IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

AP 198/96 (INV)

UNDER THE	Resource Management Act 1991
IN THE MATTER	of an Appeal pursuant to Section 299 Resource Management Act 1991
BETWEEN	THE ROYAL FOREST AND BIRD PROTECTION SOCIETY INC.
	Appellant
A N D	SOUTHLAND DISTRICT COUNCIL
	Respondent

Hearing: 12 June 1997

Counsel: P J Milne for Appellant
B J Slowly for Respondent
B I J Cowper for Rayonier NZ Limited

Judgment: 15 JUL 1997

JUDGMENT OF PANCKHURST J

Introduction:

In a decision delivered on 1 July 1996 the then Planning Tribunal ("the Tribunal") held that a rule included in the Southland District Council's District Plan, by way of amendment to the proposed Plan, was ultra vires the Southland District Council ("the Council"). Such decision reflected an application of the principle recognised in ***Countdown Properties (Northlands)***

Limited v Dunedin City Council (1994) NZRMA 145, and other cases, that an amendment to a Plan should not go beyond what was reasonably and fairly raised in submissions lodged in relation to that Plan This requirement flows from a value which underscores the Resource Management Act 1991 : that there should be public participation in the resource management process.

Unusually in the present case the Council itself made a concession before the Tribunal that it considered it had acted ultra vires. That view was shared by a number of parties who had lodged references to the Tribunal pursuant to clause 14 of the First Schedule to the Resource Management Act 1991 ("the Act"). However, the Royal Forest and Bird Protection Society Incorporated ("RF & B") contended that the amendment was validly made, in that it was fairly raised in a submission RF & B lodged in relation to the Plan.

In this Court three parties were represented. RF & B as the appellant again contended that the relevant amendment was properly made, while the Council supported the Tribunal's ultra vires ruling. Rayonier New Zealand Limited ("Rayonier") likewise supported the Tribunal's decision. Rayonier owns approximately 100,000 hectares of forest throughout New Zealand. An area approaching 30,000 hectares is in Southland and therefore directly affected by the provisions of this District Plan. Although Rayonier's forests are all exotic, a significant understorey of native vegetation develops within maturing forests. Accordingly Rayonier's concern in the present instance was with any provision controlling the clearance of native vegetation, as such provisions may impact upon the company's ability to harvest its crop.

Background:

The Southland proposed District Plan was publicly notified by the Council on 1 August 1994. *Clause 5 of the First Schedule to the Act prescribes* the steps to be followed to ensure all potentially interested parties have notice of the proposed plan and the opportunity to make submissions concerning its content. Those steps were followed.

The Plan was divided into sections, and then into subsections. Section 4 was entitled "**Resource Areas**", and section 4.6 "**Coastal Resource Area**". This section of the plan applied essentially to the coastal margin of the Southland District, which runs from Fiordland in the west, to the Catlands in the east. Within section 4.6 was a proposed Rule COA.4 as follows:

> *"Rule COA.4 Native flora and fauna*
> *Any activity that has the effect of destroying, modifying, removing or in any way adversely affecting any :*
> - *native vegetation, or*
> - *habitat of any native fauna*
>
> *shall require a Discretionary Resource Consent."*

The Rule then prescribed criteria to be applied by the Council in relation to applications for consent.

Section 3 of the Plan was entitled "**General Objectives Policies Methods and Rules**". This section was further divided into thirteen subsections of diverse content, ranging from "**Manawhenua Issues**" to "**Public Works and Network Utilities**" Section 3.4 was entitled "**Heritage**" and was devoted to three heritage types namely : natural, built, and cultural. Importantly

for present purposes section 3.4 is of district-wide application. By proposed Rule HER.5 it was provided.

> *"Any activity or work that would or is likely to have an effect on, or destroy, remove or damage any of those natural heritage sites or items in Schedule 6.13 and 6.12, shall require a Discretionary Resource Consent."*

The Rule then set out matters which the Council must consider in determining applications for Resource Consents. Schedule 6.13 described some "**123 Significant Geological Sites of Land Forms**", while Schedule 6.12 described various "**Significant Tree and Bush Stands**".

