the right direction.

Mr Kirkpatrick submitted that the council had complied with its duties under section 32; and that the appellants had not raised any section 32 issues in their appeals. He also submitted that the Tribunal is entitled to explore and resolve any consideration under section 32 which may have been omitted by the respondent, citing *Countdown Properties v Dunedin City Council* [1994] NZRMA 145 (HC) at 163.

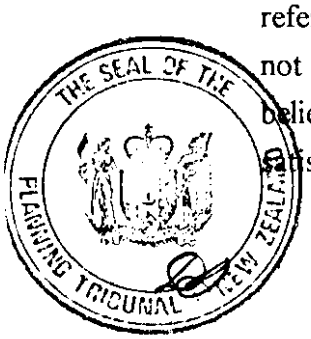


Mr Leith's reference was lodged with the Tribunal in May 1994 - ie after the amendment to section 32 made by section 23 of the Resource Management Amendment Act 1993, and before the further amendments to the section enacted by section 2 of the Resource Management Amendment Act (No 2) 1994. However the effect of all versions of section 32(3) is that a challenge to a proposed district plan on the ground of failure to comply with the duties imposed by section 32(1) may be made only by a submission under the First Schedule.

Evidently Mr Leith misremembered his submission when he answered in cross-examination. Among the numerous allegations contained in his submission which forms the basis of his reference identified as Appeal RMA 222/94 is the bald claim "neither has section 32 of the RMA been complied with." Although no particulars were given, and although the reasons for appeal cited in the reference do not refer to that point, we accept that his challenge to the proposed district plan in these proceedings on that ground is within the limited scope allowed for that challenge by section 32(3).

However it is not sufficient for an appellant to make bald assertions about the adequacy of a local authority's performance of its duties under section 32, and leave it to the respondent to demonstrate the contrary. Although there is no onus of proof in these proceedings, unless a party alleging non-compliance provides some evidence tending to show failure to comply, there is nothing of substance for the respondent to answer. A bald, and unsubstantiated allegation of failure does not require the planning authority to provide detailed evidence of its entire section 32 process. The party asserting failure has an evidential burden.

In this case apparently Mr Leith did not procure copies of the respondent's section 32 documentation because he was unwilling to meet the copying costs. Even so, the respondent brought to the hearing the substantial boxes of reports and other materials documenting its section 32 performance in case they should be needed. However neither in his own evidence, nor in his cross-examination of Mr Kaye, did Mr Leith even start to elicit evidence to support the claims he made about the respondent's performance of its duties. The burden of his assertions was not that the respondent had failed to have regard to the matters stipulated by section 32(1)(a), or had failed to carry out the evaluation of costs and benefits required by section 32(1)(b), or had not been satisfied on the matters referred to in section 32(1)(c). Rather, his point was that the respondent's assessment had not been balanced. In effect he claimed that the council had not given the weight that he believed it should have to the values that he espoused. In our opinion that is not a satisfactory basis for a section 32 challenge. If it can be shown that a planning authority



has not had regard to any of the paragraph (a) matters, or has not genuinely carried out an evaluation under paragraph (b), or has not in fact been satisfied on the matters described in paragraph (c), any of those might form the basis for a section 32 challenge. However the paragraph (b) evaluation is expressly to be one which the planning authority "is satisfied is appropriate to the circumstances"; and the paragraph (c) duty is to be "satisfied" on the matters described. If a submitter disagrees, and wishes to show that a different conclusion should have been reached, the remedy is not to challenge the planning authority's performance of its duties to carry out the evaluation or to be satisfied on those matters. The practical way to advance such a challenge is to seek to show on appeal that the relevant provisions of the proposed instrument should be replaced by others that would more effectively serve the statutory purpose of promoting the sustainable management of natural and physical resources.

In this case, Mr Leith has not discharged the evidential burden, and there was no material of probative value tending to show a failure to perform the section 32 duties that called for any response from the respondent other than the general assertion that it had performed them, and an offering of the documentation adopted for that purpose. The challenge has not been made out; and does not provide an adequate basis for the Tribunal to direct the respondent to withdraw its proposed district plan or to modify it.

PROVISIONS OF OPERATIVE DISTRICT PLAN

Mr Leith claimed that under the operative Great Barrier Island County District Scheme, owners of rural land were free to develop in an environment that facilitated low-energy and limited capital-input rural lifestyle; and that they had purchased land in good faith on that basis.

Mr Kirkpatrick submitted that the provisions of the operative plan are irrelevant to the assessment of appropriate provisions in the proposed plan; that the Resource Management Act generally, and section 32 in particular, requires current assessment to ensure that alternatives are examined; that to base consideration on the operative plan would lock resource management into the past, which is what the Resource Management Act was designed to avoid; and that while the operative plan may be relevant to consideration of alternatives, it could have no greater weight than other alternatives.

In our opinion it is significant that the Resource Management Act is not a consolidation of the former legislation that it replaces, but is deliberately a reform measure. The purpose of the legislation, stated in section 5, is substantially different from the purpose of district

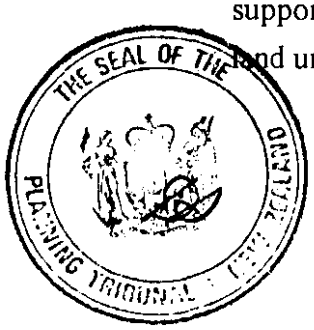
planning stated in section 4 of the Town and Country Planning Act 1977, which would have directed the provisions of the Great Barrier Island County District Scheme. However appropriate the provisions of the district scheme may have been for its purpose, there is no reason to suppose that they are appropriate for the different purpose of a district plan under the Resource Management Act Although it is possible that some of those provisions may, as Mr Kirkpatrick suggested, have some value in the consideration of alternatives, even that is by no means assured. In preparing a district plan under the new regime, the respondent was required to start with a clean sheet, and to focus on the purpose stated in section 5. From Mr Kaye's evidence we find that is what was done.

