IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2016-409-001157
[2017] NZHC 669

BETWEEN	ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED Appellant
AND	CHRISTCHURCH CITY COUNCIL Respondent
AND	INDEPENDENT HEARINGS PANEL First Third Party
AND	CANTERBURY REGIONAL COUNCIL Second Third Party
AND	FEDERATED FARMERS OF NEW ZEALAND Third Third Party
AND	LYTTELTON PORT COMPANY Fifth Third Party

Hearing: 7 April 2017 (On the papers)

Appearances: P Anderson S Gepp for Appellant
M G Conway and C G Coyle for Respondent
No appearance for First Third Party (abides decision of the Court)
M A Mehlopt for Second Third Party
R Gardner for Third Third Party
J M Appleyard for Fifth Third Party

Judgment: 7 April 2017

JUDGMENT OF DUNNINGHAM J

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[1] The appellant has appealed against Decision 50, Chapter 9: Natural and Cultural Heritage (Part) Sub-Chapter 9.1 – Biodiversity and Ecosystems (the Decision) made by an Independent Hearings Panel (the Panel), on the Christchurch

Replacement District Plan (the Plan). Other parties to the appeal are the Canterbury Regional Council, North Canterbury Province of Federated Farmers of New Zealand (Inc.), Lyttelton Port Company Limited, and the Panel itself.[1]

[2] The parties (aside from the Panel)[2] have negotiated a proposed partial settlement of the appeal. They seek the Court's approval of the proposed amendments to the Plan as negotiated, under the Court's power to substitute its decision for that of the Panel. However, they recognise that there can be no expectation that, in every case, consent orders are suitable for approval through appeals to the Court. As Whata J said in *Meridian Energy Ltd v Canterbury Regional Council*, "this is a public law process and there must be due consideration given to the wider public interest in the promulgation of planning instruments".[3]

[3] In support of the request that orders are made in accordance with the partial settlement negotiated, a detailed memorandum has been filed by the parties setting out:

(a) the issues on appeal;

(b) the proposed amendments to the provisions of Sub-Chapter 9.1 of the Plan;

(c) the reasons why they consider the proposed amendments address the errors of law asserted; and

(d) an explanation of why the parties consider the proposed amendments give effect to the New Zealand Coastal Policy statement (NZCPS), the Canterbury Regional Policy Statement (CRPS), and the purposes and principles of the RMA to the extent they are relevant to this chapter of the Plan.

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1 Te Rūnanga O Ngāi Tahu joined the appeal but subsequently withdrew its interest.

2 The Panel, quite properly, took a passive role, abiding the decision of the Court: *Portage Licensing Trust v Auckland District Licensing Agency* (1997) 10 PRNZ 554 (HC).

3 *Meridian Energy Ltd v Canterbury Regional Council* HC, Christchurch CIV-2010-409-002604, 23 May 2011 at [11].

[4] The Panel has indicated that it will abide the decision of this Court.

[5] The issue for me to consider is whether, having regard to the explanation for the amendments proposed by the parties to resolve the identified issues on appeal, those amendments are appropriate. In doing this, I must have regard to:

(a) the statutory context in which the Decision is required to be made; and

(b) the public interest in the formulation of such planning documents.

Background to the Decision

[6] The procedure for preparing the Plan had its genesis in the Canterbury Earthquake Recovery Act 2011. Section 71 of that Act authorised the making of Orders in Council which were necessary or expedient for the purposes of that Act. Those purposes included enabling a "focused, timely and expedited recovery" and to enable "community participation in the planning of the recovery".[4]

[7] The Canterbury Earthquake (Christchurch Replacement District Plan) Order 2014 (the Order) was made under s 71 and required the Christchurch City Council (the Council) to:

(a) undertake a full review of the operative provisions of the existing district plans; and

(b) develop a replacement district plan and to prepare proposals for that within a specified time from the commencement of the order.

[8] The Order went on to require the Minister to appoint the Panel. The principal functions of the Panel are to:

(a) hold hearings on submissions on proposals; and

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[4] Canterbury Earthquake Recovery Act 2011, s 3(b), (d).

(b) make decisions in relation to those proposals.[5]

[9] Proposals were notified by the Council and divided up into sub-chapters, or topics, for the purposes of conducting the Plan hearings over three stages.

