

BEFORE THE ENVIRONMENT COURT
AT AUCKLAND

I MUA I TE KŌTI TAIAO O AOTEAROA
KI TĀMAKI MAKAUROA

Decision No. [2020] NZEnvC 202

IN THE MATTER of the Resource Management Act 1991
AND an appeal under clause 14 of Schedule 1 of
the Act
IN THE MATTER Topic 17 Outstanding Natural Landscape
Mapping of the proposed Northland
Regional Plan.
BETWEEN CEP SERVICES MATAUWHI LTD
(ENV-2019-AKL-111)
ROYAL FOREST AND BIRD
PROTECTION SOCIETY OF NEW
ZEALAND INCORPORATED
(ENV-2019-AKL-127)
Appellants
AND NORTHLAND REGIONAL COUNCIL
Respondent

Court: Judge J A Smith

Members: Commissioner K Prime
Commissioner R M Bartlett

Hearing: Whangarei, Wednesday 25th November 2020

Appearances: S Shaw for CEP Services Matauwhi Ltd and Patuharakeke Te Iwi
Trust Board (s 274 Party)
P Anderson for Royal Forest & Bird Protection Society of NZ Inc
(**Forest & Bird**)
M Downing for Minister of Conservation (**MoC**) (s 274 Party)
M J Doesburg for Northland Regional Council (the **Council**)

Date of Report and Directions: 03 DEC 2020

Date of Issue: 03 DEC 2020



**INTERIM REPORT OF THE ENVIRONMENT COURT TO THE
MINISTER OF CONSERVATION AND THE NORTHLAND REGIONAL COUNCIL
INCLUDING DIRECTIONS UNDER CLAUSE 15 OF THE FIRST SCHEDULE TO
THE ACT AND SECTION 293(1) OF THE ACT**

- A: This matter was originally part of the Biodiversity Topic 11 to be heard between 23rd and 25th November 2020. The parties asked that this matter be dealt with by way of a s 293 Application. The Court has determined to issue a Report in respect of Outstanding Natural Landscapes Mapping in the CMA under Clause 15(3)(a) of the First Schedule. We also issue directions in this matter creating a new Topic 17 Outstanding Natural Landscapes Mapping (**ONL**).
- B: Under Clause 15(3)(a) of the First Schedule to the Act the Court reports that the Regional Plan has failed to map Outstanding Natural Landscapes within the CMA as required in accordance with the NZ Coastal Policy Statement (**NZCPS**) and the Objectives and Policies of the Regional Policy Statement and Settled Objectives and Policies of the proposed Regional Plan. Accordingly, the Court determines by consent of the parties that the ONL has not been appropriately mapped within the coastal margins of the CMA as required in terms of the relevant Objectives and Policies.
- C: All parties agree that this finding would not, in itself, assist in achieving the purposes of the NZ Coastal Policy Statement, Objectives and Policies of the Regional Policy Statement or the settled Objectives and Policies of the Regional Plan. Accordingly, the parties seek to utilise the process under s 293 of the Resource Management Act to fill the lacuna and provide appropriate mapping for ONL within the CMA and its margins.
- D: The Court agrees that to achieve an efficient and effective resolution of the requirements set out in the NZ Coastal Regional Policy Statement and Settled Provisions of the Regional Plan it should adopt a process which is both thorough and as expeditious as is possible in the circumstances. The parties' consent to the Directions which apply to all parties including s 274 parties. All parties have agreed that the following timetable complies with these requirements and is sought by



consent. The following timetable is agreed with milestones for reporting to the Court.

E: The Court Directs:

- (a) In light of the interim report the Council is to prepare a draft methodology to circulate to all interested parties to these proceedings by **26th February 2021** and is to provide a report by the same date to the Court that this milestone has been achieved.
- (b) By **30th April 2021** draft Maps will be circulated to the parties by the Council and a 2nd milestone report will be provided to the Court on the same date.
- (c) By the 30th July 2021, the Council will undertake necessary consultation with parties to these provisions, other community groups and Tangata whenua particularly in accordance with Policy 15(c)(viii). A further milestone report as to the consultation shall be provided to the Court by **30th July 2021**.
- (d) The Council will provide to interested parties and parties to these proceedings and the Court a final mapping and all other provisions (if any) by **27th August 2021** with a milestone report on progress to that date.
- (e) By **10th September 2021** the Council should provide to the Court a draft of the public notification indicating the publications into which it is to be inserted and the provisions to appear on its website. Public notification shall be made after approval by the Court of the form of the notice, no later than **24th September 2021**. The Council shall provide a report to the Court with a copy of the advertisement and the dates on which the publication was made being no later than **8th October 2021**.
- (f) Submissions (including any s 274 notices that parties may wish to file) are to be filed with the Court by **22nd October 2021**. The notice is to advise that copies are to be forwarded to both the Council and the Court.
- (g) The Council is to provide a summary of those submissions to the Court by **5th November 2021** and the Court will thereafter set out an appropriate process to move this matter to mediation or hearing as is required.