For this purpose we are willing to accept as a hypothesis, without having any basis for finding, that in the previous regime owners of rural land purchased it in good faith relying on being free to develop their land in a low-energy and limited capital-input lifestyle. Even so, they could have had no assurance that the regime would remain unaltered. Even if the Town and Country Planning Act had not been replaced by the Resource Management Act, the district scheme was subject to periodic review. The reality is that the Town and Country Planning Act has been replaced by the Resource Management Act; and that Act has provided a different purpose for district planning. Whether or not the new purpose meets with Mr Leith's approval, the respondent and this Tribunal have to perform functions under that Act to serve that purpose. Mr Leith's submissions and appeals have been lodged under that Act, and can only be decided by reference to its purpose.

For those reasons we accept Mr Kirkpatrick's submission that the provisions of the operative plan are not relevant to the determination of Mr Leith's appeal. We hold that the difference between the proposed district plan and the previous district scheme said to have been relied on by purchasers of rural land does not provide valid ground for directing the respondent to withdraw the proposed district plan or to modify it.

LAND UNIT TECHNIQUE

Mr Leith contended that the land unit system is based not on the purpose of the Resource Management Act, but on the inherent natural carrying capacity of the land; and that the system is at fault because it is orientated towards the conservation of natural and physical resources rather than sustainable management of natural and physical resources. In support of that general submission he referred to particulars in respect of several of the land units.



On land unit 1 he questioned whether it is clear and unambiguous that rock fishing is permitted.

In respect of land unit 2 he asserted that uses that should have been permitted had been made discretionary, for example, forestry; and that the permitted level of earthworks is unnecessarily harsh for large portions of the land in that unit, arguing that a limit of 5 cubic metres is totally inappropriate for a 15-acre or larger block. Asked in cross-examination to confirm that the definition of earthworks excludes works for horticulture, he replied that the point is that in normal farming a large amount of "dirt" is moved, and control is not required because risks of sedimentation and erosion are managed by farmers to the best of their abilities, although he conceded that a few are not competent land managers.

Of land unit 3, Mr Leith asserted that small lot subdivision is not sustainable and would intensify urban-type development on the fertile flats on the eastern side of the island; that forestry should not be a discretionary activity because farmers must retain the flexibility to switch to whatever rural use is appropriate for their own profit and aspirations; that controls on earthworks and vegetation clearance for farming are oppressive; and in particular that the potential of the land is best met by allowing areas cut over for firewood harvesting to regenerate to ensure future supply, and should not be the subject of control.

Regarding land unit 4, Mr Leith complained that where a wetland has been identified on land in private ownership, it should be the owner's right, not for the local authority, to determine its future potential if drained as part of farm management, as part of the right to use all of the holding as the need and opportunity arises.

Mr Leith maintained that land that should have been included in land unit 5 had been classified into other units where tighter controls apply; that second dwellings, multiple housing and firewood harvesting should have been permitted activities; and that the performance standards for permitted activities should be more liberal.

Land unit 7 is titled "steep infertile coastal slopes" but Mr Leith maintained that north-facing slopes in some coastal valley systems have considerable productive potential and that "it simply takes the skill and enterprise of suitably motivated humans to realise it". He argued that the land unit system only presents a generalised picture totally slanted to the objectives of passive conservation; and that the rules and table 6 standards reflect that "anti-reasonable use stance".

In respect of land unit 8, Mr Leith criticised the reference to encouraging management practices as "simply a generalised non-event and ... an undisclosed discretion"; he asserted that there is no law to require a private owner to set up his or her holding as part of a regional park, but that was the effect that most of the policies and rules for land unit 8 had, leaving the owner with no reasonable use or subjecting him or her to unreasonable costs and bureaucratic obstacles to secure it; he argued that the council's role should be one of educational overview, without unnecessarily adding to the landowners' financial burdens, as the Act "contains plenty of sting in its penalty provisions for irresponsible land use and management." He asserted that sites of ecological significance in this and other land units as "generalised blanket restrictions have become a form of 'double jeopardy' for a land owner."

The witness found a bias towards passive conservation in the issues described for land unit 9, and regretted that there was no encouragement of rehabilitating land to a productive state; he asserted that the plan strategy of revegetation would require expensive fencing; and contended that failure to provide vehicle access as a permitted use, and other costs, are effective barriers to owner-initiated rehabilitation.

In summary, Mr Leith contended that "the plan rules, policies and objectives demonstrate gross interference with existing owners' rights to use land, the right endowed with unencumbered title"; and that while the philosophy on which the plan is built is conservation, the financial instruments used have more to do with swelling the revenues of the Auckland City Council than with achieving sustainable land use and management, the requirements of section 5.

Asked in cross-examination whether there was a risk that some landowners would use land in a way that may not be for the benefit of the land or of the community, Mr Leith acknowledged that there can be poor managers, but asserted that it would be wrong to legislate for the majority so as to control the minority; though he agreed that to control the minority there must be a single law that applies to all people equally.