Both the proposed Rules COA.4 and HER.5 excited submissions and cross submissions from a range of interested parties. RF & B made submissions in relation to both Rules. In relation to the **Heritage** section generally it described the Plan as *"deficient and inadequate overall"*. Of Rule HER.5, RF & B argued:

> *"this rule is currently far too limited in its scope as it is dependent on the schedules, which only scratch the surface of significant areas."*

For present purposes it is not necessary to consider the submission in greater detail, other than to note the concern that there were in RF & B's view no controls on indigenous vegetation clearance, save for the quite circumscribed controls contained in proposed Rules HER.5 and COA.4. In argument counsel for RF & B summarised what RF & B sought in these terms:

> *"In essence the relief sought by RF & B was a new heritage rule or an amendment to existing Rule HER.5, to provide for clearance of all indigenous vegetation to be a discretionary activity and to require the Council in assessing application for*

Resource Consents to identify and protect areas of significant indigenous vegetation and significant habitats of indigenous fauna."

In relation to Rule COA.4 RF & B made a very short submission in which it noted its support for the Rule which it considered would *"allow the Council to implement the purpose and principles of the Act in the coastal area".*

By contrast Rayonier lodged a submission in which it sought the deletion of proposed Rule HER.5. Alternatively it contended the operation of the Rule should be restricted or other methods of control recognised. Following the submission lodged by RF & B, that the clearance of all indigenous vegetation should be a discretionary activity, Rayonier lodged a cross submission in opposition. It contended that RF & B's approach would effectively elevate all native vegetation to the status of significant vegetation and would unjustifiably catch understorey in forest plantations. Rayonier did not make submissions in relation to proposed Rule COA.4 since the coastal strip which comprised the Coastal Resource Area was outside the company's area of operation. I have focused upon the submissions of RF & B and Rayonier to the exclusion of those from other parties. Of course there were submissions on Rules HER.5 and COA.4 from a range of people. In my view a focus upon RF & B and Rayonier's positions is sufficient for present purposes. Their markedly different positions sufficiently expose the issues which arise in the present vires context.

Before the Planning Tribunal Mr D G Halligan, Resource Manager for the Southland District Council, gave evidence by way of a prepared statement which was not challenged by any of the parties then represented. As the Tribunal noted his evidence was largely a recital of relevant portions of : the District Plan as publicly notified, the submissions and cross submissions, the resultant decisions of the Council, and the District Plan as amended consequent upon those decisions.

Mr Halligan's evidence also included a description of a revised Rule COA.4 which was drafted by Council staff and tabled before the District Plan Committee. The revised version of the rule provided as had the first draft that any activity which had the effect of destroying, modifying, removing or adversely affecting native vegetation or the habitat of native fauna should be a discretionary activity. However qualifications were added, namely such activity on land subject to the South Island Landless Natives Act 1906 would be a controlled activity. Further, if an approved sustainable yield management plan existed, then activity which would otherwise have a discretionary status would become a controlled activity and activity which would otherwise have a controlled status would become a permitted activity.

Contrary to the expectation of the Council's planning staff the Committee in a decision concerning proposed Rule COA.4 and after review of submissions on that Rule, resolved to amend the Heritage section of the Plan by introducing a new Rule HER.3

The new Rule read:

> ***"Rule HER.3 - Indigenous Flora and Fauna***
> *(i) Any activity which has the effect of destroying, modifying, removing or in any way adversely affecting any:*
> *(a) significant indigenous vegetation or*
> *(b) significant habitats of indigenous fauna*
> *shall, except to the extent set out in this Rule, be considered to be a discretionary activity."*

Defined exceptions in paragraphs (ii) and (iii) provided for the taking of timber from an area to which the Forests Amendment Act 1993 did not apply, and for the carrying out of proper agricultural practices on agricultural land, to be controlled activities. Further certain activities in accordance with a sustainable forest management plan and certain silvicultural, horticultural, and agricultural practices were defined as permitted activities. At the same time the Committee resolved to amend Rule COA.4 by restricting its application to *"significant"* indigenous vegetation or fauna, and by incorporation of a reference back to the new Rule HER.3.

In the most general of terms therefore the final result was to introduce into the District Plan an area-wide provision whereby works which would adversely affect significant indigenous vegetation or fauna became a discretionary activity. The thrust of Rule COA.4 was largely unchanged, subject to some refinement. The decision of the Council to introduce area wide control of significant indigenous vegetation and fauna by a new Rule in the Heritage section, but to do so in reliance upon submissions relevant to the

Coastal Resource Area section, fuelled the ultra vires argument before the Planning Tribunal.