Sub-Chapter 9.1

[10] Sub-Chapter 9.1: Indigenous Biodiversity and Ecosystems was notified on 25 July 2015, as part of stage three of the hearings process. It is intended to implement Chapter 9 of the CRPS, which sets out the way in which the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna is to be carried out in Canterbury.[6]

[11] Sub-Chapter 9.1 establishes the framework for the identification, assessment, management and protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna within the Council's district, along with the maintenance of indigenous bio-diversity and ecosystems generally. The effects of activities and development on areas or habitats listed as sites of ecological significance (SES), in Schedule A of appendix 9.1.6.1, and on other areas containing potentially significant vegetation and habitat listed in Appendix 9.1.6.6 are controlled through provisions managing the clearance of indigenous vegetation.

[12] The parties explain that the schedule of SES listed in the notified replacement district plan did not identify all areas that are known to have high ecological values, as time and resource constraints limited the number of surveys that could be commissioned before the proposals had to be notified in accordance with the Order. However, the Council has identified areas for priority survey and assessment in the coming years, with a view to adding further SES to the schedule through a plan change.

[13] The Council also recognised that many of the SES on Banks Peninsula are on private land and there had been an extensive programme of land owner engagement in that area, in order to share information and discuss land owner concerns which

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5 See clauses 6, 8, 10, 12 and 14 of the order.
6 As required under s 6(c) Resource Management Act 1991.

may arise through having an SES identified on their property. The parties noted that the truncated process for preparing the Plan did not allow for full consultation with potentially affected land owners, but that the Council was continuing to engage with them and had committed to doing so.

[14] The parties explain that the hearing for Sub-Chapter 9.1 commenced on 18 January 2016, but was adjourned for further mediation in late January and in February 2016. A number of parties attended the mediation, including entities representing conservation and farming interests, and individual submitters. During the mediation the parties reached agreement regarding the prioritisation assessment criteria and the identification of further sites in the future. The parties decided to use farm bio-diversity management plans and to see how these would work in practice. Agreements were reached as to how these management plans would link to the SES Statements. The majority of the objectives, policies and rules were agreed upon for areas of land, both inside and outside identified SES, leaving comparatively few remaining areas of disagreement. Furthermore, those areas of disagreement did not materially relate to the provisions addressed in this appeal.

[15] A revised version of Sub-Chapter 9.1 was submitted to the Panel along with the Council's submissions. Areas of disagreement between the parties were identified. Closing submissions on the issues covered in Sub-Chapter 9.1 were filed in April 2016.

[16] The Panel then issued a minute on 9 August 2016 which expressed concerns about aspects of the revised version of Sub-Chapter 9.1. The Panel provided two options to the parties to address the identified deficiencies:

(a) it could reject the revised version of Sub-Chapter 9.1 and leave the existing Plan in place until the future Plan change could occur; or

(b) it could direct the Secretariat to prepare and invite further closing submissions on a revised version of the proposal for Sub-Chapter 9.1.

[17] After considering further submissions from the parties, the Panel directed the Secretariat to redraft Sub-Chapter 9.1 (the Secretariat draft). Further submissions were filed in relation to the Secretariat draft and the Panel issued its Decision on 21 October 2016.

The appeal

[18] Forest and Bird filed a notice of appeal in relation to the Decision on 25 November 2016. It alleged seven errors of law. In summary, these related to:

(a) whether the changes the Panel made to Sub-Chapter 9.1 were materially different in scope, such that they were obliged, under cl 13.4 of the Order, to direct the Council to notify a new proposal (first alleged error of law);

(b) whether or not the decision to accept the redrafted Sub-Chapter 9.1 breached natural justice (second alleged error of law);

(c) whether certain provisions added by the Panel, requiring the Council to serve notice on owners or occupiers of potential SES, before rules relating to the protection of these sites came into force (indigenous vegetation notice provisions) were void for uncertainty (third alleged error of law);

(d) whether or not the inclusion of the indigenous vegetation notice provisions breached natural justice (fourth alleged error of law);

(e) whether the indigenous vegetation notice provisions failed to give effect to the NZCPS and CRPS (fifth alleged error of law);

(f) whether the Panel failed to give effect to the CRPS, including policy 9.3.1, when it distinguished between significant sites on the schedule of SES listed in appendix 9.1.6.1 and significant sites within the potentially significant vegetation types in Appendix 9.1.6.6 (sixth alleged error of law); and

(g) whether the Panel failed to give effect to the NZCPS and CRPS, and misapplied s 6(c) of the RMA when it concluded that farm practices played a part in the determination of the boundary of significant ecological sites (seventh alleged error of law).