Mr Hill complained that the land use classification of his land was not accurate as about 35 acres of alluvial flat of his land is zoned wetland, and he claimed that it is not wetland. Of land unit 8, described as "regenerating slopes", Mr Hill said it was in varying stages of reversion and could all be farmed by application of fertiliser, but left to itself it would not revert to native bush. Of land unit 10 in which, he said, no use other than residential is a permitted activity, he deposed that the land had not been alienated from the Crown for that purpose.

In considering the submissions by the appellants, we keep in mind that these are not references of detailed provisions of the proposed district plan about giving effect to the land unit system, but references of the whole plan that challenge its general structure and claim that it should be withdrawn entirely. That is the context of Mr Leith's contention that the land unit system is not based on the sustainable management of natural and physical resources, but on the inherent carrying capacity of the land and oriented towards conservation of resources. Undoubtedly the land unit basis of the proposed district plan is so central to it that if we found that it is not calculated to serve the statutory purpose, we would need to give careful consideration to directing withdrawal of the instrument.

We have already sought to summarise the content of the proposed district plan. The different land units were constructed as sharing various natural qualities of rural land, by which each was distinct from land assigned to other units, and separate provisions were made for the land classified as being in each unit. Inevitably the processes of describing the land in each of the ten units, of classifying individual pieces of land, and of designing provisions governing activities on land in each unit, will be imprecise and will involve judgments of fact and degree. The respondent accepted that there may be room for adjustment of the classification of individual pieces of land, and of the rules applicable to each land unit; and indeed it has settled some appeals on such topics.

Having considered the various particulars raised by Mr Leith and Mr Hill in support of their challenges to the land unit provisions of the proposed district plan, we have concluded that they all refer to details of the classification of individual pieces of land or to the rules applicable to land in particular land units. Whether considered separately or collectively, they do not expose any structural defect in the land use technique itself. Nor do they support Mr Leith's claim that the land unit system is not based on the sustainable management of natural and physical resources but is oriented towards conservation.

Underlying the appellants' claims in this respect is their attitude, reiterated under various headings, that farming, and clearance of tea tree for farming, should not be subject to district plan rules or other restrictions; and that farmers can be trusted to look after their land in their own interests and should be free to do so. However Mr Leith conceded in cross-examination that some farmers are poor land managers, and that to control the minority who are, there must be rules that apply to all people equally. We agree with that.

Returning to the main point, the land unit system, we accept that the system is designed to serve the statutory purpose of sustainable management, and that in general it is calculated

to promote it. Conservation of natural values is one of the elements of that purpose; and provisions of the plan applying in some land units to that end are not necessarily inappropriate for that reason. A balance is required, and we address later the appellants' claim that the plan as a whole displays a conservation bias, or imbalance.

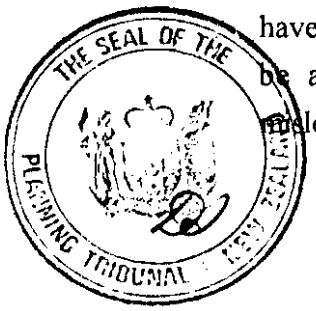
Accepting that the details of the classification of individual pieces of land, and details of the rules applicable to land in various land units, may deserve review, we find nothing about the land unit system as such that is inconsistent with the statutory purpose, or that is so defective as to justify the Tribunal directing the respondent to withdraw the plan or to modify it by deleting the land unit system.

VALIDITY OF MAPS

Both Mr Hill and Mr Leith challenged the validity of the maps forming part of the proposed district plan in support of their claims that the plan should be withdrawn.

In respect of land unit 1, Mr Leith asserted that the overlaid aerial photograph system used does not provide the accuracy necessary to establish whether an area is in fact a coastal cliff. He made a similar claim in respect of land unit 2; and of land unit 4 he asserted that lands that are not wetlands have been included in that unit when they should have been in land unit 2 or land unit 3; and that land should have been included in land unit 5 had been classified in other units. Mr Hill also claimed that the mapping is not accurate, the aerial maps being about 20 metres out; that shadows had been misinterpreted; and that individual lots cannot be identified from the maps. He asserted that the mapping had been done with intent to deceive, and is invalid. Asked in cross-examination whether he could identify his own land on the planning map, he agreed that he could do so because he knows his own land; he was talking of the general public. He thought it would be helpful if the cadastral overlay foil showed lot and deposited plan numbers.

Mr Kirkpatrick referred to regulation 38 of the Resource Management (Forms) Regulations; he conceded that the maps form part of the plan and must be reasonably accurate; and he submitted that the maps are sufficiently accurate for the purpose of identifying areas which are the subject of particular controls. He contended that the Act and regulations do not require that the maps have a cadastral base, or that the boundaries of areas to which controls apply have to be surveyed, or that lot and deposited numbers have to be shown. He accepted that the maps have to allow the effect of any provision to be ascertained; and contended that cadastral maps of Great Barrier Island can be misleading because the alignment of roads does not necessarily follow surveys. Counsel



submitted that the purpose of the proposed district plan could not be achieved by applying controls simply according to cadastral boundaries; and he conceded that if there are any particular errors in the maps, they could be investigated and if warranted, the maps could be corrected.

The requirements for planning maps are prescribed by regulation 38 as follows:

> "(1) Where any plan prepared by a local authority contains a map of an area for the purpose of complementing or depicting the spatial extent of any rule, the map shall be drawn on a base which includes sufficient detail to enable the effect of any provision to be ascertained.
> (2) Every map shall conform with accepted cartographic standards and shall be produced so as to make clear any detail intended to be shown. All notations used shall be explained by a conveniently placed key."