RF and B's Contentions:

In the present appeal pursuant to s299 of the Act, RF & B alleges that the Tribunal erred in law in three respects:

(a) in finding that Rule HER 3 was not reasonably and fairly raised in RF & B's submission on the proposed Plan,

(b) in taking into account irrelevant considerations, namely the reasoning by which the Council justified the inclusion of Rule HER 3 and the circumstance that the general Heritage submission of RF & B seeking greater control of activities affecting indigenous vegetation or fauna was in the Tribunal's view *"disallowed by the Council"*, and

(c) in failing to take into account its own finding that RF & B's Heritage submission was publicly notified in a way that would have made it perfectly clear it was seeking in the Heritage section of the Plan a new Rule to control the clearance, logging or other use of land that would adversely affect indigenous vegetation, by making such activities discretionary.

It was argued by counsel for RF & B that such errors of law, either singly or in combination, required this Court to intervene and set aside the ultra vires ruling. I regard the three points raised as so interrelated, that the convenient course is to consider them together.

Was HER.3 Fairly Raised?:

The First Schedule to the Act lays down a clear process by which there must be public notification of both the proposed Plan and of a summary of the submissions received thereon. Thereafter the parties have the opportunity to make further submissions and ordinarily the Council must hold a hearing in relation to the rival submissions. This staged process is designed to ensure that before a Plan is amended the opportunity of informed public participation in the establishment of the Plan has been extended.

All counsel accepted the test laid down in ***Countdown Properties (Northlands) Limited v Dunedin City Council*** as appropriate in the present context. In that case a full Court, after review of earlier High Court decisions including in particular ***Nelson Pine Forest Limited v Waimea County Council*** (1988) 13 NZTPA 69, concluded that in deciding whether a plan amendment was properly made:

> *"The local authority or tribunal must consider whether any amendment made to the plan change as notified goes beyond what is reasonably and fairly raised in submissions of the plan change. .... It will usually be a question of degree to be judged by the terms of the proposed change and the content of the submissions."*

The Court then made some general observations concerning the extent to which the Act encouraged public participation in the resource management process. In this context it noted that persons making submissions were unlikely to fill in the forms exactly as required by the First Schedule, but opined that the

process should not be one *"bound by formality"*. I agree with, and adopt, the approach embraced in the ***Countdown Properties*** judgment.

The process of public notification, submissions, and hearing before the Council is quite involved. Issues commonly emerge as a result of the participation of diverse interests and the thinking in relation to such issues frequently evolves in the light of competing arguments. Thereafter the Council must determine whether changes to the Plan are appropriate in response to the public's contribution. Against this background it is important that the assessment of whether any amendment was reasonably and fairly raised in the course of submissions, should be approached in a realistic workable fashion rather than from the perspective of legal nicety

In the present case submissions made in relation to s3.4, the **Heritage** section, clearly raised the theme of greater control upon activities likely to adversely affect indigenous vegetation. The Tribunal accepted as much at p 6 of its decision when it held:

> *"This part of RF & B's submissions was publicy notified in a way that would have made it perfectly clear that it was seeking, in this section of the Plan, a new rule to control the clearance, logging or other use of land that would directly and adversely affect indigenous vegetation, by making this a discretionary activity."*

Rayonier, for example, readily appreciated the significance of RF & B's submission and moved to counter it. Had the Council, in the context of a decision concerning the **Heritage** section, and in response to submissions

thereon, decided to introduce Rule HER.3, a vires argument could hardly even have been raised.

The problem is one borne of the particular approach the Council adopted. In its **Decisions on Submissions** issued on 1 August 1995 the Council in Decision 3.4.2.201 first summarised the extensive submissions made in relation to Rule HER.5. It then continued:

> *"**Decision:** There was a general misconception in the submissions received that this section related to the removal of indigenous vegetation on private property.*
>
> *If detailed consideration is given to Schedule 6.12 it can be seen that the items of significant tree and bush stands identified are either situated on public property (ie. reserves), or in the alternative where they exist on private property, are a schedule of those lands already protected under QEII covenants in one form or another.*
>
> *It was not the intention of Council under Rule HER.5 to impose restrictions as it relates to indigenous plantations on indigenous vegetation on private property. This matter is more strictly addressed under Method HER.8."*

The decision of the Council relevant to Rule COA.4 was Decision 4.6.2.191. Again the approach of summarising the thrust of the submissions from various parties was adopted.

There then followed a lengthy decision of more than four pages. The decision included:

> *"The Committee has carefully read and listened to all of the submissions that have been made in respect of this Rule. As a result of that consideration the Committee has decided that the Rule should have the following amendments and that it*

> *should apply to the whole of the District and as a consequence be included in the* ***Heritage*** *section:"*

There then followed a description of what was to become Rule HER.3 and a description of the exceptions to it. The Council then continued:

> *"With those general amendments the Council believes that the Rule can be sensibly applied throughout the whole District through its inclusion as Rule HER.3."*

A little later the full text of Rule HER.3, and of the consequential amendments to Rule COA.4, were set out. These provisions are sufficiently quoted, or summarised, earlier in this judgment.