- (h) All existing s 274 parties and appellants are deemed to be parties to the s 293 process and hearings that ensue. Any new parties will need to file either a general submission (if they do not wish to be heard but wish their position to be considered) or a notice under s 274 joining the proceedings if they wish to appear and give evidence. The Court may make further directions and/or alter this timetable in the event any milestone is not met.

REASONS FOR DECISION, REPORT AND DIRECTIONS

[1] Northland Region contains a significant length of coastline (over 3000km), a significant number of waterways (in excess of 1700) and many natural features. These include both flora and fauna which are rare or even unique in the New Zealand context. In particular, many threatened or at risk birds use parts of the Northland coastline and even in-land areas as habitat.

[2] The requirement for the Regional Council to provide for a freshwater, land and coastal plan is a significant imposition on a relatively small Council with a significant area of coverage. We would describe the task from the evidence we have heard in this and other matters as Herculean. The current plan demonstrates the dedication of the staff and other parties that have engaged in a meaningful way in resolving or attempting to resolve the many issues that have arisen. Matters have been complicated by the new Freshwater Plan (**NPS-FM 2020**) and regulations NES-FW published shortly prior to the hearing of these Appeals. The consequential effects of these documents on brackish and seawaters is yet unresolved.

[3] Nevertheless, all parties to these proceedings acknowledge the significant work performed by the Council in preparing the various overlays for natural character, outstanding natural landscapes and those in respect of flora and fauna values. Given the scope of the task it is not surprising that not all features within Northland have been identified. There are various appeals addressing perceived shortfalls in the proposed Plan and the ways in which these might be remedied both on an inclusionary basis and on an investigatory basis for the future.

Outstanding Natural Landscapes

[4] Assessment of ONL provisions is not a matter that has proceeded to full hearing in 2020. It was to be included as part of Topic 11 Biodiversity for hearing in the week of



23rd November 2020. The parties filed an application with a supporting affidavit of Mr B M Lee, a Council Manager, on the 19th November 2020 just prior to the commencement of the Court hearing. This application sought that the matter be dealt with by the Court making directions under s 293.

[5] Given that this matter had not been raised in earlier telephone conferences or memoranda the Court had not had an opportunity to consider this matter prior to commencement of the hearing on 23rd November 2020.

[6] The Court was concerned that it had not conducted a hearing on ONL provisions of the Plan which appears to be a precursor to utilising s 293. The Court did indicate however that if the only evidence offered in respect of the Topic was the affidavit of Mr Lee then it may be able to reach a conclusion on the Appeal (ie., allow the Appeal) and then consider directions under s 293. That is the process that the parties have preferred and supported before this Court. This is referred to in Clause 15(3) of the First Schedule of the RMA. Given this is a Coastal Appeal the hearing is an inquiry as it relates to the CMA. The Court provides a report under s 15(3)(a) and may make directions under s 293(1) to the Council (Clause 15(3)(b)).

[7] Essentially it is conceded by the Regional Council that the existing provisions are insufficient and that the ONL within the CMA has not been mapped. Counsel acknowledge that there is a requirement to do so but say that no party is in a position at this point in time to have undertaken the comprehensive analysis required for such a task prior to this hearing.

[8] To this end, Counsel for the Minister of Conservation (to whom this Report must be forwarded) is involved in the matter but does not appear to have undertaken any of the significant assessments required. Similarly, Forest & Bird and CEP Services acknowledge the need for such assessments but have not proffered to this Court any information or resources which would expedite the identification of such features.

[9] For our part we consider that some co-operative approach should be considered by the Government in the future for these large tasks of national significance. For current purposes the parties have agreed that there is a way forward. There is an advantage in the Council officers establishing a methodology for identifying ONL with the co-operation and assistance of the key parties including CEP Services, Forest & Bird and the Minister of Conservation.



[10] We also note that Ms Shaw acts for Patuharakeke Te Iwi Trust Board which is one of the interested Tangata whenua groups who have some particular interest in these issues. This in our view will give at least some input into the methodology to be considered involving Tangata whenua and maori cultural issues.