As mentioned above, the planning maps of the proposed district plan have a base of recent aerial photographs and a series of transparent foils which, when overlaid and aligned on the base, show the boundaries of strategic management units, land units, policy areas and sites of ecological significance and sensitive areas. The appellants were able without trouble to ascertain which of those control levels applied to land with which they were familiar and could recognise from the aerial photography base.

Referring to the requirements of the regulation, we find that the map has been drawn a base which includes sufficient detail to enable the effect of any provision of the plan having spatial effect to be ascertained; the overlay foils conform with accepted cartographic standards, and when overlain on the aerial photograph base, they make clear the detail intended to be shown.

We have examined the maps to evaluate Mr Hill's claims that the aerial maps are about 20 metres out; that shadows had been misinterpreted; and that individual lots cannot be identified from the maps. We found nothing to show the first two claims. Cadastral boundaries are delineated on one of the overlay foils, and individual lots can be identified from the maps by relating the lot boundaries to physical features shown on the photographic base. Anyone seeking to ascertain the effect of the plan provisions on a specific piece of land is likely to be able to identify that land from the aerial photograph.

There was no evidence to support Mr Hill's claim that the mapping had been done with intent to deceive, and we reject that allegation as entirely unfounded. We do not accept the other claims about the planning map as establishing that it is invalid, or as justifying that the proposed district plan should be withdrawn.

RURAL PROPERTY MANAGEMENT PLANS

The proposed district plan contains provisions for obtaining resource consent for a rural property management plan. The concept is designed to provide for a single comprehensive consent covering a variety of individual activities planned in the development of a rural property, instead of having to obtain separate consents for each component in the plan. The proposal could be evaluated in terms of the balance of effects on the environment. The concept was introduced in response to submissions by people with concerns about the effect on farming of provisions in the proposed district plan requiring resource consents for various activities.

The appellants Mr Leith and Mr Hill cited the provisions for rural property management plans in support of their challenges of the proposed district plan.

Mr Leith claimed that the council did not have the legal right to pre-empt the owners' rights of land management; and that there is no incentive for the retention of productive use of land. He asserted that the proposed district plan would encourage reversion, intensive subdivision and restriction on agricultural use of land with potential for food production. He challenged the 6-metre height limit for felling manuka on Great Barrier Island, and claimed that there is a strong case for taking mature fully developed trees that are nearing the end of their natural life-cycle. He also asserted that "it is essential that landowners have the opportunity to submit planned developments in a low-key, no cost, no controls manner to ensure that the best available options are adopted" and that the plan had ignored the potential of the pastoral farmers of the area for increased productivity from the restoration of marginal land. Mr Leith also claimed that a property-by-property survey of landholders' aspirations should have been made; and that the council did not have a mandate for rural property management plan provisions, in that sustainable management according to his own aspirations is the right of every landowner.

Mr Hill was also critical of the provision for rural property management plans, in that for a fee the council would offer a bulk consent based on listed discretionary activities. He asserted that the farmer does not need the burden of a consent fee for every activity to maintain the land; and that a resource consent fee is a tax on an activity to produce food for the city.

We do not understand the basis of the appellants' attack on the provision for consent to rural property management plans. To the extent that the appellants commend the notion of landowners having the opportunity of submitting their development plans for approval in a

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relatively informal way, we would have thought that the provision for obtaining consent for rural property management plans would do just that. It is unrealistic to expect that the consideration and decision on such proposals should be "no cost, no control". The cost of consideration and decision should be borne by those seeking the benefit, rather than subsidised by ratepayers who have no direct interest in the matter. And if there was to be no control, the plan would not necessarily be calculated to serve the promotion of sustainable management of natural and physical resources, let alone advancing the objectives and policies of the proposed district plan.

It appears to us that the provision for obtaining consent to rural property management plans demonstrates that the council has responded to submissions from rural landowners with an innovative provision that may prove to be practical, or may be found to leave room for improvement. However the evidence of the appellants has not drawn attention to any improvements that might usefully be made at this stage.

Rather the appellants' purpose has been to challenge the provision altogether, and to rely on it as a ground for directing that the whole plan be withdrawn. We have already given our reasons for not upholding their attitudes that farming activities should not be the subject of any controls. On the claim about a property-by-property survey of landowners' aspirations, we accept Mr Kaye's replies that such a survey was not required by law, and that it would have taken disproportionate resources. The process of considering submissions and amending the proposed plan in response to those that were found to be worthwhile is consistent with the procedure prescribed by the First Schedule. We address in the next section of this decision the reiterated claims that charges made by the council for assessing resource consent applications are unjustified taxes.

In summary, we do not accept that the provisions for obtaining consent for rural property management plans are in general unlawful or unreasonable or otherwise deserving of being deleted; and we do not consider that the proposed district plan should be withdrawn on account of them.