Proposed partial settlement of the appeal

[19] The parties have engaged in discussions in an attempt to resolve the appeal, continuing the collaborative approach that has been taken throughout the hearings and earlier mediation, in relation to this Sub-Chapter. They advised that, through these discussions, they have significantly narrowed the issues and they agree that the appeal can be resolved, in part, by amendments to the Decision.

[20] The partial settlement involves:

(a) Forest and Bird withdrawing the first, second and fourth alleged errors of law;

(b) settlement of the third and sixth errors of law; and

(c) an agreement to only pursue the fifth error of law if the Court is not minded to make the orders sought by the parties.

[21] The seventh alleged error of law remains unresolved, although the parties continue to discuss its potential resolution.

[22] The withdrawal of the first, second and fourth alleged errors of law does not prejudice the consideration of the remaining errors of law, as they relate to the procedure adopted by the Panel and not to the actual provisions of Sub-Chapter 9.1 itself.

[23] The parties also agree that the seventh error of law can remain to be resolved by the Court as it is a discrete matter relating to the role that farm practices have in the identification of SES boundaries.

The third alleged error of law – Indigenous Vegetation Notice Provisions

[24] The Plan contains a number of provisions that require the Council to have served an indigenous vegetation notice on an owner or occupier of land before rules regulating the clearance of indigenous vegetation listed in Appendix 9.1.6.6 come into force. The third error of law claims that the Panel erred in creating these provisions because they are void for uncertainty. In particular the appellant alleges:

> The Panel erred in approving indigenous vegetation notice provisions, which trigger the indigenous vegetation rules in relation to potentially significant vegetation types in Appendix 9.1.6.6, only where a Council indigenous vegetation notice under rule 9.1.4.0.1 is served on the owner or occupier of land. The panel erred because the provisions are void for uncertainty, as there are circumstances where no person can reasonably ascertain whether the clearance of indigenous vegetation is permitted or not.

[25] The parties go on to explain that Appendix 9.1.6.1 is divided into two schedules, Schedule A and Schedule B. Schedule A lists SESs which are either on public land, or on private land where the land owners have agreed to inclusion of the site on the schedule. However, Schedule A is not a comprehensive list of SES within the district. There are other sites that meet the criteria for being an SES and which may include, but are not limited to, those sites identified in Schedule B. The areas identified in Schedule B are for information purposes only and are not subject to the rules relating to SES. Council's intention is to continue discussion with the land owners about the ecological values that exist on their property and the management of these values.

[26] The approach adopted in the decision is to identify certain vegetation types that are potentially significant and include them in an appendix (Appendix 9.1.6.6) with corresponding indigenous vegetation rules. The Council is then required to serve an indigenous vegetation notice, as defined in rule 9.1.4.0.1, on the owner or occupier of the land in order to trigger those rules.

[27] The parties agree, for the purpose of these proceedings, that the indigenous vegetation notice rules are void for uncertainty as there are many circumstances where it is not possible to ascertain whether the clearance of indigenous vegetation is permitted under the rules, particularly, where there has been a change in occupation or ownership of a property. The memorandum sets out a range of such examples, for

example, when land is sold, but a new owner is not provided with a copy of the notice. They consider that in its current form, the Decision offends the principle that owners and occupiers of land should be able to determine on the face of the plan whether they can undertake an activity on their property or not, and consequently, the current rules are void for uncertainty.[7]

[28] The amendments proposed by the parties recognise that there is merit in advising land owners of the presence of potentially significant ecological sites, but are agreed that the formal service of an indigenous vegetation notice should not be necessary for the rules to apply and that the provisions will be more certain and effective with a notice requirement removed. The amendments proposed remove the requirement for notice to be served before the rules apply.

[29] The specific amendments proposed are:

(a) amendment to policy 9.1.2.6 by:

(i) replacing the requirement for service of Council indigenous vegetation notice on land owners with the potentially significant vegetation types on their land, with a reference to working with and advising such land owners;

(ii) replacing the requirement to keep the notice on the property file, with provision that the Council will keep its advice on the property file;

(iii) deleting the reference to notified properties in policy 9.1.2.6(a)(iii) in order to ensure that the provision applies to all sites in Appendix 9.1.6.6;

(b) removing the reference to land owner notification from policy 9.1.2.9, 10 and 15 to ensure that the policies apply to all sites in Appendix 9.1.6.6;

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7 *New Plymouth District Council v Baker* W101/94, 28 October 1994 at 6.