[11] Nevertheless, it is accepted that after initially methodologies are adopted by the Council and mapping generated as a result, extensive consultation will need to be undertaken with interested groups including Tangata whenua to ensure both methodology and mapping picks up relevant ONL and ensure that these are significant on a regional and/or national basis.

Reasons for adopting the s 293 process

[12] It is clear that the Court could simply report allowing the Appeal and conclude that the Plan does not properly address the obligations of the NZCPS as they relate to ONL Mapping. The particular concern of CEP Services and Forest & Bird is that any Plan changes that might be consequent upon that might take many years to be promulgated and returned to the Court. They consider that Court supervision through the s 293 process will give more surety that the purposes of the NZCPS will be achieved. This was not disputed by the Northland Regional Council or any other party, counsel for the Minister.

Future Process

[13] The Courts key task is to achieve sustainable management where we are empowered to do so. It is clear that the process of this Court needs to be efficient and effective but clearly is intended to ensure that the purposes of the Act (which in this case includes the purposes of the NZCPS) are achieved. In this way the overall purpose of Part 2 of the Act, sustainable management is achieved. No party is suggesting that they have mapping provisions that could be inserted to the Plan immediately and it is clear that any examination of ONL needs to be undertaken by a common methodology but in a thorough way.

[14] On the other hand, the process of the Court cannot be seen as an alternate mechanism to avoid Schedule 1. The Court does have in mind the early conclusion of this Regional Plan so that there is finality for the parties. In this particular case, the parties draw the attention of the Court to the existing ONL provisions from the Operative Plan,



particularly, Policy 8.4.1 which effectively controls many activities within the coastal environment. They also point to the provision of the Regional Plan which is now settled D2.15 and the Rules which Mr Doesburgh describes as meaning any significant activity requires a resource consent.

[15] Other parties agree that with the settling of the Objectives and Policies for the Regional Plan, which is occurring contemporaneously with this Decision, the position in the short term is acceptable. Nevertheless, all parties seem to agree that reliance should not be put on this when the proposed Plan becomes operative.

The Courts process of Appeals and Inquiries

[16] The parties have engaged in an extensive period of mediation at their request with several extensions granted, again at the request of the parties. Matters have also been affected by the imposition of constraints at Level 4 and Level 3 of Covid-19 which has delayed some of the earlier hearings. Nevertheless, the parties have all demonstrated a commitment to progressing the matters that are not settled to appeal in an orderly way.

[17] At this stage, the Court has proposed Regional Plan matters set down in the new year to July 2021 and the issue of Rules and the effective mapping provisions etc are likely to be set down in the third quarter of 2021. The Court would have thought that it should have heard most of the Appeals in respect of this complex Plan by the end of 2021. Matters continue to settle or narrow and it is likely that most provisions should be resolved by then. The marine spatial issue and the Rules in relation to Appendix 5 issues and mapping are the major outstanding issues beyond those raised by this s 293 Application.

Creation of a new Topic

[18] We have therefore concluded unanimously that we should create a new Topic, Outstanding Natural Landscapes Mapping as Topic 17 of the Northland Regional Plan Appeals and that this matter should be set on a separate track to hearing. We acknowledge that like the Marine Spatial Planning issue this inquiry needs to be seen as a special process and not part of the general resolution of appeals.

[19] Nevertheless, we are clear that the s 293 process should be timely and that the parties should be required to adopt a milestone approach to reporting progress through



the various stages with the matter returning to the Court after notification of the provisions. The Court would then allow the matter to be mediated or progress to hearing. It anticipates that if a hearing is required, it would take place in the first half of 2022. However given the extensive consideration of these issues by the parties, we are at least hopeful that the issues in relation to ONL may be narrowed once the methodology and mapping has been concluded. If the milestones are not met the Court may adopt an alternate approach.

[20] To this end, we have concluded that we should make Directions under s 293 having determined that the Appeal should be allowed. All Directions made apply to all parties including s 274 parties.

[21] The Court Directs:

- (a) In light of the interim report the Council is to prepare a draft methodology to circulate to all interested parties to these proceedings by **26th February 2021** and is to provide a report by the same date to the Court that this milestone has been achieved.
- (b) By **30th April 2021** draft Maps will be circulated to the parties by the Council and a 2nd milestone report will be provided to the Court on the same date.
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[22] This is issued as an Interim Report to the Minister of Conservation and Northland Regional Council under clause 15 of the First Schedule to the Act and s 293(1) of the Act.




Judge J A Smith
Environment Judge