CHARGES AND REVENUE

Mr Leith contended that the proposed district plan imposes unjust resource consent charges: that people without income other than from production on the land will require land-use consents which would become a form of selective, oppressive taxation, as the minimum fee for a resource consent application is $225, which would discourage people struggling to establish an economic base on the island. He gave as an example that the cost

of obtaining resource consent for firewood harvesting would have to be passed on to people who could least afford it, such as pensioners on small fixed incomes, and would be oppressive. He deposed that there is no reticulated electric power on Great Barrier Island; that LPG costs twice what it costs on the Auckland isthmus; and that manuka and kanuka are important sources of fuel for heating (including domestic waterheating) and cooking on the island. Mr Leith asserted that there is little justification for the charges and that the reasons put forward in support of the policy were fraudulent. He also claimed that it would be inflationary because it would raise costs without commensurate increases in production; and that sensitivity of parts of the land in land unit 2 had been used as an excuse to extract more money by resource consent, for example, for forestry. He asserted that the assessment criteria for discretionary activities give the council power to do lots of costly research "and charge out a nice fat resource consent fee"; and alleged that "financial instruments are or may be used to frustrate the reasonable use expectation of the landholder"; that the council is using the discretionary provisions of the plan as a cashflow generating mechanism; and that it is seeking revenue from the issue of certificates of compliance for existing uses. Asked in cross-examination whether the charges are not a fee for processing an application, Mr Leith replied that a non-notified application has an element of rubber-stamping about it if the appropriate money is paid.

The respondent denied that the plan had been drafted as a mechanism to generate revenue for the City Council from charges made for processing resource consent applications. Mr Kirkpatrick submitted that discretions are provided for by the Act, and are a necessary part of the administration of the district plan; that the charges made by the consent authority depend mainly on whether an application is notified or not; and that the proposed district plan makes use of the procedure provided by section 94(1A) enabling certain discretionary activities to be dealt with on a non-notified basis. He contended that costs are involved in the consent process; and submitted that section 36(1)(b) authorises fixing of charges, but does not confer unfettered powers.

Charges made by local authorities for receiving, processing and deciding resource consent applications are authorised by section 36 of the Resource Management Act. Subsection (4)(a) of that section, and section 690A(4) of the Local Government Act which is applicable by section 36(2)(a), both stipulate that such a charge is to recover no more than the reasonable costs incurred by the council; and section 36(4)(b) also stipulates that a person should only be required to pay a charge to the extent that the benefit of the local authority's actions is obtained by that person as distinct from the local authority community as a whole; and where the need for the local authority's actions is occasioned by the actions of that person. It is clear from those enactments that the provisions of the

proposed district plan for activities to require resource consent would not enhance the respondent's revenue. Rather they could only achieve recovery of costs incurred in processing the applications.

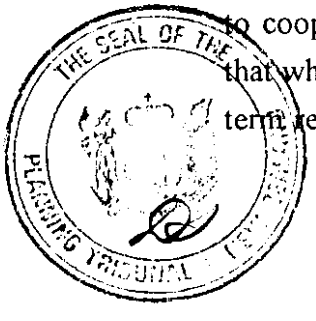
Section 36(5) also authorises a local authority, in its discretion, to remit the whole or any part of a charge. No doubt the council would seek advice from a local community board before making a decision on a proposal to remit a charge. It is appropriate for us to suppose that where collection of the charge for a resource consent application would be oppressive on applicants without income, the council would remit the charge, in whole or in part. In other cases, we do not see why applicants for resource consent who stand to obtain a benefit from the outcome distinct from that of the community as a whole should not be expected to pay a charge reflecting the reasonable costs incurred by the council in processing and deciding the application.

To the extent that Mr Leith's submission challenges rules which classify activities as controlled activities, discretionary activities, or non-complying activities, which require resource consent, rather than as permitted activities, that cannot be addressed satisfactorily in general. Section 76(3) authorises the making of district rules to that effect. The appropriateness of the contents of any such classification to implement the policies of a plan and attain its objectives and serve the statutory purpose can only be considered by reference to a particular rule. The inclusion in the proposed district plan of rules that classify activities so as to require resource consent when the appellant considers that they should be classified as permitted activities does not justify our directing withdrawal of the proposed plan.

In our judgment, none of the matters raised by Mr Leith under this heading would justify that outcome.

COMPENSATION

Mr Leith contended that the proposed district plan should provide financial incentives and compensation to landowners whose development opportunities are restricted by the rules. He pointed out that there is no incentive for the retention of productive use of land; claimed that a landowner offered labour and resources directed at land improvements that would ultimately be to his or her and the community's benefit would be much more likely to cooperate in the attainment of goals associated with more sensitive areas; and urged that where the public interest requires passive conservation of land in private title, a short-term rental paid to the owner may well be the most cost-effective way of implementing



some of the objectives of the plan. He also argued that where wetland in private ownership is so significant that it should be retained, then the financial burden and costs arising from its loss to the financial aspirations of the landowner should be shared by the wider community; and maintained that encouragement ought to be paid for retiring land on steep pastured slopes from productive use, or for rehabilitating land, suggesting bonus subdivision, rate relief, assistance with fencing or planting costs, free planning and land management advice and outright financial assistance. He considered that the extent of normal farm development may well lead to conflict between what is perceived as community interest and the interest of an individual landowner, and submitted that any such conflict must be resolved by negotiation and that a regulatory approach is not appropriate and is ultra vires, relying on section 10.

Counsel for the respondent informed us that the respondent is giving some consideration to financial incentives such as rate relief, but has not yet adopted a policy on the topic. Mr Leith described those as very minor concessions and incentives, not adequate.

We think it is significant that, unlike the former Town and Country Planning Acts which expressly provided for compensation for district scheme restrictions in certain circumstances (see section 44 of the 1953 Act and section 126 of the 1977 Act), the Resource Management Act expressly provides (by section 85) that an interest in land is not taken or injuriously affected by reason of any provision in a plan. Instead of providing for compensation, the section provides that where a plan provision renders land incapable of reasonable use, and places an unfair and unreasonable burden on any person having an interest in the land, the Tribunal can delete or direct deletion of the provision.