(c) deleting the reference to Council indigenous vegetation notices from the rules;

(d) a minor amendment to improve readability by moving the words "and that the size and scale identified in Appendix 9.1.6.6" from policy 9.1.2.6(a)(i) to policy 9.1.2.6(a)(iii); and

(e) deletion of rule 9.1.4.0.1 which describes what a Council indigenous vegetation notice is.

Sixth alleged error of law – protection of significant indigenous vegetation

[30] The sixth alleged error of law relates to the distinction between SES listed in Schedule A in Appendix 9.1.6.1 of the Plan and potentially significant sites containing vegetation types listed in Appendix 9.1.6.6.

[31] Objective 9.1.2.1 of the Plan provides for the protection of areas of significant vegetation in Schedule A, but there was evidence before the Panel that there may be other potentially significant sites that were not included in that schedule.

[32] The CRPS, which the plan is required to give effect to under s 75(c) of the RMA, requires protection for all significant indigenous vegetation.

[33] The parties agree, for the purposes of these proceedings, that the panel has erred in law by failing to give effect to the CRPS when it determined that objective 9.1.2.1 and policy 9.1.2.16 did not apply to significant indigenous vegetation within the potentially significant vegetation types listed in Appendix 9.1.6.6.

[34] As the plan recognises and is acknowledged in the Decision, not all areas or habitats that meet the criteria in Appendix 3 of the CRPS are listed in Schedule A of Appendix 9.1.6.1. There are other potentially significant sites containing the vegetation listed in Appendix 9.1.6.6 that may also meet the criteria in Appendix 3 of the CRPS. The parties therefore agree to the following amendment to objective 9.1.2.1 to resolve this error of law:

> Areas of significant indigenous vegetation and significant habitats of indigenous fauna ~~listed in Schedule A of Appendix 9.1.6.1~~ are protected so as to ensure that there is no net loss of indigenous biodiversity.

[35] This amendment also necessitates a consequential amendment to policy 9.1.2.16 which relates to offsetting significant sites, and to policy 9.1.2.9 ensuring the provisions no longer relate only to SES listed in Schedule A of Appendix 9.1.6.1.

Jurisdiction to determine appeal

[36] The Court has jurisdiction to determine this appeal under r 20.19 of the High Court Rules. It provides:

> (1) After hearing an appeal, the court may do any 1 or more of the following:
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> (a) make any decision it thinks should have been made:
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> (b) direct the decision-maker—
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> (i) to rehear the proceedings concerned; or
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> (ii) to consider or determine (whether for the first time or again) any matters the court directs; or
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> (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.
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> …

[37] I am satisfied that I have heard from the parties through the comprehensive joint memorandum they have filed and it is open to me to amend the Plan in accordance with the proposed changes set out at Appendix 1 to the memorandum.

[38] I am also satisfied that approval of the amendments is appropriate in the present circumstances because:

(a) the amendments sought are within the scope of the appeal;

(b) one of the fundamental purposes of the Order was to provide an expedited process for replacing the District Plan, and by settling the

appeal in the way proposed, this represents a just, speedy and inexpensive way to implement that part of the replacement District Plan that supports recovery and rebuilding;

(c) the agreement has been reached on the amendments sought by parties who represent a cross section of the community, and persons who might have had an interest in the appeal have had an opportunity to participate through service of the notice of appeal;

(d) the proposed amendments are consistent with the purpose and principles of the RMA including, in particular, s 6(c) of Part 2 which this Sub-Chapter of the plan is intended to give effect to. It also gives effect to the NZCPS and CRPS under s 75 of the RMA;

(e) I am advised that the amendments are also consistent with the position reached in mediation, between a wider range of parties during the Panel hearing process and, in particular, I am advised that:

(i) there was no disagreement that objective 9.1.1 should apply to all significant ecological sites, whether they were on the schedule or not; and

(ii) at no stage prior to the Secretariat draft being circulated on 2 September 2016, did Sub-Chapter 9.1 contain any provisions resembling the indigenous vegetation notice provisions;

(f) given the narrow scope of the relief requested I do not consider it is necessary for the matter to be remitted back to the Panel; and

(g) the remaining appeal point is not affected by the making of these orders. It can be separately argued, although the Court is advised that discussions are continuing with a view to resolving it too.

Outcome

[39] After reading the joint memorandum of counsel filed on 31 March 2017, this Court orders:

(a) that the Christchurch City Council amend the Christchurch Replacement District Plan as set out in Appendix 1 to the consent memorandum; and

(b) by consent, there is no order as to costs.

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