Against that background the Tribunal concluded Rule HER.3 was ultra vires for three reasons First, it found that the Rule was *"clearly founded on, and only on, the submissions and cross submissions made on Rule COA.4".* Moreover the Tribunal considered that *"none of the submissions or cross submissions on that Rule sought the resultant Rule HER.3".* Second, the Tribunal found that *"although there are similarities between Rule HER.3 and (what) was sought by RF & B, there are important differences".* In this regard the Tribunal noticed the specific exceptions in respect of forest management plans and the link between Rule HER.3 and Method HER.9 whereby determinations about whether indigenous vegetation was *"significant"* were to be made. Accordingly Rule HER.3 was described as *"a different rule"* from what was sought by RF & B. Third, the Tribunal found that the **Heritage** submission made and relied upon by RF & B to support Rule HER.3 was

disallowed by the Council. Decision 3.4.2.201, read as a whole, led the Tribunal to this conclusion.

It then noted however that the introduction of Rule HER.3 seemed at first sight to conflict with a rejection of RF & B's submission. However, the Tribunal referred again to the *"material differences"* between what RF & B sought and Rule HER.3. Finally, it added in a passage which seems to me to capture a principal concern of the Tribunal members that:

> *"It is plain from the Council's reasoning that in introducing Rule HER.3 it did not think it was controlling all activities relating to indigenous vegetation throughout the district which would have been the effect of the rule sought by RF & B. Nevertheless of course, the Council did introduce a District Rule containing a measure of control in respect of indigenous vegetation and the habitats of indigenous fauna, based on submissions that did not seek this relief."*

Then followed the ultra vires ruling.

Mr Slowley, in submissions on behalf of the Council, argued that the above findings, in particular the conclusion that Rule HER.3 was founded only on submissions made on Rule COA.4, were findings of fact which this Court should not disturb. The observations of Chilwell J in ***Environmental Defence Society v Mangonui County Council*** (1987) 12 NZTPA 349 at 353 are apposite:

> *"An expert tribunal, such as the Planning Tribunal, ought to be given some latitude to reach findings of fact which fall within the area of its own expertise even in the absence of evidence to support such findings; and some latitude in reaching findings of fact made in reliance upon its own expertise in the evaluation of conflicting evidence; and some latitude in reaching conclusions based on its expertise, without relating them or being able to relate them to specific*

> *findings of fact; but care should be taken to ensure that expertise is not used as a substitute for evidence such that the burden of proof is unfairly shifted."*

I accept these observations have some application in the present context. The Tribunal undoubtedly possesses expertise in relation to the evaluation of the process for public participation prescribed in the First Schedule. It must see and consider many examples of that process in the course of its work. On the other hand, the present are not findings of fact in the conventional sense. The Tribunal did not hear contested evidence and therefore enjoy an opportunity not possessed by this Court. The subject findings are rather conclusions drawn in the main from the Council's **Decisions on Submissions** issued on 1 August 1995. I accept it is appropriate to afford those findings special recognition as emanating from an expert Tribunal, but I do not accept counsel's submissions that the findings are decisive of the present problem.

Mr Milne for RF & B squarely confronted each of the reasons advanced by the Tribunal for its ruling As to the point that Rule HER.3 was founded only on submissions made in relation to Rule COA.4, he argued that the Tribunal's focus upon the reasons given by the Council was wrong in law; as the sole issue was whether the new Rule went beyond what was reasonably and fairly raised in RF & B's **Heritage** submission. Put another way, the ultimate issue was whether the public had received a fair crack of the whip; had enjoyed the opportunity to be heard in answer to RF & B's **Heritage** submission before Rule HER.3 was included in the Plan. Likewise, counsel disputed the finding that there were important differences between Rule HER.3

and what RF & B sought in its **Heritage** submission. He accepted there were differences, but argued such were as to matters of emphasis. The new Rule was fairly to be seen as a watered down version of what RF & B sought in the first place, counsel contended. Moreover, he submitted the proper test was not whether Rule HER.3 was *"materially different"* from, but whether its substance was *"reasonably within"* the scope of, the submission made by RF & B.