Local authorities, in their executive capacities, can provide incentives by rates relief to occupiers of land under development or protected for natural conservation purposes (see Parts XIIA and XIIB of the Rating Powers Act 1988). We are not aware of any similar power that they may have to grant rates relief or to make available other incentives, such as provision of labour and other resources, fencing or planting costs, free advice, or financial assistance to occupiers of land retained in productive use.

Decisions to grant or withhold rates relief of other incentives necessarily involve allocation of public funds and are made by local authorities in their capacities as executive bodies. As such, local authorities are responsible to their electorate from whom substantial proportions of those public funds are collected by rates and charges. They are not decisions of those local authorities as planning authorities under the Resource Management Act.

The Planning Tribunal is a judicial body. It does not have any relevant executive functions, and is not responsible to an electorate. We understand that the Tribunal has no authority to interfere with local authorities in such matters, either directly by ordering the offering of incentives, or indirectly by directing amendments to district plans on the basis of the existence or absence of any policy to grant incentives.

Therefore we decline jurisdiction to consider Mr Leith's assertions that the proposed district plan should provide financial incentives in compensation to landowners whose development opportunities are restricted by the rules of the proposed district plan. That does not mean that the respondent should not be considering what (if anything) it should do in that respect, but it is an acknowledgment that it is a question for the local community and its electorate council, and outside the Tribunal's purview.

OTHER RELEVANT PLANNING INSTRUMENTS

It was Mr Leith's case that the proposed district plan is not compatible with other relevant planning instruments. He claimed that there is difficulty with the compatibility of the objective for land-unit 1 of allowing land-use activities only where they preserve and protect the natural features of the coastal environment with the New Zealand Coastal Policy Statement. He gave an example of rock fishing.

Mr Leith deposed that he had difficulty in reconciling the proposed district plan with the rural land provisions of the published draft Auckland regional policy statement; and that there are conflicts in policy and in application of policy through the rules. He gave several examples in support of his case in that respect.

First Mr Leith referred to the urban containment provisions of the regional policy statement as being in conflict with subdivision proposals for Great Barrier Island; and to difficulties with sewerage at Tryphena (a township on Great Barrier Island) because of existing intensity of residential subdivision, although he acknowledged that the proposed district plan gives special consideration to policy areas (of which Tryphena is one).

A second example of inconsistency with the proposed regional policy statement that was raised by Mr Leith was that the latter states that rural areas are to be used for productive activities such as forestry, pastoral farming, horticulture, market gardening and mineral extraction. Mr Leith claimed that the provisions applying in land unit 3 for intensification of land use allow wastage of valuable rural resources that is too liberal for sound

economics in productive land-use, and has potential to place demands on other resources, such as water, that cannot be sustained, and lends itself to undesirable country lifestyle blocks.

The third example cited by Mr Leith referred to a passage in the proposed regional policy statement that countryside living is only to be provided in defined locations. The witness expressed the belief that the proposed district plan does not have the emphasis in the right places, being based on a false premise of passive conservation as opposed to sustainable productive land-use.

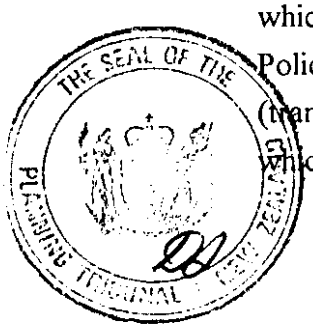
His fourth example of inconsistency was that the proposed district plan does not adequately address the regional policy statement objective of seeking to maintain and improve water quality. He claimed that the district plan should reinforce the principle of people on Great Barrier Island providing their own infrastructure, such as provision of watertanks, sewage and rubbish disposal, and electric power supply, and that the plan should actively encourage alternative energy sources such as LPG for cooking, solar, and wind sources; and should ensure that new woodburning stoves and replacement stoves are of the most efficient types available and that finance is available at reasonable rates of interest to ensure that only environmentally friendly equipment is installed.

Mr Leith's fifth point under this heading was that land use intensification allowed in land unit 3 by the proposed district plan would mean that people are going to be disappointed when it is found that there is insufficient water. He considered that to be inconsistent with the water conservation provisions of the proposed regional policy statement. He also claimed that the proposed district plan does not make enough provision for discrete development.

Mr Leith asserted that small lot subdivision in land unit 3 would defeat the rural provisions of the regional policy statement.

Mr Hill also claimed that the plan is not consistent with the regional policy statement, because it does not acknowledge production land.

For the respondent, Mr Kirkpatrick submitted that the relevant planning instruments with which the proposed district plan is not to be inconsistent are the New Zealand Coastal Policy Statement, the proposed Auckland Regional Policy Statement, and the deemed (transitional) Auckland regional plan in regard to any matter of regional significance or for which the regional council has primary responsibility under Part IV. All those instruments



postdate the publication of the proposed district plan (Hauraki Gulf Islands section). Counsel contended that there is no evident inconsistency between any of those instruments and the proposed plan, and observed that neither the Minister of Conservation nor the Auckland Regional Council has appealed against the proposed district plan.

On Mr Leith's point about integration of the proposed district plan with other planning documents, Mr Kirkpatrick observed that in preparing its proposed district plan the respondent had been required by section 74(2) to have regard to them, and contended that Mr Leith's argument raises a distinction without a difference, particularly in the light of the holistic approach which the Act promotes. Mr Kaye deposed that those responsible for preparing the proposed district plan had recognised that the Department of Conservation and the Auckland Regional Council had significant planning responsibilities and that there was potential for three separate management processes without integration; that what the Department of Conservation does with its land affects how private land around it has to be managed; and that the proposed district plan will relate to private land on the Hauraki Gulf islands. He also deposed that the Department of Conservation, the Auckland Regional Council and the Auckland City Council are involved in seeking a cooperative approach.

Section 74(2) directs that in preparing a district plan, the territorial authority is to have regard to any proposed regional policy statement or regional plan on a matter of regional significance in respect of its district. Mr Kaye's evidence shows that those responsible for preparing the proposed district plan had regard to the transitional regional plan, and consulted with the regional council, but the proposed regional policy statement had not been published at the time. We find that the respondent performed its duties under section 74(2) to the extent possible at the time. We note the absence of any reference of the proposed district plan to this Tribunal by the regional council.

We also agree with Mr Kirkpatrick's submission that to the extent that the respondent has sought to integrate the proposed district plan with other applicable planning instruments, that does not infringe the duty under section 74(2) to have regard to other instruments. Those preparing the district plan could not have sought to integrate it with the other instruments without having regard to them.

Section 75(2) directs that a district plan is not to be inconsistent with a New Zealand coastal policy statement, a regional policy statement or a regional plan in regard to any matter of regional significance or for which the regional council has primary responsibility. The terms "regional policy statement" and "regional plan" are defined by section 2(1) to mean operative instruments. There is a New Zealand coastal policy statement, and a

transitional regional plan, but there is no operative regional policy statement for the Auckland region. Accordingly the effect of section 76(2) as applied to the circumstances of the case is that the proposed district plan is not to be inconsistent with the New Zealand coastal policy statement or with the Auckland Regional Council's transitional regional plan. We hold that there is no requirement that the proposed district plan not be inconsistent with the proposed regional policy statement, on which the regional council has not yet given decisions on submissions.

We have some difficulty in understanding Mr Leith's claim that the proposed district plan is inconsistent with the New Zealand coastal policy statement. The particular provisions of the proposed district plan cited by him were the objective for land unit 1 of allowing land-use activities only where they preserve and protect the natural features of the coastal environment. He referred to a general principle stated in the New Zealand coastal policy statement that the protection of the values of the coastal environment need not preclude appropriate use in appropriate places. We do not see any inconsistency between those provisions. Nor do we see any inconsistency with the New Zealand coastal policy statement that the proposed district plan does not prevent rock fishing.

Mr Leith did not bring to our attention any respect in which the proposed district plan might be inconsistent with the transitional regional plan. It is not for the Tribunal to scrutinise those instruments and search for possible inconsistencies.

Our conclusion is that Mr Leith has not made out any failure of the respondent to perform its duties concerning the relationship between the proposed district plan and other relevant planning instruments. We hold that there is no reason to direct withdrawal of the proposed district plan in that respect.

CONSERVATION BIAS

Mr Hill asserted that the plan had been drafted on the wrong premise, the emphasis being on conservation, making every other provision subservient with that bias. He described it as an attempt at bulk confiscation of an individual owner's rights. Mr Hill contended that the Act is about sustainable management and balance, and that balance cannot be negative.

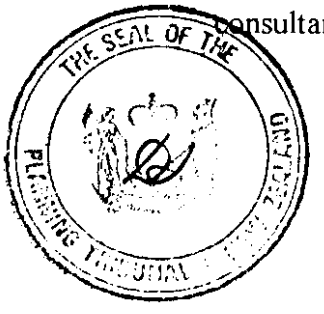
Mr Leith referred to a statement in a draft copy of the plan that the requirements of the Department of Conservation management strategy were seen as a means by which the purposes of the district plan could be implemented, as showing that the proposed district plan is anti-rural use and pro-passive conservation. He also claimed that vegetation

clearance and earthworks controls were derived from Waiheke-based perceptions; and he claimed that urban bureaucrats and Auckland City Council committees are not the appropriate people to make evaluations on those matters, he doubted that committee decisions would attain better results than farmers would, and suggested that the effect may well be loss of the competitive innovative edge for which New Zealand farmers are noted. Mr Leith claimed that examination of the resource analysis reference material would demonstrate justification for the claim of conservation bias; and that the scales are not balanced but tipped in favour of conservation at the expense of reasonable land-use; a bias that is so strong that it overwhelms other considerations, and is taken beyond reasonable limits. He pointed out that the Act required the respondent to have regard to the conservation management strategy for the area, but that there is not a requirement to integrate with it; and he argued that the integrity of the proposed district plan has been compromised by trying to integrate with the conservation management strategy, rather than having regard to it.

For the respondent, Mr Kirkpatrick submitted that a local authority's functions under section 31(a) and (b) include measures for protection of land, so a district plan may properly contain provisions for the protection of land as much as for its use and development; that the proposed district plan strikes an appropriate balance, permitting almost any activity subject to appropriate standards and containing provisions to protect the environment; and that a laissez faire approach would be contrary to the purpose of the Act.

In cross-examination, Mr Kaye did not accept that the proposed district plan has a conservation bias, or that conservation is the strategy of the proposed district plan which, he deposed, provides a framework for sustainable management and for pursuing opportunities that are there. The witness gave the opinion that conservation and development are compatible and can be mutually supportive. He deposed that the proposed district plan provides opportunities in return for environmental protection actions such as protection of key ecological features; and that the thrust of the plan is to achieve balance.