As to the finding that the Council rejected RF & B's **Heritage** submission, counsel argued that rejection was far from clear upon a reading of the Council's decision as a whole. In particular, the decision did not expressly state whether it accepted or rejected the submission, although Clause 10 of the First Schedule required that to be done.

Conclusion:

With some hesitation I am driven to the conclusion that the appeal must be allowed. The fundamental issue must be whether Rule HER.3 was *"reasonably and fairly raised"* in submissions relevant to the Southland Plan. There can only be one answer to that inquiry, namely that the substance of the rule was properly raised. Not only does a reading of the RF & B submission demonstrate this to be so, but the Tribunal found as much in the passage quoted earlier from page 6 of its decision.

As to the three matters relied upon by the Tribunal in support of its ultra vires ruling I do not see them, either singly or in combination, as supportive of the essential ruling. Unquestionably the Council's process of

reasoning was curious, in that it made the decision to include Rule HER.3 in the **Heritage** section, in the context of its consideration of the **"Coastal Resource Area"** section. But such a curious process of reasoning does not detract from the fact that the content of Rule HER.3 was squarely raised in RF & B's **Heritage** submission. In real terms no-one could be heard to argue that during the public consultative process they were denied the opportunity to oppose a change sought by RF & B. Put another way, the subsequent faulty reasoning of the Council does not impinge upon the effective process of consultation which preceded it.

Further the Tribunal's view that there were important differences between Rule HER.3 and what RF & B sought in its **Heritage** submission, is not helpful. I accept counsel's argument that the new rule was nothing more than a watered down version of what RF & B sought. Moreover the required approach was to ask whether Rule HER 3 was within the scope of RF & B's *submission, rather than whether there were material differences.* Likewise, I am not at all confident that a sensible reading of the Council's decision leads to the conclusion that it rejected RF & B's **Heritage** submission. In the absence of an express acceptance or rejection of this submission I am of the view that the proper conclusion to be drawn is that the Council accepted the thrust of RF & B's **Heritage** *submission, by including Rule HER.3 in the* **Heritage** *section;* albeit that the process of reasoning adopted was curious. Lastly, I reject the concern averted to by the Tribunal that the Council did not appreciate in introducing Rule HER.3 that *"it was controlling all activities relating to*

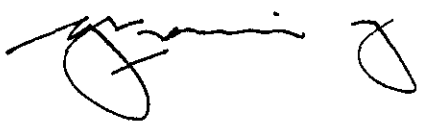
indigenous vegetation throughout the District ...". Such conclusion is not tenable when one has regard to the terms of Decision 4.6.2.191 where, albeit in the **"Coastal Resource Area"** section, the Council expressed its belief that an amendment could *"be sensibly applied throughout the whole District through its inclusion as Rule HER.3".*

To summarise, in my view the essential inquiry was whether the amendment effected through Rule HER.3 was reasonably and fairly raised in submissions Once it is decided that it was, the answer to a vires argument was plain. Instead the Tribunal focused upon the three reasons it advanced in support of its ultra vires conclusion. Aside from the fact that such reasons were dubious anyway, it was in my view wrong in law to elevate those issues above the test recognised in ***Countdown Properties***.

The formal determination of the Court is that the Tribunal erred in law in determining that Rule HER.3 was ultra vires the Council. Accordingly such ruling is set aside. Counsel for Rayonier submitted that should the appeal be allowed, the case should be remitted to the Environment Court for consideration on its merits. I agree In that regard it is appropriate to make two observations. First, the present vires decision may not preclude parties before the Environment Court from challenging the merits of Rule HER.3 by reference to the terms of the Council decision which produced it. Second, Rayonier in support of the Tribunal's vires ruling, argued that because the Council introduced rule HER.3 in the context of its decision in the **"Coastal Resource Area"** section, Rayonier could not challenge the merits of the new rule before

the Environment Court. This because it had not made submissions or sought to be heard in relation to the **"Coastal Resource Area"** of the Plan. I doubt that this can be so. The decision of this Court that Rule HER.3 is not ultra vires, because it was reasonably and fairly raised in RF & B's **Heritage** submission, must carry the consequence that Rayonier has standing to challenge the new Rule. It made a cross submission in direct response to RF & B's **Heritage** submission. Just as the curious process of reasoning whereby the Council introduced Rule HER.3 does not make the Rule ultra vires, nor can that same process of reasoning deny Rayonier standing which it would otherwise undoubtedly possess.

The question of costs is reserved. If RF & B seeks an award it should promptly file a memorandum. The Council and Rayonier, following filing and service of such memorandum, shall have fourteen days in which to respond.



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