The evidence established that the respondent had liaised with the Department of Conservation as a major landowner on Great Barrier Island, and had taken their views into account and had used a Department of Conservation staff member as a specialist consultant. In our opinion neither of those facts provides a basis for criticism.



Within the broad language of the definition of sustainable management (see section 5(2)) there may be room for differences of opinion about the degree to which a district plan should seek to pursue goals that may be described as conservation. There are differing interpretations about the intention of that definition but whichever interpretation is adopted, it is clear that substantial attention has to be given to the contents of paragraphs (a), (b) and (c) of that definition, which might be considered by some as conservation values.

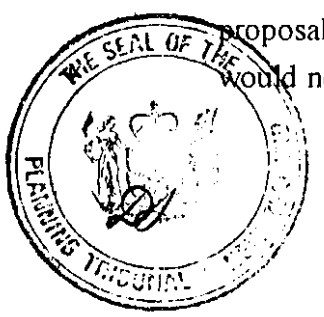
We respect the appellants' opinions about what they see as an imbalance in the proposed district plan; but having considered the various aspects to which they drew our attention in the hearing of these appeals, we have concluded that their perspective of the instrument is that of a section of the community interested in farming development without restraint. From our own perspective as outsiders to the Great Barrier island community, we have not been persuaded that there is a conservation bias in the plan. We have not found provisions which demonstrate that the restraints on land development for farming would be oppressive. We note that the provisions have been revised (for example by the provision for consenting to rural property management plans) to respond to submissions about the practicality of farm development within the regime of the new plan. In our opinion, the claims made by the appellants in this regard were overstated, and do not provide a basis for directing that the proposed district plan be withdrawn.

SITES OF ECOLOGICAL SIGNIFICANCE

Finally, the appellants challenged provisions of the proposed district plan about sites of ecological significance and sensitive areas, claiming that the rules concerning them are uncertain and restrictive, and have the effect of turning private land into defacto reserves, without payment of compensation.

For the respondent, Mr Kirkpatrick submitted that nothing had been presented to show that the technique of defining sites of ecological significance is unauthorised or unjustified.

Mr Kaye explained that the rules in the proposed district plan provide that certain activities are not permitted activities in a site of ecological significance, but provide for discretionary consent criteria, so that the rules do not preclude use opportunities done in an appropriate manner. By a discretionary application a landowner could put forward a proposal which may affect a site of ecological significance, and provided the activity would not have a detrimental effect on the integrity of the area, consent may be granted.



He pointed out that there are particular criteria stated in the plan; and he agreed that substantial modification would be unlikely to be allowed.

Having studied the relevant provisions of the proposed district plan for sites of ecological significance and sensitive areas, we find that they are not equivalent to designations. Rather, they involve identification of particular areas having qualities that are considered to deserve more specific control than would otherwise be necessary. Those controls are designed to address the qualities for which the site of ecological significance or sensitive area was identified, and the effect on them of the proposed activity. Although the controls involve applications for resource consent, it is to be remembered that classification of activities that require various grades of resource consent is expressly contemplated by the Resource Management Act for district plans: see section 76(3).

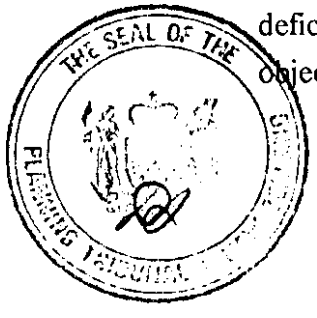
We consider that the provisions challenged are within the contemplation of the Act and are capable of serving the statutory purpose. Obviously the identification of individual sites of ecological significance or sensitive areas, if properly challenged, would need to be justified. However it is an overstatement to claim that the provisions have the effect of turning private land into de facto reserves.

We conclude that the provisions of the proposed district plan about sites of ecological significance and sensitive areas are not faulty in general concept, so as to justify directing the respondent to withdraw the proposed district plan.

CONCLUSIONS

It is important for us to remember that these are not appeals seeking discrete amendments to the proposed district plan. Rather, the thrust of the relief sought by these appellants is that the proposed district plan be withdrawn, or substantially modified.

On an appeal about content of a proposed planning instrument it is not out of the way for the Tribunal to direct specific amendments to the instrument. Clause 15(2) of the First Schedule empowers the Tribunal to confirm, or direct the local authority to modify, delete, or insert any provision which is referred to it. The Act does not expressly empower the Tribunal to cancel a whole instrument. Such an order was made under previous legislation in respect of a proposed variation of the district scheme for Great Barrier island where the deficiencies were so fundamental that they could not be remedied by decisions on objections and appeals, and it was necessary to start afresh (see *Environmental Defence*



Society v Great Barrier Island County Council (1977) 6 NZTPA 301). However that is a draconian remedy, and would only be considered in an extreme case.

We have considered various aspects of the proposed district plan that were challenged by the appellants, and we have concluded that none of them, taken individually, would justify that remedy. We have also considered the plan as a whole, in case it might appear that a combination of minor matters, none of which might justify relief on its own, could collectively justify granting some relief. However on the evidence we heard, and from the contents of the proposed district plan that have been brought to our attention, we have not found any such matters.

Therefore the Tribunal's determination in respect of each of these appeals is that the appeal is disallowed.

DATED at AUCKLAND this 24th day of April 1995

DFG Sheppard
Planning Judge

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THE SEAL OF THE PLANNING TRIBUNAL NEW ZEALAND